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CHARTERS, COMPACTS, AND TEA PARTIES: THE DECLINE AND RESURRECTION OF A DELEGATION VIEW OF THE CONSTITUTION

*Edward A. Fallone**

INTRODUCTION

Originalism is widely acknowledged to be the dominant method of constitutional interpretation today.[1] However, recent scholarship advancing an originalist interpretation of the Constitution reflects disagreement over whether viewing the Constitution as a form of contract can provide insight into the original understanding of the text. For example, Professor Samuel Issacharoff has argued that one basic feature of originalism is "the underlying idea that a constitution is indeed a pact, a social contract designed to create legitimate governing institutions responsive to the political and social divides of a society."[2] Acceptance of a "contractarian notion of a constitution,"[3] according to Professor Issacharoff, provides insight into the original intentions of the founding generation.[4]

Conversely, Professor Randy Barnett has firmly declared that "constitutions are not contracts."[5] Professor Barnett argues that originalists make a mistake when they seek to interpret our Constitution in a contractual fashion, by seeking to identify the

* Associate Professor, Marquette University Law School. I would like to thank James Nafziger and Michael O'Hear for their helpful suggestions. Some portions of this Article were presented in an earlier form on September 28, 2007, as part of a conference entitled "America, Human Rights and the World," sponsored by the Marquette Human Rights Initiative. I would like to dedicate this Article to the memory of my father, James E. Fallone.

1. *See* Brian A. Lichter & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 NW. U. L. REV. 491, 491 (2009). In recent years, it has been widely stated among legal academics that "we are all originalists now," although academics continue to advance alternative forms of originalism. *See, e.g.*, James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10, 11–12 (2007) (reviewing alternative forms of originalism).

2. Samuel Issacharoff, *Pragmatic Originalism?*, 4 N.Y.U. J. L. & LIBERTY 517, 520 (2009).

3. *Id.* at 525.

4. *Id.* at 526.

5. Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 616 (2009).

underlying assumptions of the population that is covered by the text.[6] He argues instead that the differences between contracts and constitutions negate the utility of contract law theory as a means of ascertaining the underlying assumptions of the parties to the social contract.[7]

However, Professors Issacharoff and Barnett do agree on one thing. Both professors note that constitutional scholars have thus far failed to engage in a systematic examination of whether our understanding of the Constitution is furthered either by embracing or rejecting the notion of the Constitution as contract.[8] Central to any such examination must be the question of how the founding generation viewed the United States Constitution.

This Article argues that the Constitution has been understood at different times to operate as one of two competing conceptions of contract. Originally, the founding generation understood the Constitution to operate as a charter of delegated power.[9] However, over time both the Supreme Court and, more recently, the Bush administration have advanced the alternative view that the Constitution should be read as if it were a compact.[10] At this moment in history, when critics of the Obama administration have rallied around the cause of limited government—and in particular have objected to the individual mandates contained in health care reform legislation[11]—it appears that the popular understanding of the Constitution may be poised to revert toward its original nature as a charter. Indeed, in many ways the ideological underpinnings of the Tea Party Movement can be traced to this earlier understanding of the Constitution.

Part I of this Article discusses the two theories most commonly used to define the scope of the constitutional domain—theories that provide that the Constitution should be interpreted as either a charter of delegated power or as a compact—and explains the distinctive characteristics of each theory. Part II describes the Framers' original understanding of the Constitution as a charter of delegated powers and the manner in which they understood charters to circumscribe the exercise of federal power. Part III traces the

6. *Id.*

7. *See id.* at 617–26.

8. Barnett notes that "[c]onstitutional scholars have yet to examine systematically the lessons that can be learned from a close comparison of the important similarities and equally important differences between written constitutions and contracts." *Id.* at 616. Issacharoff states that the application of contractual principles to guide the interpretation of the Constitution "is a relatively underexamined claim in constitutional scholarship." Issacharoff, *supra* note 2, at 520 n.16.

9. *See infra* notes 66–72 and accompanying text.

10. *See infra* Parts III.C–D.

11. *See, e.g.*, Orrin G. Hatch et al., Op-Ed., *Why the Health-Care Bills Are Unconstitutional*, WALL ST. J., Jan. 2, 2010, at A11.

history of how the compact view of the Constitution came to predominate over the delegation view in more recent expressions of the scope of the federal government's power. Finally, the Article concludes by identifying the reasons for the recent resurgence of the idea that the Constitution should be read as a charter.

I. COMPETING THEORIES OF CONSTITUTIONALISM

The task of determining the authority of the federal government to exercise its power over individual human beings under our constitutional system has been described as "[d]efining the domain of constitutionalism."[12] The exact contours of the power granted to the federal government in certain parts of the text, and the powers denied to the federal government elsewhere, are ultimately functions of the locus of sovereignty in the constitutional system.[13] The degree of sovereign power delegated to the federal government by "the people" at the moment of our nation's inception, and the consequent scope of personal liberty that "the people" retained for themselves, are the fundamental inquiries at the heart of constitutionalism. The Framers of the Constitution debated this question,[14] and the Tenth Amendment was adopted in an attempt to provide an express resolution of the problem.[15]

Our nation's constitutional history reflects two competing views of the nature of the sovereignty possessed by the federal government. The first view is that the Constitution is a concrete compact between the federal government and the state governments, with the people of the United States as beneficiaries.[16] This view conceptualizes the Constitution in standard contractual terms and places primacy on notions of consent. This approach will be referred to throughout this Article as the "compact view."

The second view of sovereignty expressed in our constitutional history is the view that the Constitution grants no absolute sovereign powers to the federal government; those powers continue to be retained by "the people." Therefore, the only legitimate

12. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 3 (1996).

13. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 3 (2002) (emphasizing the connection between sovereignty, membership, and governmental power).

14. *See* JAMES H. READ, POWER VERSUS LIBERTY 1–10 (2000).

15. *See* THOMAS B. MCAFFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, POWERS RESERVED FOR THE PEOPLE AND THE STATES 39–44 (2006) (reviewing the drafting and the history of the Tenth Amendment).

16. *See, e.g.*, GARRY WILLS, A NECESSARY EVIL 145–47 (1999) (describing how James Madison came to embrace a compact theory of the Constitution). Michael Lind refers to this strand of American political philosophy as "democratic localism." *See* Michael Lind, *Introduction*, *in* HAMILTON'S REPUBLIC, at xi, xiii (Michael Lind ed., 1997) ("Democratic localists often (though not always) have claimed that the Constitution established merely a revocable compact among the states."); *see also generally* SAMUEL H. BEER, TO MAKE A NATION 20–25 (1993) (discussing federalism and political theory).

authority that the federal government possesses is the authority to exercise the powers expressly delegated to it in the Constitution's text.[17] This view is in accord with the "limited government" and "structural" approaches that were advanced by some critics of the Bush administration's tactics in the "war on terror."[18] In order to emphasize the fact that this approach has its roots in the basic conceptualization of the idea of sovereignty under our Constitution, this Article will refer to this approach as the "delegation view."

While the delegation view was ascendant during the years immediately following our nation's founding, the compact view made inroads into the Supreme Court's constitutional analysis in cases involving slavery and immigrants. In particular, immigration cases have provided the context for the persistent expansion of the compact view within our borders.[19] The theory of the "unitary executive," advanced by proponents of a broad presidential power, is only the most recent expression of the compact view as the prevailing method of defining the scope of federal power.[20] However, there are signs that popular opinion is shifting in favor of a return to the delegation view.

A. The Constitution as a Compact

The instrumentalist justification for adopting a contractual view of the Constitution is that it provides a basis for definitively determining the order of competing claims and interests among the people, the state governments, and the federal government.[21] The Constitution itself provides the textual evidence of the original bargain by which the parties to the agreement sought to further their interests. The primary benefits to be gained by reading the Constitution as a compact flow from the procedural method by which conflicting claims are resolved via reference to the textual evidence of the original bargain.[22] These benefits are stability and objectivity in connection with the interpretation of the content of the Constitution.

The difficulty with the compact view of the Constitution, on a

17. This strand of American political philosophy is sometimes called "democratic nationalism" or "Hamiltonianism." *See* Lind, *supra* note 16, at xii–xiii.

18. President Bush used the phrase "war on terror" when he addressed a joint session of Congress on September 20, 2001. *See* RON SUSKIND, THE ONE PERCENT DOCTRINE 19 (2006). The Obama administration has consciously avoided using the phrase "war on terror," instead emphasizing that the United States was (and remains) at war with al-Qaeda. *See* Peter Baker, *Obama's War over Terror*, N.Y. TIMES, Jan. 17, 2010 (Magazine), at 30, 33.

19. *See infra* notes 163–80 and accompanying text.

20. *See infra* Part III.D.

21. *See* Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 50–51 (1995).

22. *See id.*

conceptual basis, is in identifying the parties to the contract. Possible alternatives are to regard the Constitution as a contract among the states, as a contract among the persons alive during ratification, or as a social contract that binds the current members of our society.[23] The view that the Constitution should be interpreted as a compact among the several states was influential early in our nation's history,[24] and that view still has its adherents, but the idea is rarely advanced among academics today. Instead, contemporary constitutional theory approaches the idea of a constitutional compact through the lens of the social contract.[25]

The concept of membership is an obvious starting point for defining the boundaries of the social contract. Who are "the people" who can assert the protection of that document's provisions? A process that identifies a particular community as comprising "the people" for constitutional purposes will simultaneously define all residual human beings left out of that community as "outsiders."[26] Logically, the terms of the "constitutional bargain" can only apply to those who are part of the deal.

In his 1996 book, *Strangers to the Constitution*, Professor Gerald Neuman offered four separate approaches toward conceptualizing the Constitution in order to define its reach: universalism, membership, mutuality of obligation, and global due process.[27] The first approach, "universalism," treats all people in all places as persons protected by the text of the Constitution.[28] The second approach, which Neuman calls "membership," uses concepts of social contract to define a subset of individuals both within and without our borders who receive constitutional protection.[29] Neuman's third approach is "mutuality of obligation," which equates the reach of the Constitution to the sphere within which nonresidents are obligated to obey United States municipal law.[30] This model denies constitutional rights to persons outside of our

23. *Id.* at 57–62.

24. *See* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 105 (2001).

25. *See, e.g.*, Paul Lermack, *The Constitution Is the Social Contract So It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1429–33 (2007). *But see* SANFORD LEVINSON, CONSTITUTIONAL FAITH 111–14 (1988) (arguing that the Constitution should be read as a covenant rather than in purely contractual terms).

26. *See* Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 207 (2000) ("The *political* dimension of citizenship . . . [is] tempered by an exclusionary principle that certain types of political activity . . . [are] limited to those who meet the standards of full membership in the polity . . . ." (citations omitted)).

27. *See* NEUMAN, *supra* note 12, at 4–8.

28. *Id.* at 5–6.

29. *Id.* at 6–7.

30. *Id.* at 7–8.

borders who are not bound to respect our laws.[31] Finally, Neuman identifies a fourth approach that he calls "global due process."[32] Under this model, judges perform a case-by-case inquiry in order to determine the reach of the Constitution. In so doing, judges balance the potential application of constitutional protections to noncitizens outside of our borders against government interests that counsel against recognizing such protections.[33]

While applauding the usefulness of Neuman's analysis and his historical insights, critics have pointed out that, ultimately, the universalism, mutuality of obligation, and global due process approaches are difficult to distinguish from each other.[34] Indeed, it appears that all four of Neuman's separately identified approaches ultimately rely on a "social contract" model of the Constitution.[35] That is, each of his approaches is fundamentally premised on the idea that the Constitution embodies a contractual set of reciprocal obligations between identifiable individual and governmental actors.

Therefore, defining membership—separating those individuals who are protected by the Constitution's terms from those who are not—becomes the core focus under any compact-based reading of the Constitution. Difficulty arises, however, because the original text of the Constitution does not include any definition of membership. The ratification of the Fourteenth Amendment helps to clarify the situation somewhat, insofar as it clearly identifies a category of individuals who cannot be denied membership (natural persons born within the territorial United States).[36] However, the Fourteenth Amendment does not address the question of whether membership in the social contract can be extended to include natural persons born outside of the United States. Similarly, the Fourteenth Amendment does not speak to whether corporations and other juridical "persons" might be included as members of the social compact along with natural persons.[37] Finally, the Fourteenth

31. *Id.* at 7.

32. *Id.* at 8.

33. *Id.*

34. *See, e.g.*, Hiroshi Motomura, *Whose Immigration Law? Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1577–79 (1997) (reviewing NEUMAN, *supra* note 12).

35. *See* NEUMAN, *supra* note 12, at 9–13 (describing the "social contract" tradition that illuminates his four interpretive models); *see also* Akash R. Desai, Note, *How We Should Think About the Constitutional Status of the Suspected Terrorist Detainees at Guantanamo Bay: Examining Theories that Interpret the Constitution's Scope*, 36 VAND. J. TRANSNAT'L L. 1579, 1604–09 (2003) (discussing Neuman's "membership" and "mutuality of obligation" approaches as variants of social contract theory).

36. U.S. CONST. amend. XIV, § 1.

37. *Cf.* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 929–30 (2010) (Stevens, J., concurring in part and dissenting in part) (disputing the idea that the original understanding of free speech protected by the First Amendment extends to corporations).

Amendment does not specify which branch of the federal government—the President, Congress, or the Supreme Court—possesses the ultimate authority to make determinations of membership status under the Constitution.

B. The Constitution as a Charter of Delegated Powers

A more promising alternative to the compact view is the argument that the Constitution should be conceptualized as a document that creates a government of limited delegated powers. Sometimes called a "limited government" approach,[38] sometimes identified as a "structural" approach,[39] and alluded to by Neuman as a type of "organic" utilitarianism,[40] this approach to interpreting the Constitution posits that the United States government simply does not possess the power to act in certain situations.[41] Therefore, a delegation approach conceptualizes the reach of the text in a way that is not dependent on any definition of the social contract.

The delegation view provides a structural approach to interpreting the reach of the Constitution. This approach focuses on the scope of power delegated to the federal government in order to define limitations on the exercise of federal authority that apply even against nonmembers.[42] The result is an understanding of the scope of federal government power that differs from the result obtained under contractually derived definitions of "membership."

The "delegation view" starts with the proposition that the federal government is the creation of the Constitution and that its sovereign power is limited. As an artificially created entity, the federal government is incapable of possessing any power or authority that is not granted to it by our nation's foundational document.[43] Under this view of the nature of federal power, the government's ability to perform an act does not depend on the identity of the individual who is the subject of government action. Neither a citizen nor a noncitizen can be subjected to any exercise of government power that is an ultra vires act.[44] Therefore, it is

38. *See* Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 641 (2007); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2035 n.89 (2005).

39. *See* J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1697–1703 (2004); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297 (1994).

40. *See* NEUMAN, *supra* note 12, at 6.

41. *Id.*

42. *See infra* notes 43–44 and accompanying text.

43. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted.").

44. *See* Downes v. Bidwell, 182 U.S. 244, 277 (1901) (noting the existence of constitutional prohibitions that "go to the very root of the power of Congress to

unnecessary to classify an individual as a member or a nonmember prior to evaluating the legitimacy of the government action directed towards that individual.

A recognition that the primary objective of the Constitution is to limit the power of government, rather than to identify and protect a sphere of individual rights, has important implications. First, this recognition suggests that a general distrust of centralized power is an integral part of the constitutional design.[45] Second, this recognition elevates the principles of federalism and separation of powers to the level of basic constitutional commands, even though these principles are not explicitly referenced by the text of the Constitution.[46] While federalism and separation of powers principles are often invoked by critics of an overreaching Congress, it is important to note that the allocation of powers to Congress under Article I of the Constitution serves as a limitation on the powers exercised by the executive branch as much as it does a delegation of authority to the federal legislature.[47]

C. Compact and Delegation Contrasted

The predominant feature of the compact view is that, with the exception of the express guarantees of specified rights contained in the text, individual persons do not function as parties to the foundational compact between the federal government and the states. Instead, the interests of individuals are promoted in the constitutional system in two indirect ways. First, individual interests are preserved via the proxy of maintaining a sufficient level of state government power to serve as a counterweight to the federal government.[48] Second, individual interests are protected by a strict policing of the separation of powers between the three federal branches.[49]

In regards to those individual rights guaranteed in the text of

act at all, irrespective of time or place"). "[W]hen the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description*." *Id.*

45. *See* Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. REV. 1745, 1755 (2009) ("The primary motivation underlying the constitutional scheme of separation of powers was the framers' fear of centralized power.").

46. *Id.* at 1754–55.

47. *See* Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 304–07 (2009).

48. *See* WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 105–06 (1996).

49. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised. The citizen has a vital interest in the regularity of the exercise of governmental power.").

the Constitution, the fundamental characteristic of the compact view is that it limits the possession of these rights to those persons who are members of the social contract. Only members of the community who are parties to the contract are allowed to claim the individual rights that the Constitution guarantees.[50] As a result, the legitimacy of government action under the Constitution depends entirely upon whether a member of the political community is aggrieved. Contracts do not create any rights for nonparties, and under a compact view of the Constitution the guarantees of individual rights contained in the text do not apply to "outsiders" to the community. The Constitution is read to impose a form of privity of contract.[51]

This social contract view of the Constitution relies on membership models that incorporate certain assumptions. All such models reveal a hesitancy to define membership in ways that allow aliens to impose their membership status on the United States without the consent of our government.[52] In addition, models that recognize membership status for noncitizens for some purposes beg the question of whether noncitizens should be granted membership status for all purposes. For example, acknowledging due process rights for Guantanamo Bay detainees under the Constitution raises the question of whether the detainees also possess First Amendment rights.[53] Membership implies an all-or-nothing proposition, not gradations of rights.

Therefore, the compact view assumes that the consent of the government is necessary before membership can be asserted, and that there are no gradations of rights among the members of the social contract.[54] However, these assumptions are derived from the asserted contractual nature of the Constitution and not from any source in the text of the document itself. In contrast, the delegation view does not require us to make the assumption that government consent is necessary before individuals born outside of the United States can make constitutional claims. Similarly, the delegation view does not require us to conclude that by recognizing that the Constitution confers certain rights on an individual we are necessarily determining that the individual possesses the full range of individual liberties guaranteed by the text.

The reason for this distinction arises from the manner in which individuals enforce constitutional rights. The primary purpose of the Constitution is to protect "the people" in the enjoyment of their

50. *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT 36–40 (1985) (reviewing the advantages and disadvantages of a system of government built around political membership).

51. *Id.*

52. *See id.* at 37.

53. *See id.* at 40 (noting that a community's "humanitarian values . . . may justify certain sorts of rights and assistance to aliens").

54. *See id.* at 36–40.

lives.[55] This protection offered by the constitutional text takes two distinct forms. An individual plays "offense" with the text when they use the Constitution to assert the freedom to exercise an identifiable group of specified or implied individual rights without government interference.[56] So, for example, persons governed by the Constitution might claim the right to engage in free speech or to make reproductive decisions without being subjected to excessive governmental restrictions.

However, the Constitution also provides a second type of protection to individuals. The fact that the text of the Constitution defines and constrains the scope of governmental authority also allows individuals to assert the existence of structural boundaries that cabin the federal government's ability to act.[57] Structural boundaries act as chains that restrain the free exercise of power by each of the three branches of the federal government. Individuals play "defense" with the text when they argue that the government lacks the power to take certain actions, even in situations in which the Constitution does not expressly guarantee any identifiable right that the government is accused of infringing.[58]

It is uncontroversial to assert that "the people" enjoy the first kind of protection described above and that "outsiders" cannot play offense with the Constitution. For example, the right of free speech guaranteed by the Constitution does not reach around the world. It is also uniformly accepted that "the people" can use the structural boundaries of the text to play defense. The doctrines of separation of powers and federalism have long been asserted by individuals as a means of confining the power of the federal government within designated bounds.[59]

55. In addition to forming "a more perfect Union" between the states, the Preamble to the Constitution lists the document's goals as establishing "Justice," ensuring "domestic Tranquility," providing for "common defence," promoting "general Welfare," and securing "the Blessings of Liberty." U.S. CONST. pmbl.; *accord* James Madison, Speech to Congress, Adding a Bill of Rights to the Constitution (June 8, 1789), *in* SELECTED WRITINGS OF JAMES MADISON 164, 167 (Ralph Ketcham ed., 2006) ("[G]overnment is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.").

56. *See* U.S. CONST. amend. I ("Congress shall make no law . . . .").

57. *See* Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 5–10 (2009).

58. For example, a person aggrieved by an act of Congress need not challenge that act by pointing to an individual right guaranteed by the constitutional text that the act violates. She can merely argue that neither the Interstate Commerce Clause nor any other delegation of authority to Congress permits Congress to legislate on the act's subject matter. To give a concrete example, some opponents of health care reform legislation charge that Congress lacks the power under the Constitution to compel private individuals to purchase health insurance. *See, e.g.*, Hatch et al., *supra* note 11, at A11.

59. *See supra* notes 48–49 and accompanying text.

Controversy arises, however, when one argues that "outsiders" to the Constitution possess the same ability to protect themselves *defensively* by asserting the existence of structural boundaries that circumscribe governmental power that is possessed by constitutional insiders. In order to accept this proposition, it is necessary to reject the use of membership as a means of defining the reach of the Constitution. If the Constitution does not permit the federal government to exercise any power—either domestically or extraterritorially—that has not been affirmatively granted to it under the Constitution, then even those persons identified as "outsiders" must be permitted to challenge our government's actions as unlawful. This logic leads us to the conclusion that the power of the federal government must be subject to the check of judicial review without regard either to where that power is exercised or to the identity of the target of the power. Membership status is rendered irrelevant under the delegation view.

II. DELEGATION AND ORIGINAL UNDERSTANDING

The delegation view of the Constitution is a necessary consequence of the very nature of sovereignty as understood by the Framers and embodied in the text. The federal government created by the Constitution was not endowed with the limitless and absolute sovereign powers of a monarch.[60] The people created a sovereign entity to rule over them, but it was a federal sovereign with limited purposes and carefully circumscribed powers. This realm of federal sovereignty coexists with the sovereignty of the states and the original sovereignty of the people. Under the delegation view, the federal sovereignty created by the Constitution has four characteristics: (1) the document defining the relationship between the people and the federal government is properly understood as a charter, not a compact; (2) the federal government (including the executive branch) possesses only those powers delegated to it; (3) the people retain their ultimate sovereignty; and (4) the sovereignty of the people is active, ongoing, and cannot be severed from the people.

A. The Constitution Is a Charter, Not a Compact

The scope of the sovereignty of the federal government is dictated by the fact that the Constitution is a charter and not a compact. In this regard, the Constitution differs from the Articles of Confederation ("Articles"), adopted upon our nation's independence from Great Britain. The Articles created a federal government with a structure that was purely contractual in nature.[61] Under the Articles, each of the newly independent colonies retained its status

60. *See infra* notes 69–70 and accompanying text.

61. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 25–26 (2005) (explaining the consent-based nature of the Articles of Confederation).

as a separate sovereign.[62] The Articles joined these thirteen sovereigns in the same way that a treaty might bind sovereign nations. Although that document bound the states to act in a uniform manner on certain specified topics of mutual interest (notably foreign affairs), the vision of the Articles failed in practice because the obligations that it placed on the individual states were ultimately unenforceable.[63]

In contrast to the Articles of Confederation, the U.S. Constitution is not a compact among independent sovereign states. The architects of the new national government, in drafting the Constitution, produced a document that reflected novel ideas about the proper dividing line between the power of a federal government and the liberty of individuals—ideas that were simply not relevant to a compact between state governments.[64] The intent of the Constitution as expressed initially in the "Virginia Plan," which served as the basis for the earliest debates at the Convention, was to establish a federal government that operated directly on the people, without the states as intermediaries.[65]

62. *Id.* at 25.

63. *Id.* at 28 ("Although on paper the Congress under the Articles enjoyed some important powers, it had no effective means of carrying them out."). Not all of the founders viewed the structure of the Articles as unsalvageable. For example, Thomas Jefferson did not concede the inability of the national Congress to enforce compliance on the part of the states under the Articles, as he used language that recognized the contractual nature of the relationship at issue: "It has been so often said, as to be generally believed, that Congress have no power by the [Articles of Confederation] to enforce anything, e.g., contributions of money. It was not necessary to give them that power expressly; they have it by the law of nature. When two parties make a compact, there results to each a power of compelling the other to execute it." 2 DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON AND THE RIGHTS OF MAN 161 (1951) (quoting Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787)).

64. The search for the "original meaning" of any particular provision in the United States Constitution is frustrated by both inconsistent evidence and the impossibility of ascribing a single intention to what was ultimately a corporate act. JACK N. RAKOVE, ORIGINAL MEANINGS 6 (1996). The people who debated the Constitution, and who voted for or against its adoption, had individual and varied interpretations of the document. The ultimate text is the result of countless compromises among these views. Benjamin Franklin described the drafting process as follows:

> [W]e must not expect, that a new government may be formed, as a game of chess may be played, by a skilful [sic] hand, without a fault. The players of our game are so many, their ideas so different, their prejudices so strong and so various, and their particular interests, independent of the general, seeming so opposite, that not a move can be made that is not contested; the numerous objections confound the understanding; the wisest must agree to some unreasonable things, that reasonable ones of more consequence be obtained; and thus chance has its share in many of the determinations . . . .

Letter from Benjamin Franklin to Dupont de Nemours (June 9, 1788), *in* 9 THE WRITINGS OF BENJAMIN FRANKLIN 658, 659 (Albert Henry Smith ed., 1907).

65. The initial debates at the Constitutional Convention found the

The distinction between charters and compacts was well understood at the time of the Constitution's drafting.[66] The use of the word "charter" indicated that a free and sovereign people had created a national government through the act of granting it power.[67] James Madison contrasted the American experience to that of earlier parliamentary bodies that had been created by European monarchies, which Madison described pejoratively as "charters of

participants divided into two camps. Madison, Wilson, and Hamilton all argued that the Constitution should reflect the key component of the "Virginia Plan," which was a national legislature that directly reflected the interests of individuals and that allowed majorities of individuals to express their will on matters of national concern without regard to state boundaries. *See* RAKOVE, *supra* note 64, at 60–61. Opponents of the Virginia Plan argued that one primary component of any new Constitution had to be a limit on the national legislature that protected groupings of states from having to bend to the national will on issues like slavery. *See id*. at 66–68. The division between these two camps expressed itself in the debate over how to apportion seats in the Senate. Ultimately, "the framers could not avoid treating the states as constituent elements of the polity." *Id.* at 78. A compromise was brokered that resulted in a Constitution that combines aspects of a charter delegating authority, within specified limits, to the federal government, with a compact between the larger and smaller states, intended to preserve the ability of the latter to pursue their own interests and to maintain the institution of slavery. *See id.* at 77–79. The hybrid nature of the Constitution was reflected during the debate on one of the early iterations of this compromise. When discussing the combination of proportional representation based on population in the House with equal representation among the states in the Senate, Oliver Ellsworth of Connecticut described the scheme as "partly national; partly federal." *Id.* at 68.

66. James Madison, for one, frequently used the word "charter" to describe the scope of the power that would be exercised by the new federal government. Admittedly, Madison also employed the language of "compact" as a means of explaining the system of government set forth in the text. *See, e.g.*, Letter from James Madison to Spencer Roane (June 29, 1821), *in* THE AMERICAN ENLIGHTENMENT 461, 461–62 (Adrienne Koch ed., 1965) ("Our Governmental System is established by a compact, not between the Government of the [United] States, and the State Governments; but between the States, as sovereign communities, stipulating each with the others, a surrender of certain portions, of their respective authorities, to be exercised by a Common Govt. and a reservation, for their own exercise, of all their other Authorities."). The hybrid system of national government established by the Constitution was unprecedented in human history, and the Framers often struggled as they attempted to explain its precise characteristics to the general public.

67. In an 1830 letter to Andrew Stevenson, Madison wrote: "[T]he Government holds its powers by a charter granted to it by the people . . . . Hitherto charters have been written grants of privileges by Governments to the people. Here they are written grants of power by the people to their Governments." Letter from James Madison to A. Stevenson (Nov. 27, 1830), *in* THE AMERICAN ENLIGHTENMENT, *supra* note 66, at 478, 479. Similarly, in an article published in the National Gazette dated January 19, 1792, Madison described the governments created by the American and French Revolutions as "charters of power granted by liberty." James Madison, *Charters: Powers and Liberty*, NAT'L GAZETTE, Jan. 19, 1792, *reprinted in* THE AMERICAN ENLIGHTENMENT, *supra* note 66, at 508, 508 [hereinafter Madison, *Charters*].

liberty . . . granted by power."[68] The American experience was different, because our federal and state governments arise from "*great charters*, derived not from the usurped power of kings, but from the legitimate authority of the people."[69] In America, we do not enjoy our liberties at the whim of a monarch.

In 1789, the word "charter" referred to a particular type of contractual relationship with its own distinctive features. A charter was a foundational document that transferred power to an artificial entity, such as a municipal government, a university, or a corporation.[70] However, a charter was not a perpetual or complete transfer of power away from the establishing body, and the artificial entity remained permanently subordinate to the body that created it.[71] Interpreting the Constitution under a delegation view faithfully

68. Madison, *Charters*, *supra* note 67, at 508.

69. *Id.* at 509.

70. During the colonial era, the word "charter" had a very strong connotation that invoked collective entities serving a public purpose. For example, colonial legislatures often used charters to establish units of local government and to organize religious congregations. *See* STEPHEN B. PRESSER, AN INTRODUCTION TO THE LAW OF BUSINESS ORGANIZATIONS 79 (2005). Charters were also used during the colonial period to establish companies that were antecedents to our modern private corporations, but even then the majority of these companies had a strong public-service component. SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT 38 (1996). The universe of early American corporations was typically comprised of "banks, insurance companies, universities, and companies engaged in constructing turnpikes, bridges and canals." PRESSER, *supra*, at 78. Therefore, even in the case of private companies, the use of charters in the colonial era was associated with entities that served a public purpose and functioned much like today's "public utilities." *Id.*; *see also* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 949 (2010) (Stevens, J., concurring in part and dissenting in part) ("Those few corporations that existed at the founding were authorized by grant of a special legislative charter."); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 15 (2004) ("[A]lmost all of the business enterprises incorporated here in the formative generation starting in the 1780's were chartered for activities of some community interest . . . ."). The development of modern corporate law in America came after the Revolution, as the business functions of corporations began to evolve away from the quasi-public objectives of government, such as regulating trade, and instead began to increasingly reflect private objectives. BOWMAN, *supra*, at 40–41; *see also* NEWMYER, *supra* note 24, at 246–48.

71. This traditional understanding of the law of contract was at issue in the dispute between the trustees of Dartmouth College, who claimed that the terms of the school's charter were constitutionally protected from subsequent amendment, and the New Hampshire legislature, who claimed the authority to recall powers previously granted under the charter. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). Thomas Jefferson rejected the idea that the legislature lacked the power to alter the charter, calling it equivalent to the idea "that the earth belongs to the dead, and not to the living." Letter from Thomas Jefferson to William Plumer (July 21, 1816), *reprinted in* WILLIAM PLUMER, JR., LIFE OF WILLIAM PLUMER 440, 441 (A.P. Peabody ed., 1857). In the *Dartmouth* case, the Supreme Court decided the issue in favor of the trustees, thereby revolutionizing the American law of contract and making possible the

reflects the nature of the Constitution as a charter.[72]

B. Executive Power Is Limited to Delegated Powers

The delegation view also interprets the Constitution as limiting the sovereign authority of the legislative and executive branches to the exercise of delegated powers.[73] The text enumerates the specified powers that a sovereign people have delegated to their government and sets signposts beyond which the government has no authority to act.[74] James Madison was an advocate for a strong federal government during the ratification debates, but even he insisted that the powers exercised by that government must "stay within whatever limits have been clearly agreed upon."[75]

In particular, the idea of delegated powers is antithetical to the existence of any "inherent" sovereign power on the part of the federal government beyond the scope of the grant contained in the text.[76] James Madison anticipated the argument that a charter's delegation of power to the federal government might be interpreted expansively to include not only the powers specified in the text but also an inherent power of government to do all that is necessary for its own preservation.[77] He argued that the care with which the drafters of the constitutional text defined the delegated powers of the federal government belied any argument that the government possessed powers in excess of those delegated. Therefore, a power that is *not delegated* by the Constitution is the same as a power that is *withheld* from the federal government.[78] It makes no difference

rise of modern corporations. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 712–13.

72. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432–35 (1987).

73. Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 286 (2008).

74. *See* SAUL CORNELL, THE OTHER FOUNDERS 188 (1999) ("In explaining the nature of constitutional interpretation, Madison noted that the overarching principle was that the grant of power to the new federal government was intended to be limited: 'It is not a general grant, out of which particular powers are excepted; it is a grant of particular powers only, leaving the general mass in other hands.'").

75. READ, *supra* note 14, at 13.

76. For example, James Madison wrote: "[I]t is evident that the objects for which the Constitution was formed were deemed attainable only by a particular enumeration and specification of each power granted to the Federal Government; reserving all others to the people, or to the States." James Madison, The Alien and Sedition Acts: Address of the General Assembly to the People of the Commonwealth of Virginia (Jan. 23, 1799), *in* THE AMERICAN ENLIGHTENMENT, *supra* note 66, at 513, 514.

77. *See* READ, *supra* note 14, at 12 ("What Madison argued against . . . was the use of implied powers in a way that allowed the indefinite expansion of governmental power.").

78. *See* Letter from James Madison to Thomas Jefferson (Jan. 12, 1800), *in* 6 THE WRITINGS OF JAMES MADISON, 1790–1802, at 345, 347 (Gaillard Hunt ed.

whether the advocates of expansive powers label them as inherent, implied, or expedient.[79]

Perhaps the most significant limitation that the Constitution places on the federal government is contained in the Supremacy Clause. The Constitution itself, the law of nations, and acts of Congress passed pursuant to its delegated power are declared the supreme law of the land.[80] This provision does more than enforce the precedence of federal sources of law over law that originates in the states. It also denies the three federal branches of government the power to contravene either the Constitution or international law.[81]

Madison did not fear a powerful executive branch simply because of the quantum of authority that it possessed. Rather, what he most feared about executive authority was its potential to claim to possess *any* power deemed necessary to defend the nation. "For Madison the possibility of reconciling the power of government and the liberty of citizens depends above all upon the existence of clear boundaries to governmental power publicly agreed upon by an enduring majority of the people. . . . [O]nce they [are] agreed upon, liberty is threatened if they are trespassed."[82] Interpreting the Constitution under a delegation view precludes the possibility that the executive branch will exceed the limited scope of governmental power that Madison sought desperately to demarcate.

C. The People Retain Absolute Sovereignty

The delegation view presupposes that the people retain the ultimate authority under our constitutional system.[83] It therefore stands in contrast to theories of executive power that posit the existence of an inherent and unbounded authority in the field of foreign affairs, such as the theory of the "unitary executive."[84] The recognition that the people are the source of all sovereign authority is incompatible with the assertion that the executive branch possesses any powers derived external to the constitutional text.

Proponents of the theory of the unitary executive often rely on the writings of Alexander Hamilton to provide an originalist justification for their views.[85] Hamilton argued that a unitary federal government, rather than a confederation of states, was best suited to defend the nation as a whole.[86] He also argued that the

1906).

79. *Id*.

80. U.S. CONST. art. VI, cl. 2.

81. *Id.*

82. READ, *supra* note 14, at 28.

83. *See* Amar, *supra* note 72, at 1435–36.

84. *See infra* Part III.D.

85. *See, e.g.*, JOHN YOO, WAR BY OTHER MEANS 119–20 (2006).

86. *See* THE FEDERALIST NO. 23, at 148, 148–50 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

powers of the executive branch of the federal government should be lodged in the hands of one individual rather than in a multiperson council so that those powers could be exercised with energy in the face of exigencies.[87] From these two propositions, supporters of the theory of the unitary executive arrive at the conclusion that Hamilton supported an executive branch with almost unbridled power when it acted in the realm of national security.[88]

There is a difference between asserting a federal locus for the power of the national defense, on the one hand, and locating that power exclusively in the hands of the federal government's executive branch on the other. There is also a difference between a constitutional text that scrupulously avoids any role for the states in the determination of national security measures, on the one hand, and a text that places no structural limits *at all* on the means that the executive branch uses to advance national security, on the other. In neither case does the acceptance of the first premise necessarily lead to the second.

In fact, Alexander Hamilton believed that the constitutional text *did* place limits on the exercise of federal power, whether in the realm of national security or otherwise. His writings are consistent with the delegation view of the Constitution, albeit in a less direct way than Madison's view. For example, like Madison, Hamilton argued that a Bill of Rights was unnecessary in the original text because the federal government created by the Constitution already lacked the delegated power to take actions that infringe on individual liberties.[89] Hamilton did not consider a bill of rights to be necessary because the Constitution expresses a system under which the sovereign people retain the ultimate power.[90]

87. *See* THE FEDERALIST NO. 70, *supra* note 86, at 421, 422–24 (Alexander Hamilton).

88. *See* YOO, *supra* note 85, at 119–20 ("The Framers . . . created an executive with its own independent powers to manage foreign affairs and address emergencies which, almost by definition, cannot be addressed by existing laws.").

89. Hamilton asked in *The Federalist No. 84*: "[W]hy declare that things shall not be done which there is no power to do?" THE FEDERALIST NO. 94, *supra* note 86, at 509, 513 (Alexander Hamilton). This question assumes a scope of federal sovereignty along the lines of the ultra vires doctrine: the federal government is the creation of the people and therefore cannot possess more powers than are granted to it by its creator. *See also* Madison, *supra* note 55.

90. *See* Amar, *supra* note 72, at 1429 (referring to the preexisting sovereignty of "the people" as one of the "first principles" of the Constitution). In *The Federalist No. 84*, Hamilton describes the nature of a bill of rights in the general sense as being a form of reservation of rights by the people against the otherwise absolute sovereignty of the king (using the Magna Carta, the Petition of Right under the reign of Charles the First, and the Declaration of Right presented to the Prince of Orange in 1688 as examples of typical "bills of rights"). THE FEDERALIST NO. 84, *supra* note 86, at 509, 512 (Alexander Hamilton). Hamilton argued that a constitution is a fundamentally different text from a bill of rights, because under a constitution the people retain their

The main distinction between the views of Madison and Hamilton in regards to delegated power may be a matter of timing. Madison felt that the outer limits of federal government power were permanently set by the understanding of the people at the time that the Constitution was ratified.[91] Those boundaries could not be expanded short of a constitutional amendment. Hamilton seems to have believed that these limits could be loosened or lifted through precipitous action by the federal government, explained and defended to the public, so long as the public demonstrated its approval of the new boundaries.[92] Hamilton's conception of sovereignty allowed for the possibility that later generations of Americans might approve of a stronger national government than was originally envisioned if they were persuaded that the extra authority was merited, without the need to resort to a constitutional amendment.[93] Significantly, however, while he seemed to believe that the people could consent to an expansion of federal sovereignty beyond its original confines, Hamilton did *not* argue that the executive branch possessed the power to expand its authority on a unilateral basis.

Hamilton's writings illuminate the manner in which delegated authority is a fundamental corollary of the very nature of

ultimate sovereignty. *Id.* ("[Under a constitution], in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations . . . ."). Therefore, he argued, the U.S. Constitution as originally drafted had no need for a bill of rights. *But see* READ, *supra* note 14, at 75 (arguing that Hamilton did not accept the concept of an active sovereignty of the people other than in some "nebulous sense").

91. READ, *supra* note 14, at 58.

92. *Id.* at 85–86.

93. *Id.* Hamilton does not appear to have considered the consequences if the federal government asserted increased powers only to find them rejected by the public. He seems to anticipate a process that redraws the lines of sovereignty through the government's instigation of a constitutional crisis. *See id.* at 86. Hamilton's later proposal to charter a national bank and his adoption of the principle that even a federal government limited in its ends could employ tremendous discretion in choosing the appropriate means to achieve those ends later led to a philosophical split with Madison. The result was that Madison came to align himself with the Anti-Federalists in opposition to the National Bank. However, this split between Madison and Hamilton was not due to Madison changing his position on the nature of sovereignty. Rather, Madison opposed Hamilton's proposed bank because he saw it as inconsistent with original assumptions concerning the proper ends for which the federal power would be used. *See* CORNELL, *supra* note 74, at 187–91 (explaining the constitutional conflict over the chartering of a national bank). Madison was convinced that it had been settled at the time of ratification that the federal government lacked the power to charter a national bank. READ, *supra* note 14, at 29; *see also* NEWMYER, *supra* note 24, at 104 ("Among those nationalists who disagreed with Hamilton's version of nationalism was Madison himself."). For his part, Hamilton believed that, so long as the general public accepted the national bank as a proper means to pursue legitimate federal ends, the bank was constitutional.

sovereignty. If the people are truly sovereign in the United States, then the government created by the people cannot possess more power than do the people.[94] To speak of the "inherent" powers of the executive branch in the realm of foreign affairs is to deny the ultimate sovereignty of the people over the exercise of foreign affairs. Only by reading the Constitution as a compact can we conclude that the people have severed all ties to their sovereignty and surrendered it to the federal government.

D. Popular Sovereignty Cannot Be Severed from the People

The use of the delegation view in order to police the scope of the sovereign power delegated to the federal government is consistent with the Constitution's overall conception of popular sovereignty. James Wilson, whose arguments were influential during the debate over ratification, believed that a national body of "the people" predated the creation of both the state and federal governments.[95] Subsequent to the ratification of the Constitution, "the people" in a national sense remain superior to every level of government. Therefore, the Constitution reflects a concept of popular sovereignty that cannot be severed from the people.[96] The delegation view

94. *See supra* notes 89–90 and accompanying text (discussing Hamilton's delegation view, under which the sovereign people retain the ultimate power).

95. *See* James Wilson, Speech Before the Ratifying Convention of Pennsylvania (Nov. 26, 1787), *in* 1 THE WORKS OF JAMES WILSON 525, 543 (James DeWitt Andrews ed., 1896) ("The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people."); *see also* READ, *supra* note 14, at 17 ("Wilson's response to the complications of federalism was to assert the existence of a single, national sovereign people standing above all authority conflicts.").

96. Fundamentally, Wilson rejected the idea that "the people" could ever completely delegate away their sovereign powers to any governmental unit. MOORE, *supra* note 48, at 109. Instead, Wilson believed that the Constitution preserved separate and ongoing realms of power for the states, for the federal government, and for the people, with the people retaining both ultimate sovereignty and the ability to recall to themselves any delegated power as they saw fit. *Id.* at 107–09. "He never wavered from his faith that there existed in the United States a single, national sovereign people capable of distributing power between national government and state governments while remaining superior to both." READ, *supra* note 14, at 89. Wilson argued that the state governments that had been adopted upon independence received a different form of delegated authority from the type of delegated authority that the federal government received. The state governments received a delegation of *all* governmental authority subject to express reservations by the people intended to preserve individual liberties. MOORE, *supra* note 48, at 107–08. Under the U.S. Constitution, in contrast, the people delegated only an *express authority* to the federal government, leaving all residual sovereignty in the hands of either the states or private individuals (depending on whether the relevant state constitution allocated that residual power to the state government or preserved it as a part of individual liberty). *Id.* Under Wilson's constitutional design, therefore, each of the three sovereigns—the newly created federal government, the preexisting states, and a national community of "the people"—comprised

reflects this understanding of the fundamental nature of the sovereignty possessed by the people.

The case of *Schneiderman v. United States*[97] demonstrates how the residual sovereignty of the people continues to be preserved from government encroachment. The federal government sought to revoke Mr. Schneiderman's citizenship on the grounds that his membership in the Communist Party rendered it impossible for him to truthfully claim an "attachment to the principles of the Constitution," as required under the relevant naturalization statute.[98] A deeply divided Supreme Court held that membership in the Communist Party was not incompatible with the principles of the Constitution, despite the fact that the Communist Party platform called for the communal ownership of property and for restructuring the federal government in order to eliminate both the Senate and the Supreme Court.[99] In dissent, Chief Justice Stone claimed that the majority was denying the existence of any unchangeable principles in the Constitution.[100]

Traditionally, *Schneiderman* has been interpreted through the lens of individual rights. Under this interpretation, the case stands as an affirmation of Mr. Schneiderman's First Amendment rights.[101] However, the case is better understood as a rebuke of the idea that the grant of sovereignty to the federal government in the Constitution is a static one. The dissent views the Constitution as a binding contract, and the current structure of the federal government as reflecting a bargain that cannot be altered. The

distinct actors that contemporaneously exercised independent authority in a three part confederation. *Id.* at 107 ("[Wilson] presumed, in short, that powers of the United States government, powers reserved to the respective states, and some of the people's rights and powers were mutually exclusive normative categories."). A system in which three actors expressed different forms of sovereignty would not be feasible if the federal government possessed absolute sovereignty, and therefore Wilson refused to view the Constitution simplistically as a compact whereby "the people" granted their sovereignty to the federal government. Nor did Wilson view the Constitution as a compact between sovereign states in which the states agreed to cede authority to a federal government. Instead, Wilson treated the powers exercisable by the federal government under the Constitution "as analogous to powers of attorney or powers of trust, not irrevocable transfers or contractual commitments." *Id.* at 110. Wilson's ideas influenced many early Federalists, including Supreme Court Justice John Marshall. *See* Michael Lind, *Preface* to James Wilson, *Popular Sovereignty and the Constitution*, *in* HAMILTON'S REPUBLIC, *supra* note 16, at 85, 85; NEWMYER, *supra* note 24, at 173–74.

97. 320 U.S. 118 (1943).

98. *Id.* at 121 & n.2.

99. *Id.* at 145–47, 157–61.

100. *Id.* at 181 (Stone, C.J., dissenting) (claiming such principles include "protection of civil rights and of life, liberty and property, the principle of representative government, and the principle that constitutional laws are not to be broken down by planned disobedience").

101. *See* LEVINSON, *supra* note 25, at 148.

majority, in contrast, affirms the existence of a sovereign power of the people to choose a new structure for the federal government that differs significantly from the original structure embodied in the text. The majority opinion rejects any interpretation of the naturalization statute that operates to limit the people's prerogative to exercise its sovereign power in the future.

Therefore, it is incompatible with the Framers' original intent to read the Constitution as a device that completely severs sovereignty from the people and transfers it to the federal government, whether it be a wholesale transfer or one limited to the authority to conduct foreign affairs. Instead, the text of the Constitution defines an ongoing relationship among the states, the federal government, and the people. None of these three sovereign entities possesses any authority independent of the boundaries of that relationship. Interpreting the Constitution under a delegation view preserves this unique tripartite relationship.

E. The Delegation View Post-Ratification

The legitimacy of the delegation view is further confirmed by events following the ratification of the Constitution. The primary architects of the Constitution expressed their opposition to the view that the federal government possesses the whole of sovereignty as the result of a contractual devise, whether originating from "the people" or from the states.[102] Instead, the Framers had conceptualized the relationship between the people and the federal government along the lines of a clearly defined charter—setting forth specific purposes and modes of operation for the exercise of governmental functions. The founding generation believed that the constitutional text as drafted was sufficiently clear and precise[103] to accurately reflect their underlying assumptions concerning the proper scope of federal authority.[104] This original understanding of

102. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 930 (1985). Powell denies that the Framers had any intent to create a compact or contract when they drafted the Constitution, citing the explanations of the Framers during the debate over ratification and emphasizing the text's failure to include any reference to either a "compact" or to the states as contracting parties. *Id.* at 929–30.

103. The usage of ambiguous language in the Constitution does not require the reader to acquiesce in "an indefinitely expansive rule of construction." READ, *supra* note 14, at 39. As explained by historian James Read, "There is a difference between conceding that some powers must be left to implication and setting into motion a process by which governmental power can be continually expanded [beyond the Constitution's agreed-upon boundaries]." *Id.*

104. It must be conceded that not everyone reads the text in the same way. Critics of the Constitution were alarmed precisely because they interpreted its language as a compact by which the governed ceded to the federal government a breadth of sovereignty that was coextensive with the absolute power of an English monarch. The debate over the ratification of the Constitution reflects these differing interpretations of the text. During the debate over ratification,

the meaning of the text persisted in the years after ratification.

In particular, early Supreme Court opinions are notable for the manner in which they reject the compact view and embrace the delegation view. In *Chisholm v. Georgia*, Justice James Wilson gave precedence to the sovereignty of the national community of "the people" over the sovereign immunity of the state of Georgia.[105] Chief Justice John Jay concurred with Justice Wilson, going so far as to refer to the people as "joint sovereigns" with the states.[106]

In later Supreme Court cases, such as *McCulloch v. Maryland*[107] and *Gibbons v. Ogden*,[108] Chief Justice John Marshall espoused a particularly expansive view of the federal sovereign power in contraposition to the power reserved to the states.[109] However, Marshall's opinions in these cases were premised on his determination that the federal government was acting within the delegated spheres of authority envisioned by the Framers.[110] Marshall frustrated attempts to subordinate federal sovereignty to state control, but his opinions left the sovereignty of the people unscathed.[111] Many of these early cases were argued before the Court by Daniel Webster, who drew on Madison's and Hamilton's writings in order to dispute the idea that the United States was a "compact" among sovereign states.[112] Webster agreed with James

Federalists argued against the inclusion of a bill of rights, promising that federal power would be interpreted narrowly under the text. *See* MOORE, *supra* note 48, at 105–06. Anti-Federalists called for a bill of rights precisely in order to minimize any possibility that the original text would be read to create a federal government of vast powers. *Id.* at 106. With the birth of political parties in the decades after ratification, both sides switched positions. Under President John Adams, many Federalists became advocates of an expansive interpretation of federal power, effectively adopting the interpretation of the Constitution's language that the Anti-Federalists had used to justify their opposition to the Constitution. Meanwhile, the Anti-Federalists reemerged as Jeffersonian Republicans who now asserted a reading of the constitutional text premised on the assumption that the document only delegated limited authority to the national government. *Id.*; *see also* CORNELL, *supra* note 74, at 164–68.

105. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 453–57 (1793). The decision of the Supreme Court was superseded by the Eleventh Amendment, which limited federal court jurisdiction in cases in which states are a party. *See* READ, *supra* note 14, at 106; Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1737–38 (2007).

106. *Chisholm*, 2 U.S. (2 Dall.) at 479 (Jay, C.J., concurring).

107. 17 U.S. (4 Wheat.) 316 (1819).

108. 22 U.S. (9 Wheat.) 1 (1824).

109. *See* NEWMYER, *supra* note 24, at 337–53.

110. *Gibbons*, 22 U.S. at 196–97; *McCulloch*, 17 U.S. at 405.

111. "The government of the Union . . . is, emphatically, and truly, a government of the people. . . . Its powers are granted by them . . . and for their benefit." *McCullough*, 17 U.S. at 404–05; *see also* NEUMAN, *supra* note 12, at 60–61 (discussing Marshall's resistance towards interpretations of the Constitution as a compact).

112. *See* NEUMAN, *supra* note 12, at 78–79; GARRY WILLS, LINCOLN AT GETTYSBURG 129–33 (1992). Webster also served as a United States Senator,

Wilson that the United States was a single nation from the moment of revolution, before the individual states even existed as separate political entities.[113]

The influence of the delegation view can also be seen beyond the opinions of the Supreme Court. Justice Joseph Story, in his influential book *Commentaries on the Constitution of the United States*, adopted and expanded on the anticompact ideas of John Marshall and Daniel Webster.[114] Delegation ideas also influenced early states' rights advocates such as John Taylor of Caroline.[115]

Later in our nation's history, Abraham Lincoln's legal argument that the secession of the Confederate states was unconstitutional reflected the influence of both Daniel Webster and Justice Story.[116] Lincoln's argument against secession is premised upon the idea that the nation was formed by the people as a whole upon independence from Great Britain, rather than by the states via a constitutional compact.[117] As a consequence, Lincoln believed that only the people acting as a whole nation possessed the power to dissolve the union.[118] Indeed, an argument can be made that throughout American history it has been the delegation view that has prevailed whenever there was a major struggle "to determine what kind of a country the United States would be."[119]

Therefore, the delegation view derives its legitimacy as a means of interpreting the constitutional text from the fact that it vindicates the original conception of the sovereignty of the federal government.[120] Enforcing a textual limit on the power of the federal government to exercise nondelegated powers is consistent with the Framers' intention to preserve the ultimate sovereign power in "the people." Recognizing that all humankind can object to overreaching

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and his most famous speech in the Senate was a rebuke of the compact theory of the Constitution. *See* Daniel Webster, Second Reply to Hayne, (Jan. 26, 1830), *in* 1 THE PAPERS OF DANIEL WEBSTER: SPEECHES AND FORMAL WRITINGS 1800–1833, at 284, 330–31 (Charles M. Wiltse ed., 1986).

113. *See* READ, *supra* note 14, at 110; WILLS, *supra* note 112, at 129–33.

114. *See* NEWMYER, *supra* note 24, at 384–85; WILLS, *supra* note 112, at 129–32. *See generally* JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 221–72 (5th ed. 1994).

115. *See* NEUMAN, *supra* note 12, at 57–58; Barnett, *supra* note 105, at 1735–36.

116. *See* Michael Lind, *Preface* to Daniel Webster, *The Second Reply to Hayne*, *in* HAMILTON'S REPUBLIC, *supra* note 16, at 108, 108 (noting that Lincoln's Gettysburg Address reflects a conscious attempt to invoke the language of Webster's famous "Second Reply to Hayne" speech).

117. *See* READ, *supra* note 14, at 117; WILLS, *supra* note 112, at 129–33.

118. *See* Abraham Lincoln, Message to Congress in Special Session, *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 246, 255 (Don E. Fehrenbacher ed., 1989) ("Our States have neither more, nor less power, than that reserved to them, in the Union, by the Constitution—no one of them ever having been a State *out* of the Union.").

119. *See* Lind, *supra* note 16, at xiv.

120. *See* Barnett, *supra* note 105, at 1757–58.

executive branch action, without limiting the benefits of this approach to the members of the social contract, functions as a way of policing illegitimate exercises of federal government power.[121] However, despite evidence that the Constitution should be read under a delegation view, our nation's ongoing dialogue about the original understanding of the text[122]—a dialogue that ensures that the Constitution continues to be relevant in an ever-changing world[123]—has often favored the compact view of the Constitution over the delegation view. Precisely how the compact view came to predominate this debate is the subject of the next Part.

III. HISTORICAL EXPRESSIONS OF THE COMPACT VIEW

The compact view has long influenced the public understanding of the meaning of the Constitution. It was instrumental in arguments advanced in order to deny constitutional protections to aliens and slaves. Its influence can also be observed in Supreme Court jurisprudence acquiescing in the exercise of federal powers that exceed the scope of powers delegated by the text. This is not to say that the Supreme Court is disinclined to place limits on the scope of federal sovereignty. However, when the Court *has* curbed the scope of federal power, it has typically been in the context of domestic controversies and in a manner that places the residual sovereignty withdrawn from the federal government into the hands of state governments rather than those of the people. Meanwhile, the compact view has often been invoked to support an expansive scope of federal power in the areas of immigration and foreign affairs—instances when state interests are rarely directly at stake.

A. The Framers and the Compact View

The origins of the compact view of governmental authority can be traced to the search for a replacement for monarchy by political thinkers in England and its colonies during the Enlightenment. By the early eighteenth century, absolutism as the basis for the authority of the English Crown had been undermined by the facts of the Glorious Revolution of 1688 and the Hanoverian reaccession to

121. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 187 (1992) (noting that the American conception of republican government viewed state legislatures as "sovereign embodiments of the people with a responsibility to promote a unitary public interest that was to be clearly distinguishable from the many private interests of the society"). There are countless examples of the Framers' recognition that the rights embodied in the Constitution are an expression of the universal rights enjoyed by all humankind. For example, John Adams wrote: "That all men are born to equal rights is true. Every being has a right to his own, as clear, as moral, as sacred, as any other being has." Letter from John Adams to John Taylor (1814), *in* THE AMERICAN ENLIGHTENMENT, *supra* note 66, at 221, 222.

122. *See, e.g.*, CORNELL, *supra* note 74, at 303–07.

123. *See* READ, *supra* note 14, at 169–71.

the throne.[124] The American colonists, in particular, had begun to think about the source of government authority in new ways that sought to replace the patriarchal relationship between the Crown and its subjects with a political philosophy that recognized a role for the consent of the governed.[125] Traditional notions of sovereignty that had long viewed the king as a paternalistic father figure began to give way to the idea of sovereignty as a contract between the king and his people.[126]

The nature of any contract is to impose commensurate obligations on both parties. Colonists who lived in an increasingly commercialized world easily adapted the notion of commercial contracts to the political arena.[127] The colonists' experience with commercial contracts acculturated them to the idea that positive bargains could be "deliberately and freely entered into between two parties who were presumed to be equal and not entirely trustful of one another."[128] It was a natural evolution to come to view the relationship between the people of a nation and their government in similar terms.[129]

The colonists began to believe that, even in a monarchy, the Crown and its subjects owe each other commensurate obligations. The Crown owes an obligation to its subjects to protect them from external harms and, in return, the subjects owe the Crown their loyalty.[130] Colonists aggrieved by the arbitrary dictates of a distant

124. *See* WOOD, *supra* note 121, at 155–56.

125. MCAFFEE, BYBEE & BRYANT, *supra* note 15, at 5–6.

126. *Id.*

127. *See* NEWMYER, *supra* note 24, at 211 ("The line between public and private law in early national jurisprudence was plainly imprecise. So was the distinction between private entrepreneurial activity and public welfare, at least in the economically-grounded, common- law-infused constitutional jurisprudence of [John Marshall].").

128. *See* WOOD, *supra* note 121, at 162.

129. The compact view also displays the influence of the method of biblical interpretation that views the Bible as a compact between God and a chosen people. *See* MCAFFEE, BYBEE & BRYANT, *supra* note 15, at 3 ("The use of covenants to establish civil governments melded the early colonists' religious and legal traditions."). The Puritan familiarity with the concept of covenants undoubtedly contributed to the ease with which the colonists in New England accepted a view of governmental authority premised on contractual terms. *See* WOOD, *supra* note 121, at 163. Covenants described the relationship between people and God, between congregations and ministers, and between members of a religious community, so in a sense the compact view merely placed secular authority on the same doctrinal footing as moral authority. *Id.* After independence, economic forces built on this religious foundation. The need to clarify and formalize conflicting titles to land, as well as the desire to protect nationwide markets from localized government protectionism, meant that "contract thinking derivative from private law . . . insinuated its way into constitutional discourse as the chief protector of property rights." NEWMYER, *supra* note 24, at 242; *accord id.* at 264–66 (discussing the influences on John Marshall's contract law jurisprudence).

130. In 1774, James Wilson wrote that "protection and allegiance are the

king began to view themselves as "parties to contracts, deliberative agreements, legal or mercantile in character, between people and rulers in which allegiance and protection were the considerations."[131] Indeed, the moral justification for the rebellion against the Crown that became the American Revolution was that by failing to live up to its obligations toward the American colonies the Crown had forfeited any right to expect their allegiance or loyalty.[132]

The compact view adopts these influences and assumes a purely contractual source of governmental authority. As applied to the U.S. Constitution, the compact theory posits a "Genesis story" that explains the creation of our nation. The story holds that the text of the Constitution was created as an agreement among individual sovereign states and that the language of the document embodies the terms of that agreement.[133] Therefore, the parties to the contract (the several states) remain the repository of any powers not granted to the federal government by the text.

It is well understood that, in the debate over the ratification of

reciprocal bonds, which connect the prince and his subjects." James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, *in* 2 THE WORKS OF JAMES WILSON 721, 743 (Robert Green McCloskey ed., 1967). Wilson then wrote: "Allegiance to the king and obedience to the parliament are founded on very different principles. The former is founded on protection: the latter, on representation." *Id.* at 736–37.

131. WOOD, *supra* note 121, at 165.

132. MCAFFEE, BYBEE & BRYANT, *supra* note 15, at 6–8.

133. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."). The "Genesis story" expounded by adherents to the compact view begins with the assumption that the Framers of the Constitution relied heavily upon the social theories of John Locke. *See, e.g.*, FORREST MCDONALD, STATES' RIGHTS AND THE UNION 7 (2000). The Framers, therefore, would have expected that "the compact that establishes and legitimizes a political society is between a prince or governing body and the people," and that only the failure of the compact returns the sovereign power to the people who are then free to reconstitute a government. *Id.* After the American Revolution, the thirteen former colonies were established as new sovereigns by the popular consent of the people, and were authorized to exercise any power not expressly forbidden by their state constitutions. *Id.* at 8. The U.S. Constitution is therefore a compact between separate state sovereigns, representing the people of separate societies. *Id.* at 9. The grant of power to the federal government contained in the Constitution does not originate directly in the people, because all thirteen state sovereigns were still in existence at the time of ratification and the compact between the states and their residents had never been dissolved into the state of nature that is necessary under Lockean principles to return sovereignty to the people. *Id.* In sum, under the compact view, the U.S. Constitution is a federal act performed by the several states and not a national act performed by individuals comprising the entire nation. *Id.* at 19. Luther Martin, who voted against adoption of the Constitution at the Constitutional Convention, expressed this understanding of the document as one of his reasons for opposing ratification. *See* CORNELL, *supra* note 74, at 61–62.

the Constitution, those who advocated for the creation of a truly national federal government prevailed over those who advocated for more localized state power. However, the act of ratification itself did little to assuage the efforts of the Constitution's opponents. Prominent voices continued to be raised in support of structural changes to the Constitution that would elevate state power over its nationalist focus.[134] When these structural changes were not forthcoming, the opponents of nationalism switched gears: instead of arguing that the constitutional text needed structural changes, they argued that the text in its existing form should be interpreted as a compact between the states.[135]

Because individual persons are not a party to the agreement, the compact view does not preserve any meaningful residual power in the hands of the people. Under this view, "the people" are the beneficiaries of the individual rights guaranteed by the Constitution but are otherwise spectators (albeit interested ones) at the bargaining table between the states and the federal government.[136] One early example of the compact view being asserted in order to interpret the Constitution took place during the debate over the congressional statutes known as the Alien and Sedition Acts.

B. The Alien and Sedition Acts

Under the administration of John Adams, the Federalists, who had shepherded the nation from monarchy to independence under a banner exalting the rights of man, had degenerated by 1798 into a political movement that was premised on two main articles of faith. First, the Federalists adopted measures that reflected a fundamental fear of the people and a distrust of democracy as being incompatible with order and security.[137] Second, the Federalists firmly believed that opposition to their policies was premised on, and indistinguishable from, opposition to the Constitution.[138] When

134. *See* NEWMYER, *supra* note 24, at 103 ("What Jefferson and Madison said in the [Virginia and Kentucky Resolutions]—what Marshall heard with alarm—was that the Constitution was a contract created by sovereign states and that disputes over its meaning should be settled by those states and not the Supreme Court.").

135. *Id.* at 105.

136. Some Federalists took this argument to its logical extreme and denied that the Constitution had any applicability to residents of the District of Columbia or the territories. *See* NEUMAN, *supra* note 12, at 73–76.

137. JOHN C. MILLER, CRISIS IN FREEDOM 10 (1951).

138. *Id.* at 11. Federalist policy was motivated to a very great extent by political considerations. As summarized by James Morton Smith:

> Under the guise of patriotic purpose and internal security, the Federalists enacted a program designed to cripple, if not destroy, the Jeffersonian party. In the face of the emergence of an effective grass-roots democratic opposition to their domestic and foreign policies, they retreated to repression as a means of retaining political power. The authoritarian alien and sedition system was the logical culmination of

tensions with France created the very real prospect of war, the Federalists reacted in a way that reflected these two basic premises. Congress passed, and President Adams signed, the four pieces of legislation that have come to be known collectively as the Alien and Sedition Acts.[139]

Although all four laws engendered great controversy, the Alien Act in particular is illustrative of the development of the compact view of the Constitution. Federalists defended the Alien Act by arguing that aliens had no rights under the Constitution, for the simple reason that they were not a part of "the people" who possess rights that the federal government was obligated to recognize. Timothy Pickering, the Secretary of State under President Adams, expressed this view when he stated that "he must be ignorant indeed who does not know that the Constitution was established for the protection and security of American citizens, and not of intriguing foreigners."[140] Harrison Gray Otis, one of the leading Federalists in the House of Representatives, argued that when the drafters of the Preamble of the Constitution made reference to "[w]e, the people," they were referring to a discrete community of individuals who were parties to that document.[141] This community did not include aliens who had yet to attain citizenship. Therefore, "[s]ince [the Constitution] was not made for the benefit of aliens, they could not claim equal rights and privileges with American citizens."[142] These arguments clearly reflect the view of the Constitution as a "compact" that only creates rights enforceable by the parties to the agreement.[143]

Federalist political philosophy.

JAMES MORTON SMITH, FREEDOM'S FETTERS 21 (1956).

139. The Naturalization Act of 1798 was intended to reduce the growing strength of the foreign-born vote, most of which was in support of Republican candidates, by raising the probationary period for citizenship from five to fourteen years. MILLER, *supra* note 137, at 47. The Act Respecting Enemy Aliens, passed on July 6, 1798, was a war measure, granting the power to the President to remove citizens of enemy nations from the United States in times of war or threatened invasion. *Id.* at 50. The Alien Act, passed on June 25, 1798, was directed at alien subversives whether or not the nation was at war and without regard to whether they were citizens of an enemy or friendly nation. *Id.* at 51–52. This Act granted the President the power to deport any alien suspected of engaging in subversive activities. *Id.* Finally, the Sedition Act of July 14, 1798 made it a crime to write, print, or speak in an attempt to weaken or defame the government and laws of the United States. *Id.* at 66–71. While the Naturalization Act and the Alien Act were attempts to muzzle the Republican newspapers, many of which were founded and operated by recent immigrants, the Sedition Act was intended by Federalists to strike at political opposition by citizens as well as aliens. *Id.* at 69.

140. MILLER, *supra* note 137, at 164.

141. SMITH, *supra* note 138, at 86.

142. *Id.*

143. *See* DANIEL KANSTROOM, DEPORTATION NATION 59 (2007); NEUMAN, *supra* note 12, at 54.

Opponents of the Alien Act premised their opposition on the lack of any delegation of power to the Congress to legislate on the right of aliens to reside within the country.[144] The Constitution did not delegate a power to Congress to expel aliens any more than it delegated a power to expel natives.[145] While the states might pass laws governing the terms of residence by aliens, Congress could not.[146] The fact that Congress was acting against noncitizens did not save an unconstitutional attempt to exercise a nondelegated power.[147] Republican critics of the law also rejected the argument that the Constitution applied only to citizens. Representative Edward Livingstone of New York argued forcefully that the text of the document referred to rights possessed by "persons," thus failing to distinguish between citizens and aliens, and that the courts had uniformly read the Constitution in this manner.[148]

The Alien Act is significant in our nation's constitutional history with regard to the conceptualization of the Constitution as a compact. First, Federalist advocates of centralized federal government power resorted to contractual analogies in order to justify their suspicion of immigrants. Second, it is also notable that this early expression of the compact view was made in conjunction with the assertion that the federal government possessed inherent powers of self-preservation that were not expressed in the constitutional text. This interconnection between the compact view, the assertion of the rights of immigrants, and the justification of a nontextual inherent power is a persistent theme in our nation's history.[149]

144. KANSTROOM, *supra* note 143, at 57; NEUMAN, *supra* note 12, at 68.

145. James Madison characterized the power to decide whether to permit the continued residence of natives and aliens alike as "a right originally possessed, and never surrendered, by the respective States." Madison, *supra* note 76, at 516. Federalists, in contrast, believed that the distinction between natives and aliens was important. At least insofar as it was directed at noncitizens, the Alien Act was said by Federalists to fall within the implied and inherent power of the federal government to defend the country against "foreign aggression." MILLER, *supra* note 137, at 164.

146. KANSTROOM, *supra* note 143, at 57; SMITH, *supra* note 138, at 71.

147. SMITH, *supra* note 138, at 72.

148. *Id.* at 87. The Sedition Act eventually expired under its own terms without being subjected to a constitutional challenge in the Supreme Court (although the Court would later characterize the Sedition Act in terms that suggested it was unconstitutional). *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."). The Alien Act expired on June 25, 1800. The Naturalization Act has been amended and superseded countless times since 1798. Alone among the four statutes passed in 1798, the Enemy Aliens Act persists as a part of the United States Code. 50 U.S.C. §§ 21–24 (2006).

149. Ironically, Republican opponents of the Alien and Sedition Acts responded to the threat of a centralized federal authority by advancing their own contractual analogy. Republicans began to assert a "states' rights" version

C. Supreme Court Assimilation of the Compact View

1. Utility of Compact View in the Defense of Slavery

The Supreme Court fully embraced the compact view in the case of *Scott v. Sandford* ("*Dred Scott*").[150] The rationale of *Dred Scott* is a direct result of the Supreme Court's attempt to permanently preserve slavery despite the fact that the Constitution scrupulously avoided choosing sides on the issue. The Court's decision, holding that slaves were not "persons" under the meaning of the Constitution, claimed to do no more than give effect to the intent of the Framers.[151] However, the Constitution dealt with the question of slavery by leaving the institution for states to adopt or reject under state law as a matter of federalism.[152] This was the compromise necessary to get the Constitution adopted.[153] The historical record does not support any specific intention on the part of the Framers to exclude slaves from the definition of "people."

The acceptance of slavery at the time of ratification offers no support for the argument that the word "persons" in the Constitution has anything less than universal application. To the contrary, the failure to prohibit slavery actually supports a limited

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of the compact view that maintained that the true parties to any constitutional agreement were the people acting through the medium of their state governments, a theory that reflected Republican distrust of excessive federal power. *See* CORNELL, *supra* note 74, at 238–39. Saul Cornell summarizes this "states' rights" response to the Alien and Sedition Acts as follows:

> Jefferson and Madison asserted that the protection of individual liberty depended upon preserving the balance of power between the states and the federal government. States' rights and individual rights continued to be linked in opposition constitutional discourse. [The Virginia and Kentucky Resolutions] also adopted the compact theory of federalism, in which the states were cast as the original parties of the compact that created the Union. The people acting through the states had consented to alienate a portion of their power to the federal government for a limited set of objectives detailed by the Constitution. The original parties to this compact, the states, were therefore entitled to judge infractions that violated the original contract.

Id. at 240.

By adopting a "states' rights" version of the compact theory, Republicans incorporated some of the Anti-Federalist critique of the Constitution. As an attempt to check the growing authority of the federal government, the Republicans' rhetorical tactic had merit. However, by accepting the validity of the contract analogy as a framework for constitutional interpretation, rather than repudiating it altogether, the Republicans perversely ended up strengthening the legitimacy of the compact view as a means of excluding "outsiders" from the protection of the constitutional text.

150. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

151. *Id.* at 404–05.

152. *See* NEWMYER, *supra* note 24, at 424–25.

153. *Id.*

delegation of sovereign power to the federal government by "the people." The federal government never received the power to prohibit slavery. It was left to the states to define whether their residents enjoyed equal protection under the law prior to the adoption of the Fourteenth Amendment, and the Constitution was expressly set up to preserve each state's independent ability to decide this question.[154] The original constitutional text is concerned with the power (and lack of power) of the *federal* government.[155]

The difficulty facing the majority of the Supreme Court in *Dred Scott* was that the Constitution *did* delegate to Congress the power to legislate for the territories.[156] Therefore, while reliance on the delegation view might lead to the conclusion that the Constitution offered no protection to slaves residing in the southern states, the delegation view provided no basis for arguing that Congress lacked the power to prohibit slavery in the territories or to make the prohibition of slavery a condition for statehood. Unless the majority interpreted the Constitution in a way that imposed such constraints on Congress, the southern states would become increasingly outnumbered by the ranks of "free states."

The solution to this dilemma, embraced by Chief Justice Taney and the rest of the majority, was to espouse a compact theory that was at odds with the traditional use of delegated powers as a means of defining the scope of federal power. Justice Taney argued that the southern states would never have ratified the Constitution if the text required the federal government to treat slaves as "persons."[157] This argument reduces the Constitution to a contract whose terms are to be defined in accord with the intentions of the parties, while ignoring the interests of nonparties to the agreement.[158]

After the Civil War, the Fourteenth Amendment was adopted in order to overturn the *Dred Scott* decision.[159] The Fourteenth Amendment mandated equality of all persons under the law of the states, thereby fundamentally restructuring relations between federal and state governments. States were no longer free to define who enjoyed equal treatment. The sovereign "people" of the nation reclaimed from the states the broad authority that states previously wielded to discriminate among classes of state residents. The Fourteenth Amendment definitively rejected the definition of personhood propounded in *Dred Scott*, and this rejection should have put the compact theory to rest.[160] No longer could the

154. *See id.* at 434 (concluding that John Marshall's theory of federalism "deferred to the states on the question of slavery").

155. Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243, 247 (1833).

156. *Scott*, 60 U.S. at 436.

157. *Id.* at 416.

158. *See* NEUMAN, *supra* note 12, at 61.

159. U.S. CONST. amend. XIV, § 1.

160. Rejection of the compact theory does not threaten the continued vitality

Constitution be read as a contract between certain "persons" and the federal government, to the exclusion of others who were born within our borders.

However, while it emphatically affirmed the equality of all of those born within our borders, the Fourteenth Amendment did not address or resolve the question of whether immigrants have constitutional rights coextensive with those of citizens. Nor did it address whether coextensive treatment should turn on whether the immigrants entered our country lawfully or unlawfully. In addition, the Fourteenth Amendment failed to address whether the federal government could deliberately undercut the promise of equality of the "persons" referenced in its text by purposefully and methodically ensuring that questionable government conduct take place on foreign soil. Therefore, the addition of the Fourteenth Amendment to the Constitution left an opening for the compact theory to reinsert itself into the nation's constitutional jurisprudence.

2. Compact and Immigration Law

a. *External Borders Define the Parties to the Compact.* The Supreme Court would inject the compact theory into its reading of the Constitution when it once again had the opportunity to consider

of the "states' rights" jurisprudence that was often the Supreme Court's focal point during the term of Chief Justice Rehnquist. Under Rehnquist, the Supreme Court developed a theory of states' rights that combined a decreased emphasis on the Fourteenth Amendment's structural changes with a textualist buildup of the content of the Tenth and Eleventh Amendments. *See* Barnett, *supra* note 73, at 292–93. Both aspects of this states' rights approach explicitly rely on compact theory principles dating back to the Articles of Confederation in order to interpret the Constitution as a compact between the state and federal governments. The intention of the Rehnquist Court was to recognize a broad sphere of state sovereignty that is immune from federal interference. As a result of this line of cases, the compact theory and states' rights jurisprudence have become mutually reinforcing.

However, the Rehnquist Court's states'-rights cases need not be seen as inconsistent with the delegation theory. The federal government lacks power to legislate in certain fields simply because the text of the Constitution reserves certain sovereign powers to the states. There is no need to go further and make analogies to a compact. To do so, and to premise the existence of a limitation on federal power on the existence of a "contract" between the federal government and the states, is to ignore the fact that "the people" in their general capacity are also members of the "contract" (via the Tenth Amendment) and are therefore free to use their federal representatives to act on the states. A better reading is simply to construe the Constitution as the source of all delegated powers that the federal government possesses. The Fourteenth Amendment changes the original text by removing a power that the states had previously retained and by lodging a new power to police the states with the federal government. After the Fourteenth Amendment, the states no longer possess the power to treat their residents unequally under the law, and the federal government is given the authority to enforce equality of treatment against offending states.

whether the Constitution provided any rights to "outsiders." This resurrection of the compact view occurred in the context of immigration law. In 1889, the Court decided the seminal immigration law case commonly known as *The Chinese Exclusion Case*.[161] Congress had passed a law barring the entry of Chinese nationals into the United States. Chae Chan Ping, the plaintiff-alien in the case, argued that Congress could not pass laws regulating the entry of noncitizens because the Constitution did not expressly grant such a power to Congress.[162] The premise of his argument was that the Constitution leaves it to the individual states to regulate immigration of persons across their borders.[163]

The premise of the argument put forth by Chae Chan Ping was identical, therefore, to the delegation view of the Constitution put forth by the opponents of the Enemy Aliens Act. Significantly, if Congress lacked the power to prohibit the entry of Chinese persons into our country, it would be irrelevant whether the person objecting to Congress's authority was a noncitizen. It would be equally irrelevant that the aggrieved person was physically located outside of our borders, seeking permission to enter. However, in *The Chinese Exclusion Case*, the Supreme Court upheld the constitutionality of the statute barring Chae Chan Ping's entry.[164]

Justice Field's opinion for the Court's majority held that Congress does indeed possess the power to exclude noncitizens from our borders. Three possible interpretations of the Constitution (which is silent on the question of immigration) can be advanced to support his holding. First, Justice Field explicitly argued that the locus of the federal government's immigration power lies outside of the Constitution, in the sovereign power of nations.[165] Obviously, this interpretation is problematic. While occasionally invoked by the Supreme Court during its history,[166] the idea that the federal government derives any authority from sources outside of the constitutional text has been criticized by legal scholars.[167]

161. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

162. *Id.* at 603.

163. *See generally* Gerald L. Neuman, *The Lost Century of Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–84 (1993) (demonstrating that state laws served the function of regulating immigration during the first century of American independence).

164. *The Chinese Exclusion Case*, 130 U.S. at 609.

165. *Id.* at 604.

166. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (observing that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution").

167. *See, e.g.*, David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 489 (1946) ("Certainly institutions operating in crisis situations may be forced to exercise powers beyond their announced authority. That, however, would not support a

Second, Justice Field suggested that the Constitution contains an "implied" delegation of foreign affairs power to the federal government, and that immigration falls within the scope of this implied delegation.[168] This second interpretation of the Constitution is similarly problematic. Even if a "foreign affairs power" might be implied from the structure of the constitutional text to reside in the federal government, the most logical recipient of a foreign affairs power would be the executive branch, rather than Congress.[169] Most of the responsibility for dealing with foreign nations is explicitly delegated by the Constitution to the federal government in the person of the President.[170]

However, there is a third possible interpretation of the Constitution lurking beneath Justice Field's holding that Congress can pass the exclusion law at issue—albeit one that Justice Field himself does not articulate. Arguably the compact view supports the exclusion law at issue in the *Chinese Exclusion Case* to a greater extent than do the first two rationales, because constitutional limits on government power do not apply to nonmembers. Noncitizens located outside of our territory are simply not part of the bargain embodied by the constitutional text. This third rationale employs territorial borders to define the members of the "community" who are entitled to avail themselves of the constitutional bargain.

The possibility that the compact view provides an unexpressed rationale in *The Chinese Exclusion Case* was furthered in a subsequent case. *Fong Yue Ting v. United States*[171] extended and expanded on what has come to be called the "plenary power doctrine" in immigration law, a much-criticized exception to the prevailing view of constitutional limits on federal authority. In that case, Congress passed a law providing for the deportation of Chinese nationals in the United States who could not establish their lawful presence.[172] Just as the Constitution is silent as to whether Congress has the power to pass laws excluding foreigners, the Constitution is also silent as to whether Congress possesses the power to order the deportation of noncitizens within our borders. The opinion of the majority of the Court upheld the power of

conclusion that it was the theory on which the institutions operated."). *But see* JOHN YOO, THE POWERS OF WAR AND PEACE 8–11 (2005) (arguing that the constitutional text reflects eighteenth century concepts of sovereign power, and, in doing so, justifying a theory of executive power that is derived from political philosophies external to the text).

168. *The Chinese Exclusion Case*, 130 U.S. at 605.

169. Indeed, the very congressional statute that barred the plaintiff from entering the United States in the *The Chinese Exclusion Case* was passed in contravention of guaranteed rights of reentry that had been acceded to by the executive branch in a treaty with China.

170. U.S. CONST. art. II, § 2, cl. 2 (granting the President the right to make treaties).

171. 149 U.S. 698 (1893).

172. *See id.* at 699 n.1.

Congress to pass deportation laws, relying on the first and second rationales expressed in Justice Field's opinion in *The Chinese Exclusion Case*.[173]

Justice Field wrote a vigorous dissent in the *Fong Yue Ting* case. In light of his prior opinion for the majority in *The Chinese Exclusion Case*, Justice Field's refusal to join the majority in extending that case's rationale to the deportation context seems anomalous. Justice Field is clear that he fully stands by his two earlier assertions that the power to regulate immigration is, in fact, a legitimate extraconstitutional sovereign power, and, in any event, that the Constitution impliedly delegates the power to regulate immigration to the federal government as a type of "foreign affairs."[174] Why, then, does he draw a distinction between the congressional power to exclude and the congressional power to deport?[175]

Justice Field's two opinions can be reconciled if he is, in fact, using the compact view as a filter through which to define the rights of aliens. If the members of the "political community" entitled to assert the protections of the Constitution are defined on a territorial basis, then those immigrants who are present within U.S. borders are a part of the community in a way that those aliens outside of our borders are not. The Constitution must leave it to the states to regulate the deportation of their residents, because the Constitution does not grant a deportation power to Congress. Deportation, therefore, implicates questions of membership in the state that are not implicated by exclusion.

The majority of the Court, however, chose to define the relevant community differently than did Justice Field. The majority considered noncitizens to be present within our borders at the pleasure of Congress, and it denied the existence of any constitutional command for Congress to treat noncitizens fairly if they are to be expelled.[176] For the majority, therefore, the presence of Fong Yue Ting within our borders was not presumptively sufficient to bring him within the constitutional compact. Significantly, however, the majority did not rely on a compact rationale in deciding the case. Instead, the rationale of the *Fong Yue Ting* majority builds on the holding of *The Chinese Exclusion Case* to hold that the immigration power is founded on the sovereign

173. *Id.* at 705–07.

174. *Id.* at 745–46 (Field, J., dissenting).

175. It is also possible that Justice Field was operating under the assumption that the Constitution does not delegate any power to the federal government that is not sanctioned by international law. Justice Field's brother was the author of a well-known international law treatise that argued, among other things, that there was no right under international law for one nation to expel the citizens of another nation without special cause. *See* KANSTROOM, *supra* note 143, at 97.

176. *Fong Yue Ting*, 149 U.S. at 731.

power of nations, with the result that it largely immunizes congressional statutes dealing with immigration matters from the standard judicial review that the Supreme Court otherwise applies to acts of Congress in order to ensure that statutes do not transgress the confines of the Constitution.[177] As a result, fundamental questions of membership are left unanswered by these two immigration cases.

b. *The Interior Remains Borderless.* During the late nineteenth and early twentieth century, the conflict between the delegation theory and the compact theory did not seem to play a major role in the Supreme Court's interpretation of constitutional rights outside of the immigration context. The Supreme Court advanced the view that all persons located within the United States, without regard to alienage or citizenship, had an equal claim to assert the individual rights guaranteed by the Constitution.[178] The equality of rights promoted by the Court during this period can be justified under either a delegation lens or a compact lens. Under a delegation view, the federal government lacks the power to infringe on the protected sphere of individual rights. With the exception of matters relating to admission or expulsion of aliens, which were considered to fall within the plenary power doctrine, the compact view regarded all persons within the territory of the United States—whether citizen, lawful permanent resident, or illegal entrant—to be members of the community entitled to constitutional protection. The congruence between the delegation view and the compact view during the nineteenth century was possible because the nation's territorial boundary was assumed to mark the dividing line between members of the political community and those "outsiders" who lacked the ability to complain if Congress overstepped its bounds.

The decision in *Yick Wo v. Hopkins*[179] demonstrates the Supreme Court's acceptance of the inclusive nature of the rights guaranteed to all individuals physically located within the national boundary. The Court's holding applied the command of equal protection under the law set forth in the Fourteenth Amendment to

177. This anomalous characteristic of immigration law has come to be known as the plenary power doctrine. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.").

178. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.").

179. 118 U.S. 356 (1886).

strike down a state law that discriminated against noncitizens.[180] Similarly, in *Yamataya v. Fisher*, the Court held that the constitutional guarantee of due process applied to noncitizens present within our nation's borders.[181] In the case of *Wong Wing v. United States*,[182] the Court took the clearest stand in support of this principle:

> [T]he Supreme Court in *Wong Wing* held that constitutional rights protected unlawfully present aliens even against the exercise of Congress' power to control immigration. For the first time in its history, the Court expressly invalidated a federal statute for violating the constitutional rights of an alien. And it did so despite the government's argument that unlawfully present aliens should not be recognized as possessing constitutional rights.[183]

Until World War II, therefore, the principle that all persons located within our nation's borders were entitled to equivalent rights appeared to be firmly established.[184] The Court's commitment to this principle would be called into question, however, as it moved to apply the compact view to limit the applicability of the Constitution within our nation's interior.

3. The Compact View Moves into the Interior

As America entered the Cold War era, the Supreme Court decided a series of immigration cases that invoked the plenary power doctrine and that drew on the compact theory to deny the reach of the Constitution *outside* our borders. These Cold War cases made clear that the underlying rationale beneath the plenary power doctrine was not judicial deference to Congress's exercise of an implied foreign affairs power, but instead the more aggressive assertion that the federal government possesses the unbounded power to take any action that it chooses against nonmembers of the compact. For example, in *United States ex rel. Knauff v. Shaughnessy*, the Court ruled that the German bride of an American soldier could be prevented from making her initial entry

180. *Id.* at 369.

181. Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903).

182. 163 U.S. 228 (1896).

183. Gerald L. Neuman, Wong Wing v. United States*: The Bill of Rights Protects Illegal Aliens*, *in* IMMIGRATION STORIES 31, 40 (David A. Martin & Peter H. Schuck eds., 2005).

184. Even *Korematsu v. United States*, 323 U.S. 214 (1944), which notoriously upheld the constitutionality of the internment of Japanese-American citizens during World War II, accepted the premise that all persons within the territory of the United States are entitled to the protections of the Constitution. *Id.* at 223–24. The *Korematsu* Court was simply not brave enough, during wartime, to follow this premise to its logical conclusion and rule the internment unconstitutional.

into the country without any explanation and with virtually no opportunity to be heard.[185] In *Shaughnessy v. United States ex rel. Mezei*, the Court held that the same unfettered government power could be applied to prevent the reentry of a lawful resident alien of long standing who was returning from a trip abroad.[186] These cases suggested that the federal government could take actions against persons outside of our borders who might well be considered to be members of the political community had they merely been present on U.S. soil.

It is not surprising, therefore, that the rationale adopted in these Cold War immigration cases would be extended to exclude persons located *within* our borders from the "community" entitled to assert constitutional protection.[187] This extension can be observed in cases that considered whether *unlawful* border crossers located within the United States were entitled to the same constitutional protections as citizens. The same process can be seen in cases in which the Supreme Court has questioned whether even *lawful* immigrants within our borders should enjoy constitutional rights identical to those that citizens enjoy.

a. *Unlawful Border Crossers.* In the second half of the twentieth century, the federal courts began to struggle with the question of whether illegal aliens subjected to state discrimination possessed constitutional rights. The plenary power doctrine as it had developed in immigration cases was inapposite to the exercise of state power, and therefore the plenary power of Congress provided no support for the challenged state laws. However, the Supreme Court was not willing to ignore the illegal status of alien residents when considering the extent to which the Constitution protected them. The result was a series of cases in which illegal aliens received some constitutional protection from discriminatory state laws, but for reasons that were unclear.[188] The Court's struggle

185. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

186. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

187. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 862–63 (1987) (criticizing the Supreme Court's immigration and deportation rulings for ignoring the fundamental protections accorded by the Constitution). Professor Henkin argued that the plenary power cases should be brought into the constitutional mainstream. *Id.* In fact, it is the mainstream that has been influenced by these outlier cases.

188. For example, the Supreme Court's opinion in *Plyler v. Doe*, 457 U.S. 202 (1982) prevents states from denying public education to minor illegal aliens within our borders, but does not posit a convincing rationale. *Id.* at 210. *Accord* Graham v. Richardson, 403 U.S. 365, 374–75 (1971) (holding that an alien "is a 'person' for equal protection purposes," and extending to resident aliens the same public assistance benefits enjoyed by citizens).

reflects an unsuccessful attempt to integrate the extraconstitutional dimension of the plenary power doctrine within the normal constitutional framework.[189]

It is difficult to reconcile the lack of constitutional rights outside of the border with the guarantee of full constitutional protection within the border. The reason for the Court's struggle to maintain this distinction is that an illegal entrant has no greater moral or political status by virtue of evading a border checkpoint than he had when he stood outside of our borders. Moreover, it seems incongruous to deny the existence of constitutional due process rights of lawful residents who seek to reenter the United States after a trip abroad, yet recognize that illegal entrants possess constitutional rights merely because they stand on U.S. soil. When attempting to resolve this dilemma, the Supreme Court adopted the position that crossing into the territory of the United States in contravention of law grants the entrant some, but not all, of the protections of the Constitution.[190]

Nothing in the constitutional text supports the idea that different populations within our borders are entitled to different levels of constitutional protection. However, practical necessity requires that the expansive federal power over immigration matters be maintained even while the justification provided for this power by the plenary power doctrine is increasingly exposed as bankrupt. Even though the props upholding absolute government power over the control of immigration have been exposed as unstable, they cannot be allowed to fall, and thus new theories were necessary in order to buttress the federal government's immigration power. An increasing reliance on the compact theory of the Constitution served this purpose, and allowed the broad power exercised by the government outside of our nation's borders to reach illegal entrants living within our territory.[191]

In compact theory, persons who entered our country unlawfully enjoy the same status as persons who are physically located outside of the United States: neither group is part of the "community" that is part of the bargain with the federal government. Because the plenary power doctrine is tied to extraconstitutional notions of sovereignty, it cannot grow to encompass legislation outside of the immigration context unless the Supreme Court were willing to adopt a very expansive view of the types of legal disputes that fall within the "immigration" field. On the other hand, the compact theory of the Constitution has room to grow outside of the immigration context. All that is necessary is to shift away from the territorial boundary as the exclusive determinant of who belongs to the

189. *See* Linda S. Bosniak, *Membership, Equality and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1137–41 (1994).

190. *See supra* note 188 and accompanying text.

191. *See supra* note 187 and accompanying text.

political community and instead to become more selective regarding the groups within our borders who qualify for membership.

United States v. Verdugo-Urquidez,[192] decided in 1990, made explicit the expansion of the compact view into the interior of our country. The case involved a Mexican national who was transferred to U.S. custody by the Mexican government.[193] While he was in custody in California, agents from the Drug Enforcement Agency searched his home in Mexico without a warrant.[194] Mr. Verdugo-Urquidez sought to have the results of the extraterritorial search suppressed on the grounds that his Fourth Amendment rights had been violated.[195]

Chief Justice Rehnquist wrote the opinion for the Court, although his reasoning was only fully adopted by three other Justices. He concluded that the Fourth Amendment did not protect the defendant and that the search was lawful.[196] He based this conclusion on the assertion that the words "the people" in the Fourth Amendment referred to a specific community of persons who possess cognizable ties to the United States.[197] Chief Justice Rehnquist reasoned that aliens within our borders do not acquire full constitutional protection until they develop sufficiently demonstrable ties with the political community.[198] Although his reasoning was intended to limit the reach of the Constitution to aliens outside of the United States[199] who object to government conduct occurring outside of our borders, Rehnquist's rationale applies equally to limit constitutional rights for illegal entrants inside the United States. Therefore, the *Verdugo-Urquidez* decision raised the prospect that residents who are present in the United States in violation of the law can be excluded from "the people" who can claim the protections of the Constitution.[200]

The legislative and executive branches of the federal

192. 494 U.S. 259 (1990).
193. *Id.* at 262.
194. *Id.*
195. *Id.* at 263.
196. *Id.* at 274–75.
197. *Id.* at 265. The First, Second, Ninth, and Tenth Amendments also reference "the people."
198. *Id.* at 271.
199. Mr. Verdugo-Urquidez's presence in the United States was involuntary, and did not confer any greater rights on him than he would have possessed had he remained in Mexico.
200. *See, e.g.*, United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1265–66 (D. Kan. 2008) (holding that an aggravated felon deported from the United States has no Fourth Amendment rights upon illegal reentry); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271 (D. Utah 2003) (holding that the Fourth Amendment does not apply to those illegally present in the United States), *aff'd*, 386 F.3d 953 (10th Cir. 2004). *But see* United States v. Atienzo, No. 2:04-CR-00534 PGC, 2005 U.S. Dist. Lexis 31652, at *14–15 (D. Utah Dec. 6, 2005) (reading *Esparza-Mendoza* narrowly to apply only to alien *felons* who are illegally present in the United States).

government seem to have accepted the implications of the *Verdugo-Urquidez* case. In 1996, Congress amended the immigration laws to create expedited removal procedures at border crossings for aliens who lack proper documentation, procedures that operate to remove aliens under streamlined proceedings and without the benefit of a hearing.[201] The 1996 legislation also granted the Attorney General the authority to expand the use of expedited procedures.[202] In 2004, the Department of Homeland Security announced that it was doing just that. The new policy permits the deportation of non-Mexican aliens apprehended inside the United States, without a hearing, so long as their apprehension occurred within one hundred miles of the U.S. border and less than fourteen days after the alien's illegal entry into the country.[203] In this manner, a lesser form of due process rights has migrated from the border to the interior. It is no longer the location of the alien, but the illegal manner of his or her entry, that allows the federal government to act against the alien free from the full measure of restraints that the Constitution otherwise places on the exercise of government authority.

b. *Lawful Border Crossers.* Even those who enter our borders *lawfully* can lose their membership status and therefore lose the protection of the Constitution. Congress has adopted procedures such as mandatory detention prior to a hearing, expedited hearings, and limited judicial review—originally limited in application to illegal entrants—that are now regularly applied to lawful border crossers who commit a criminal violation after they enter the United States.[204] In particular, Congress's creation of the "aggravated felon" provisions of the immigration laws fostered the application of extraterritorial norms to lawful border crossers.[205] These provisions operate to substantially reduce the procedural rights possessed by those who are deemed to fall within the perpetually expanding definition of an "aggravated felon." In rejecting constitutional challenges to these provisions, the Supreme Court has equated those who enter lawfully but subsequently commit a violation of the civil or criminal law with those who have entered our country illegally.[206]

The Court initially expressed some discomfort at this prospect

201. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 422, 110 Stat. 1214, 1270–72 (1996).

202. *Id.* § 504, 110 Stat. at 1260–61.

203. *See Fact Sheet: Arizona Border Control Initiative*, U.S. DEP'T OF HOMELAND SEC. (Sept. 21, 2004), http://www.dhs.gov/xnews/releases/press_release_0520.shtm.

204. KANSTROOM, *supra* note 143, at 10–12.

205. *See id.* at 227–28 (discussing the expanding definition of the "aggravated felon" category between 1988 and 1994).

206. *Id.* at 227–28 ("[T]here has been a recent expansion—deep onto U.S. soil—of internal deportation mechanisms that were originally envisioned as appropriate only at the border and points of entry.").

when it decided the case of *Zadvydas v. Davis*[207] in 2001. Kestutis Zadvydas immigrated to the United States from a displaced persons camp at the age of eight.[208] As a resident alien, he built a long criminal record ending with a cocaine distribution conviction that rendered him deportable after he finished serving his criminal sentence.[209] However, given the circumstances of his birth, Mr. Zadvydas did not possess citizenship in any other country, and the United States was unable to identify a country willing to accept him. Although the Immigration and Nationality Act ("INA") provides that a removal order must be effectuated within ninety days, the INA also provides that the Attorney General can determine that certain aliens "may be detained beyond the removal period."[210] The government asserted that this provision allowed it to detain Mr. Zadvydas indefinitely while it continued in its fruitless efforts to identify a country willing to accept him.[211] Mr. Zadvydas filed a writ of habeas corpus challenging his detention on the grounds that the Fifth Amendment did not permit the government to detain him for an indefinite period.[212]

Justice Breyer's majority opinion held that it would raise constitutional concerns under the Fifth Amendment to interpret INA section 241(a)(6) as granting the Attorney General the power to indefinitely detain individuals who were not deemed to be either a danger to the community or a flight risk.[213] The doctrine of substantive due process requires that government action to deprive an individual of liberty must have a purpose, and, in the absence of any country willing to accept Mr. Zadvydas, the government could not identify any purpose served by continued detention. Justice Breyer strongly rejected the government's argument that the Fifth Amendment's constraints did not apply to government action directed against aliens residing within our borders, distinguishing precedent that denies constitutional protections to aliens as solely applicable to the situation of aliens who have not entered the territorial borders of the United States.[214] Given the "constitutional problem" that would arise if the statute were interpreted to permit indefinite detention, Justice Breyer held that the language of INA § 241(a)(6) should be read to authorize detention beyond ninety days only so long as the removal of the alien is "reasonably foreseeable."[215]

207. 533 U.S. 678 (2001).
208. *Id.* at 684.
209. *Id.*
210. *Id.* at 706 (Kennedy, J., dissenting) (quoting 8 U.S.C. § 1231(a)(6) (Supp. V 1994)).
211. *Id.* at 689 (majority opinion).
212. *Id.* at 686.
213. *Id.* at 690.
214. *Id.* at 690–96.
215. *Id.* at 701.

Justice Scalia dissented. He viewed Mr. Zadvydas's situation through the lens of the compact view. Under this view, once an alien is convicted of a crime and becomes deportable as a consequence, that alien is no longer part of the community of "the people."[216] Instead, such an alien stands in the exact same relation to the United States as does an alien outside of our borders. The result is that Mr. Zadvydas, even though he stood on U.S. soil, was simply beyond the reach of the United States Constitution. Therefore, under Justice Scalia's reasoning, Congress was perfectly free to grant the Attorney General the power to order Mr. Zadvydas to be detained for years, decades, or until he dies.[217]

When the Supreme Court next considered the due process rights of noncitizens, in the case of *Demore v. Kim*,[218] the Court limited the holding of *Zadvydas* to the point of nonexistence. Mr. Kim immigrated to the United States from Korea at the age of six and became a permanent resident alien. As an adult, he was convicted of burglary and petty theft.[219] These convictions fell within the definition of "aggravated felonies," and in INA section 236, Congress provided that all aliens convicted of aggravated felonies must be taken into custody and detained during the pendency of their removal hearings.[220] Mr. Kim challenged his detention under the doctrine of substantive due process. He argued

216. *Id.* at 702–03 (Scalia, J., dissenting).

217. While written in broad language that clearly invoked constitutional concerns as a backdrop for the Court's interpretation of INA § 241(a)(6), the majority in *Zadvydas* was careful to cast its opinion as a matter of statutory interpretation. The Court would later be asked to construe the applicability of INA § 241(a)(6) in the context of aliens being detained as inadmissible at the border. In *Clark v. Martinez*, 543 U.S. 371 (2005), Justice Scalia wrote a majority opinion in which he delighted in interpreting the statutory language to require that new arrivals with no connection to the United States be given the same relief from indefinite detention as aliens detained in removal proceedings who have longstanding ties to this country. *Id.* at 378. Justice Scalia argued that consistency in construing the statutory language requires a parallel interpretation. In his view, the "absurd" result of forcing the government to set loose illegal entrants pending their removal hearing if they cannot be removed within ninety days merely underscores the mistake the majority made in *Zadvydas* when it interpreted the statute to grant noncitizens rights that approach those accorded to "the people" by the Constitution. *Id.* at 378–79. Noncitizens *outside* of the border can often make claims of membership that are equally as compelling as the claims of noncitizens *within* the border. In Scalia's view, the fact that aliens outside of our borders cannot be considered members of the community governed by the Constitution dictates that aliens within our borders must also be outside of the national compact (at least once they commit a criminal offense that renders them deportable). If the *Zadvydas* majority has foolishly construed the statute to treat deportable aliens as members of the compact, then it has no choice but to accept the consequence that the statutory language accords equal treatment to aliens detained at the border. *Id.*

218. 538 U.S. 510 (2003).

219. *Id.* at 513.

220. *See id.* at 513–14.

that the federal government had to have reason to detain him while he awaited his deportation hearing.[221] If he could show that he was not a flight risk, nor a danger to the community, then the Fifth Amendment required that he be released on bond until his hearing date.

In an opinion by Justice Rehnquist, the Supreme Court disagreed. Significantly, Justice Rehnquist's opinion treated Mr. Kim as having "conceded" his deportability.[222] Therefore, the only true issue was the discretion of the government in adopting procedures to effectuate his eventual removal. In the view of the majority, mandating the detention of whole categories of persons during this process did not implicate constitutional concerns because these persons had already ceased to be part of the national compact.[223] The Fifth Amendment simply placed no constraints on the procedures that Congress chose to employ. Justice Rehnquist's majority opinion adopts the same compact view of the Constitution as did Justice Scalia's dissent in *Zadvydas*.

The dissenters in *Kim* did not agree that Mr. Kim had conceded his deportability, and therefore they did not view him as having forfeited the protection of the Constitution. Even conceding that Mr. Kim had no defense to his ultimate removal from the country, the discussion of the Fifth Amendment in the *Zadvydas* case led the dissenters to argue that all governmental restrictions on the individual liberty of noncitizens must have a purpose.[224] However, the argument that the Constitution governs all government action within our borders, without regard to the identity of the individual subjected to that action, was unavailing. The majority opinion avoided the implications of *Zadvydas* by limiting that case to the situation of an alien who is detained after the entry of a removal order and whose removal is no longer practically attainable. Very few cases will arise within this limited factual context.

The Supreme Court's treatment of the alien in *Kim* serves to strengthen the application of the "compact" view within our borders. The Court's decision suggests that a noncitizen who entered the country lawfully, but then commits a crime not only suffers the legal consequence of deportation but also loses any claim to be a member of the nation's political community. The alien's criminal conviction (in conjunction with the fact that Congress has declared that those convicted of "aggravated felonies" are automatically deportable) is sufficient to justify treating the alien as an "outsider" with no greater constitutional rights than those afforded to a foreigner abroad.[225] Mr. Kim's criminal conviction acted to expel him from the

221. *Id.* at 522–23.
222. *Id.* at 531.
223. *Id.* at 522.
224. *Id.* at 541 (Souter, J., dissenting).
225. While the opinions in both *Zadvydas* and *Kim* frame their holdings as

community of "the people." He therefore lost the right to demand that the federal government act in compliance with the limits imposed on it by the substantive due process clause of the Fifth Amendment.[226]

Congress can presumably identify whole categories of individuals and declare that they are no longer in privity with the federal government. For example, the *Kim* case implies that engaging in conduct defined as constituting an "aggravated felony" terminates an alien's membership in the constitutional compact. Once excluded from the compact, an individual loses the ability to use the Constitution to protect himself from government action. Of course, if Congress can create *one* legal category that terminates membership in the constitutional compact, then Congress can create two, three, or a dozen *other* legal categories that can be applied with similar effect. The majority in the *Kim* case was apparently untroubled by the prospect that Congress might abuse this power.

D. Contemporary Executive Branch Expression of the Compact View: The Unitary Executive

Questions of national security, like efforts to control the flow of immigrants, provide a fertile ground for compact-based theories of constitutional interpretation. It is unsurprising, therefore, that the compact theory underlies the "theory of the unitary executive," the primary legal justification put forth by the Bush administration to support its expansive exercise of executive branch power in response to the threat of terrorism. A brief summary of Bush administration policies is necessary in order to illustrate this connection.

The first legislative response to the attacks of September 11, 2001 was the Authorization for Use of Military Force ("AUMF").[227] Under the terms of the AUMF, Congress authorized the President "to use all necessary and appropriate force" against those responsible for the September 11 attacks and anyone harboring those individuals.[228] President Bush invoked the AUMF when he issued a military order providing for the detention and treatment of individuals taken into custody as a result of the United States' response to the terrorist attack, and providing for the use of military commissions to hold trials and determine punishments.[229] Although

interpretations of congressional statutes, the Court has a history of using statutory analysis as a surrogate for constitutional interpretation in immigration cases. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560–64 (1990).

226. *See* DAVID COLE, ENEMY ALIENS 224 (2003) (noting the difference in the due process rights accorded to foreign nationals within our borders).

227. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

228. *Id.* § 2(a), 115 Stat. at 224.

229. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of

the original order did not use the phrase, the Bush administration adopted the term "unlawful enemy combatant" to refer to those individuals taken into custody by the United States government as part of the "War on Terror."[230]

Although the concept of "preventative detention" is alien to our Constitution, the legal rationale used to justify the creation of the military commissions was that an unlawful enemy combatant had no rights under the United States Constitution.[231] These individuals could be held and interrogated for however long the government considered them to either possess useful intelligence or pose a future threat to the United States. In addition, persons designated as unlawful enemy combatants would not receive the procedural safeguards applicable to trials conducted in federal court, nor would such persons be entitled to claim the international law protections afforded to prisoners of war. The creation of the category of "unlawful enemy combatant" removed a whole category of individuals from the legal protections that would normally allow a person to challenge the circumstances of his detention.[232]

Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

230. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2601.

231. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court ruled that U.S. citizen-detainees have a constitutional due process right to challenge their designation as an "unlawful enemy combatant." *Id.* at 533. In response to this decision, the Department of Defense established bodies called Combatant Status Review Tribunals ("CSRT") that were intended to hear challenges to enemy combatant designations by *all* detainees, whether citizens or not. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that noncitizen detainees have the right of habeas corpus to challenge their detention in federal court, notwithstanding the provisions of the Military Commissions Act limiting the jurisdiction of the federal courts, and that the CSRT procedures were not an adequate substitute for habeas corpus proceedings. *Id.* at 2262–63. By focusing on the content of the right of habeas corpus under the Constitution, the Court avoided consideration of whether noncitizen detainees possessed the constitutional right of due process. *See id.* at 2279 (Roberts, C.J., dissenting). Therefore, the extent to which the Constitution grants noncitizen detainees any rights beyond habeas corpus remains undecided to this day.

232. In this regard, the usage of the category of "unlawful enemy combatant" mirrored the way in which the similarly elastic category of "aggravated felon" came to be employed under the immigration laws. *See supra* notes 205–06 and accompanying text. Unlike with "aggravated felons," however, the category of "unlawful enemy combatant" has the potential to include citizens as well as noncitizens. *See* YOO, *supra* note 85, at 131. The Bush administration originally sought to subject U.S. citizens Yasser Hamdi and Jose Padilla to the military tribunal process, before retreating in the face of adverse judicial rulings. *See* COLE, *supra* note 226, at 3–4, 43–45. While employed by the Office of Legal Counsel, John Yoo made the argument that American citizens working for the enemy could be treated under the Constitution as unlawful enemy combatants, but his superiors in the Bush administration made the policy decision to use either the criminal courts or the military courts martial in order

The Bush administration saw its system for detaining unlawful enemy combatants as essential to the exercise of an unfettered choice of interrogation methods. In the name of obtaining intelligence in order to prevent future attacks on U.S. soil, the Bush administration authorized a wide range of coercive interrogation tactics: sleep deprivation; stress positions; extended exposure to extreme heat and cold; threatened attacks by dogs; injections of intravenous fluid while barring detainees from using the bathroom so that they urinate on themselves; and, most notoriously, waterboarding—a practice in which the suspect is tied to a bench, immersed in water, and made to feel that he is drowning.[233] Many observers have since argued that these interrogation methods violated the United States' treaty obligations under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment ("CAT").[234] This Convention, ratified by Congress in 1990, prohibits the use of torture under all circumstances.[235]

to conduct trials of U.S. citizens, rather than the military commissions that were conducting trials of Guantanamo detainees designated as unlawful enemy combatants. *See* YOO, *supra* note 85, at 143–44; *see also* al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008), *vacated sub nom.* al-Marri v. Spagone, 129 U.S. 1545 (2009). It is troubling to consider that the existence or nonexistence of the constitutional procedural rights of citizens might be determined by the policy decisions of future Presidents. It is doubtful that the Constitution was intended to place so much power over the rights of citizens in the hands of the executive. *Cf.* KANSTROOM, *supra* note 143, at 18 ("Citizens . . . may be transformed into foreigners in order to be ostracized and banished.").

233. Under the same preventative rationale, the Bush administration also "disappeared" certain "high-value" suspects into "black sites" operated by the Central Intelligence Agency ("CIA")—"a series of prisons in undisclosed locations where the government's conduct [could not] be monitored and [where] the suspect [was] completely cut off from the outside world." DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 3 (2007). In other instances, when these secret detention centers and coercive methods were not deemed sufficient, the Bush administration "rendered" suspects to be interrogated by agents of foreign governments that possessed even fewer scruples about their methods. *Id.*

234. *See, e.g.*, *id.* at 34–36. For a defense of the legality of these interrogation methods, see YOO, *supra* note 85, at 165–203. For criticism of Yoo's reasoning, see COLE & LOBEL, *supra* note 233, at 56–57. For an argument that customary international law is not binding on the President, see YOO, *supra* note 167, at 171–72.

235. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment arts. 1–7, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. The universality of the CAT prohibition on torture would seem to be beyond doubt. *See* COLE & LOBEL, *supra* note 233, at 55. However, the Bush administration advanced its own interpretation of the CAT that gave it a less than universal scope. During the confirmation hearings for Alberto Gonzales, following his nomination as Attorney General, the question of the applicability of the CAT to the Bush administration's interrogation practices arose. During those hearings, Gonzales expressed the view that the CAT did not apply to the situation of foreign nationals outside of United States. *Id.* at 35; *see also* Opposition Statement, Human Rights First, Human Rights First

In addition to its detention policies, the Bush administration also responded to the September 11 attacks by embarking on an effort to gather intelligence about al-Qaeda activities using methods that contravened either the limits of congressional legislation or the Constitution.[236] For example, while Congress responded to the

Opposes Alberto Gonzales To Be Attorney General 4 (Jan. 24, 2005), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/hrf-opp-gonz-full-012405.pdf.

In putting forth this interpretation, Gonzales relied on the statutory construction of the congressional legislation ratifying the CAT. During the congressional debate over ratification, some members of Congress worried that its prohibition on "cruel, inhuman and degrading treatment" might be construed to limit sentencing and penal conditions within the United States, even when those practices had been upheld by the federal courts as permissible under the Eighth Amendments. Therefore, Congress added a reservation to the ratification of the CAT, specifying that Congress understood the ban on "cruel, inhuman and degrading treatment" under CAT to be coextensive with treatment that "shocks the conscience" and that violates the Fifth and Eighth Amendments. COLE & LOBEL, *supra* note 233, at 34–35. During his confirmation, Gonzales argued that Congress's reservation should be read as an indication that the CAT did not create any enforceable rights for persons held abroad that go beyond the scope of any Fifth and Eighth Amendment rights possessed by foreign detainees. *Id.* at 35. Since the U.S. Constitution is not generally interpreted to have extraterritorial effect, Gonzales explained, persons held abroad have no rights under the Fifth and Eighth Amendment. Therefore, Gonzales concluded, the prohibitions on inhumane torture contained in the CAT simply do not apply to the U.S. government's treatment of foreigners held abroad. *Id.* Clearly, Gonzales' post hoc interpretation of the ratification proceedings does not reflect the intention of the Senate. However, some observers have defended the power of the executive branch to adopt and apply its own interpretation of treaty obligations, even when that interpretation appears contrary to the intent of the Senate. *See* YOO, *supra* note 167, at 192–93.

After Gonzales was confirmed as Attorney General, Congress passed the McCain Amendment in order to clarify the effect on domestic law of its 1990 CAT reservation. The McCain Amendment stated that the agents of the U.S. government are prohibited from using cruel, inhumane, and degrading conduct outside of the United States, and without regard to the nationality of the person subjected to the treatment. In response, President Bush appended a "signing statement" to the bill before signing it into law. COLE & LOBEL, *supra* note 233, at 35–36. In the signing statement, President Bush asserted the power to ignore the McCain Amendment if he decided it was in the interest of the United States to do so. In effect, the Bush administration abandoned any argument that the scope of its authority to engage in "enhanced interrogation techniques" was premised on an interpretation of congressional legislation passed as part of the ratification of the CAT. Instead, the sole justification relied on by the Bush administration for the power to ignore the terms of the CAT is that the President has authority under the Constitution to exercise all of the powers possessed by "the unitary executive branch," including the power to employ any interrogation technique that it chooses. *Id.*

236. *See generally* Bruce Fein, *A Defining Constitutional Moment*, WASH. LAW., May 2006, at 35 (discussing the legality of the Bush administration's expanded surveillance efforts).

September 11 attacks by passing the "USA Patriot Act,"[237] which broadened the government's ability to wiretap and search individuals without any showing of probable cause that such individuals had broken any laws,[238] the Bush administration acted independently of Congress to implement surveillance beyond the scope authorized by the USA Patriot Act. President Bush authorized a secret program to engage in wiretapping outside of the warrant procedures set forth in the Foreign Intelligence Surveillance Act ("FISA"), allowing the National Security Agency ("NSA") to spy on Americans without first obtaining a court order.[239] The Bush administration also embarked on a large-scale data mining effort under the auspices of the NSA that intercepted and analyzed phone records and email communications into and out of the United States.[240]

While seemingly separate undertakings, both the detention and surveillance policies were interrelated components of one overall strategy: the decision to expand government surveillance efforts was directly tied to the decision to question enemy combatants free from the usual checks and balances placed on government detention.[241] The September 11 attacks had exposed how little the U.S. government knew about al-Qaeda and its intentions. Government officials identified an urgent need to obtain actionable intelligence about al-Qaeda through the interrogation of detainees, and to follow up on leads obtained through interrogation by intercepting private communications and data on financial transactions.[242] Therefore, the overriding purposes behind the detention policy were forward-

237. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; *see also* COLE, *supra* note 226, at 66–68; YOO, *supra* note 85, at 71–73.

238. *See* COLE & LOBEL, *supra* note 233, at 31; YOO, *supra* note 85, at 74–75.

239. COLE & LOBEL, *supra* note 233, at 32. While the warrantless NSA surveillance program authorized by President Bush started with the premise that only extraterritorial conversations would be monitored, it eventually led to the monitoring of some conversations within the United States. *See* ATHAN THEOHARIS, THE QUEST FOR ABSOLUTE SECURITY 243 (2007). In January 2007, the Bush administration announced that it would henceforth only conduct wiretapping operations within the scope of congressional authorization. COLE & LOBEL, *supra* note 233, at 43. In a similar example of executive branch disregard for FISA procedures, Federal Bureau of Investigation agents improperly obtained National Security Letters on a regular basis in order to obtain bank, credit card, and Internet information for individuals, many of them United States citizens, without a court order. *See* SUSKIND, *supra* note 18, at 39; THEOHARIS, *supra*, at 255–56.

240. *See* YOO, *supra* note 85, at 107–08.

241. *See* COLE & LOBEL, *supra* note 233, at 51. As stated by John Yoo, "Military detention is . . . one of our most important sources of intelligence, which in turn is our most important tool in this war." YOO, *supra* note 85, at 151; *accord id.* at 147 (discussing the benefits of military detention).

242. YOO, *supra* note 85, at 106.

looking; imposing punishment for past actions that the prisoner may or may not have taken against the United States was reduced to a secondary concern.

While the wisdom and effectiveness of the above tactics continue to be debated, what is undisputable is that any action taken by the President without specific congressional authorization must have some constitutional basis.[243] It is not enough to argue that increased surveillance of private individuals and enhanced interrogation of prisoners provided useful intelligence. The challenge facing the Bush administration was to locate a constitutional source of authority for executive branch actions that (paradoxically) infringed on constitutionally protected individual rights. The answer to this dilemma was provided by a constitutional interpretation called the "theory of the unitary executive."

The theory of the unitary executive posits that when the President exercises a power delegated to him in Article II of the Constitution, he exercises that power *without any limitations placed on him by the Congress or the Judiciary*.[244] As explained by John Yoo in memos written for the Justice Department's Office of Legal Counsel, and later in subsequent writings, the theory of the unitary executive holds that Congress lacks the power to "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."[245] According to Yoo, the Constitution preserves these decisions for the President alone, to be made without congressional interference.[246]

At its most extreme, the theory of the unitary executive leads to the assertion that the executive branch possesses all of the military power that was possessed by the King of England at the time of the American Revolution, minus whatever military power the

243. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

244. *See* Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341, 344 (2008). *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008). While early proponents of the theory limited its definition of executive branch authority to the context of the President's exclusive power to supervise and control executive branch agencies free from congressional interference, later proponents expanded the theory to the realm of foreign affairs. *See generally* GARRY WILLS, BOMB POWER 209–36 (2010).

245. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 98 (2007) (quoting Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them 24 (Sept. 25, 2001)).

246. *See id.*; *see also* YOO, *supra* note 167, at 17–24.

Constitution expressly grants to Congress.[247] The scope of executive power is therefore defined only by the scope of the President's responsibilities.[248] The logical consequence of the theory of the unitary executive is that the President would have the power to take any action that is necessary to defend the national security of the United States. The evidence that the Framers intended the power of the executive branch to extend so far is slight, and there is much evidence to the contrary.[249]

The influence of the compact theory is reflected in two separate premises that underlie the theory of the unitary executive. First, the theory promotes the understanding of the Constitution as a contract whereby "the people" agree to surrender certain natural rights to the government in exchange for their security.[250] In other words, natural rights are not inalienable but rather can be bargained away by one generation for itself and for its descendants.

For example, John Yoo argues that the Fourth Amendment to

247. GOLDSMITH, *supra* note 245, at 97; *see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316 (1936) ("As a result of the separation from Great Britain . . . the powers of external sovereignty passed from the Crown . . . to the colonies in their collective and corporate capacity as the United States of America."). *See generally* YOO, *supra* note 167, at 39–45 (locating the source of the broad executive branch power over foreign affairs in the eighteenth century conception of the authority of the Crown).

248. *See* GOLDSMITH, *supra* note 245, at 79.

249. *See* THE FEDERALIST NO. 69, *supra* note 86, at 414, 416 (Alexander Hamilton) (noting that the power of the Commander-in-Chief consists of "nothing more than the supreme command and direction of the military and naval forces . . . ; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature"); Reinstein, *supra* note 47, at 299–304 (comparing and contrasting the powers conferred to the President by the Framers to those held by the British monarch); *accord* WILLS, supra note 244, at 209–36 (criticizing both the theory of the unitary executive and its application in legal memos written by John Yoo).

250. For example, different arguments have been advanced that the executive branch has a license to take whatever actions are necessary to secure national security, without regard to the powers delegated to it by the Constitution. Some argue that the presidential "prerogative" to act broadly in response to a crisis is part of the original constitutional design. *See, e.g.*, JOHN YOO, CRISIS AND COMMAND xii–xiv (2009). Others put forth Machiavellian theories of leadership that applaud Presidents who act to further the long-term health and safety of the populace even when they transgress constitutional bounds. *See, e.g.*, CARNES LORD, THE MODERN PRINCE 69–85 (2003). The Supreme Court has considered and rejected the idea that the Constitution grants the executive branch a reservoir of emergency powers. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649–50 (1952) (Jackson, J., concurring) ("The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.").

the Constitution simply does not apply to military searches intended to uncover al-Qaeda activities within the United States.[251] An examination of the language of the Fourth Amendment reveals that it does not contain any exception that limits its application during wartime. Only one constitutional provision, the Suspension Clause, provides for the limitation of rights during conflict.[252] A plain reading of the text would therefore suggest that the Fourth Amendment protects against unreasonable warrantless searches whenever they occur within the United States. However, Yoo argues that the protection of the right to be secure in one's home does not extend to "actions taken to defend the country from foreign threats."[253]

Under Yoo's reading, the Fourth Amendment does not express a natural right that the federal government is precluded from invading. Instead, the constitutional text is nothing more than a bargain. In his interpretation, the people have agreed to surrender rights otherwise guaranteed to them if the federal government deems that surrender to be necessary for the protection of the nation from outsiders.[254] Of course, whether the nature of the threat merits this surrender, and whether the surrender is necessary in order to respond to the threat, are determinations that Yoo leaves in the hands of only one party to the bargain—the executive. This is a Frankenstein view of the executive branch, one that treats it as a creature with a life beyond the control of its creator.

The second way in which the compact view can be seen to influence the theory of the unitary executive is that "the people" who benefit from the constitutional bargain are defined in such a way as to exclude any person who may pose a threat to the security of the nation. John Yoo makes this connection explicit in his arguments used to support an inherent presidential power to order torture and the invasion of privacy. In his view, war is waged against foreign enemies who are not a part of the "American political community."[255] Therefore, the tactics employed by the executive branch during wartime are not limited in any way by the Constitution's framework of individual rights and separation of powers.[256] That framework,

251. YOO, *supra* note 85, at 82.

252. U.S. CONST. art. 1, § 9, cl. 2.

253. YOO, *supra* note 85, at 82.

254. Yoo explicitly places military action outside of the warrant requirement of the Fourth Amendment, calling the authority to engage in military searches a "distinct legal regime[]" from the criminal justice system. *Id.* His lone support for severing military action from constitutional constraints is a citation to *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). Under this view, this citation makes clear the connection between the compact theory as employed in immigration cases and its use as a legal justification for the tactics employed in the War on Terror.

255. YOO, *supra* note 85, at 16.

256. *See id.* at 162 ("[E]nemy aliens are not part of the American political community and do not have the same constitutional rights as its actual

according to Yoo, only applies to the relationship between the people and their government during peacetime.[257] Yoo concludes that the "clear, strict rules" that delineate the limits of the power of the federal government under our constitutional system should not be applied to place any constraint on the form of power that the federal government asserts against its enemies.[258]

The theory of the unitary executive as described by John Yoo operates under the assumption that unlawful enemy combatant status renders the individual an "outsider" to the U.S. political community and therefore that an unlawful enemy combatant is precluded from asserting either the individual rights granted by the Constitution or the structural limits that the Constitution places on federal government authority.[259] Under this theory, the executive branch alone possesses the authority to decide which individuals receive enemy combatant status.[260] Yoo's explanation of the theory

members.").

257. *Id.* at 16.

258. *Id.* Yoo gives no citations in support of this interpretation. The Fourth Circuit explicitly rejected this argument in *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009):

> The Government summarily argues that even if the AUMF does not authorize al-Marri's seizure and indefinite detention as an enemy combatant, the President has "inherent constitutional authority" to order the military to seize and detain al-Marri. According to the Government, the President's "war-making powers" afford him "inherent" authority to subject persons legally residing in this country and protected by our Constitution to military arrest and detention, without the benefit of any criminal process, if the President believes these individuals have "engaged in conduct in preparation for acts of international terrorism." . . . Given that the Government has now acknowledged that aliens lawfully residing in the United States have the same due process rights as United States citizens, this is a breathtaking claim—and one that no member of the court embraces.

al-Marri, 534 F.3d at 247.

259. Congress seemingly acquiesced in this broad assertion of executive power. The legislation sought and obtained by the Bush administration as part of its response to the September 11 attacks, such as the Patriot Act and the Military Commissions Act, consistently sought to insulate the exercise of these broad powers from legal challenges in three ways: by foreclosing direct review of executive branch action in federal court; by limiting the utility of the writ of habeas corpus to challenge government detention; and by curtailing the procedural due process rights of suspected terrorists.

260. An accompanying benefit of outsider status (from the perspective of those advancing this theory) is that unlawful enemy combatants do not enjoy prisoner-of-war status under international law and therefore cannot appeal to any alternative legal regime of human rights that might afford protection to enemy combatants. *See* GOLDSMITH, *supra* note 245, at 110. Jack Goldsmith, former assistant attorney general at the Office of Legal Counsel during the time period immediately following the formulation of the Bush administration's policy on military tribunals and interrogation techniques, defends this result. He writes: "The bottom line was that none of the detainees in the war on terrorism would receive POW status or any other legal protection under the laws of war. This was a congenial conclusion to the administration, which

implies that the executive branch also possesses the power to police the domestic membership of the American political community, and could therefore adopt procedures for expelling disloyal citizens from the compact.[261]

CONCLUSION: THE DELEGATION VIEW RE-ASCENDANT

Ever since 1789, the original understanding of the Constitution as a charter of delegated powers to the federal government has been in conflict with a competing interpretation of the Constitution: the view that the text should be read as a compact between the states and between the federal government and a discrete population of individual members. Even as academics have largely ignored the implications of reading the Constitution in contractarian terms, each of the three branches of the federal government has taken actions that reflect the assumption that the Constitution should be read as a compact. A careful examination of the choice between a delegation view and a compact view of the Constitution is necessary, however, because the choice illuminates the constraints placed on the exercise of federal power.

The government's bailouts of financial firms and automobile manufacturers have led some observers to charge that the federal government has overstepped its proper bounds and unconstitutionally intruded into the private market.[262] Similarly, opponents of health-reform legislation have objected to the constitutionality of both the federal government's exercise of regulatory control over the market for health insurance and imposition of an individual mandate to purchase private health insurance.[263] Unease over government actions in the War on Terror that impinge on personal privacy or diminish civil liberties has combined with opposition over these government interventions in the free market to inspire the growth of the Tea Party Movement as a political phenomenon.[264]

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wanted to maintain flexibility in the face of a new type of enemy, with unknown capacities; to interrogate detainees in a way that POW status would have precluded; and to avoid future scrutiny under the War Crimes Act, which basically applies only if the Geneva Conventions do." *Id.*

261. *See* COLE, *supra* note 226, at 69–71 (discussing citizenship-stripping provisions of the draft Domestic Security Enhancement Act); *see also* al-Marri v. Wright, 487 F.3d 160, 186–87 (4th Cir. 2007) ("Neither *Quirin* nor any other precedent even suggests, as the Government seems to believe, that individuals with constitutional rights, unaffiliated with the military arm of any enemy government, can be subjected to military jurisdiction and deprived of those rights solely on the basis of their conduct on behalf of an enemy organization.").

262. *See* Andrew Napolitano, Editorial, *Unconstitutional Bailout*, N.Y. SUN, July 17, 2008, http://www.nysun.com/opinion/unconstitutional-bailout/82095.

263. *See* Randy Barnett et al., *Why the Personal Mandate To Buy Health Insurance Is Unprecedented and Unconstitutional*, EXECUTIVE SUMMARY LEGAL MEMORANDUM (Heritage Found., D.C.), Dec. 9, 2009, at 1.

264. *See* Gerald F. Seib, *Tea Party Holds Risks for GOP*, WALL ST. J., Mar. 2,

Criticism of these exercises of federal government authority reflects the persistent force of the original understanding of the Constitution as a charter. An examination of the characteristics of the delegation view reveals why it may hold an appeal for the loose confederation of libertarians, free-market advocates, and states' rights proponents that comprise the Tea Party Movement. The pendulum of popular opinion may be swinging back to the delegation view precisely because it promotes several core constitutional values that are not present under the compact view.

For example, one unique aspect of the delegation view is that under a charter, the text's grant of authority to the federal government is policed by the entire public, not just by the narrow universe of parties to the contract. James Madison wrote: "As metes and bounds of government, [charters] transcend all other landmarks, because every public usurpation is an encroachment on the private right, not of one, but of all."[265] For this reason, Madison considered the charter to be the supreme form of contract. Unlike other types of contracts, which are only enforceable by the parties to the agreement, a charter creates an interest even on the part of nonparties.[266] Everyone—insiders and outsiders alike—benefits when outsiders are granted the power to enforce structural limitations on the federal government.

Another attraction of the delegation view is that, unlike the compact view, the delegation view places primacy on the sovereignty of "the people." "The people" are the direct creators of the federal government and, as such, must of necessity continue to possess any

2010, at A2.

265. Madison, *Charters*, *supra* note 67, at 508. It is because of this common interest, shared by all citizens, in the government's adherence to the limits of its charter ("keeping every portion of power within its proper limits") that Madison believed that future citizens would be motivated to "support the energy of their constitutional charters." *Id.*

266. The implications of this different focus can be observed by comparing a charter to the modern economic conception of a business corporation as a "nexus of contracts." The nexus-of-contracts view conceives of a corporation as "a web of explicit and implicit contracts establishing rights and obligations among the various parties making up the firm." STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 8 (2002). In the context of corporate law, the pure contractual view has two characteristics. First, it emphasizes the limited universe of individuals who can claim to possess rights within the corporate enterprise, thereby implicitly rejecting any public interest in the exercise of those rights. Second, conceptualizing the corporation as a nexus of contracts places a primary value on the freedom of the participants in the firm to agree to whatever terms that they desire. The content of those terms is unimportant, so long as those terms are expressed in the foundational corporate documents. Certain participants in the corporate enterprise, such as board members or majority shareholders, may even divert the economic benefits of the enterprise to themselves, at the expense of other participants, so long as that power is granted to them in the foundational agreement. The role of the state, in such a system, is merely to enforce the private bargain.

sovereign power that they did not see fit to delegate to that body. It is not only presumptuous for the federal government to claim more power than the Constitution grants, it is also a direct assault on the sovereignty of the people.

Critics call this concept of popular sovereignty a fiction. They point out that there is no mechanism under the Constitution for a body of national "people" to meet or act—thereby leaving the federal government as the de facto possessor of absolute sovereignty.[267] However, even if popular sovereignty is in some sense a fiction, belief in this fiction has the practical effect of inspiring both the public at large and government officials to behave as if "the people" truly are the ultimate sovereign.[268] Political symbols, such as the idea of popular sovereignty, derive their power from their tendency to cause believers to modify conduct in conformity with ideals.[269] The delegation view of the Constitution inspires government officials to adopt policies that subject all official action to public accountability and control.[270]

Opponents of an expanding federal presence in the economy also likely prefer the delegation view to the compact view because the latter facilitates the power of the executive branch to grow and to expand beyond the powers expressly delegated to it. For example, the theory of the unitary executive places the actions of the

267. *See* BERNARD CRICK, IN DEFENCE OF POLITICS 69–73 (4th ed. 1992); *see also* READ, *supra* note 14, at 116 ("The idea of 'the sovereignty of the people,' if it makes sense at all, does so only at a very high level of abstraction."). Nevertheless, early constitutional expositors such as Chief Justice John Marshall believed that popular sovereignty exists in fact under the Constitution, despite the lack of any means for it to be exercised other than through the vehicle of a constitutional convention. *See* NEWMYER, *supra* note 24, at 345.

268. READ, *supra* note 14, at 116.

269. *Id.* (citing EDMUND MORGAN, INVENTING THE PEOPLE 13–14 (1988)). Susan Neiman argues persuasively that a belief in moral ideals can transform our reality:

> In the eighteenth century the idea that even all white men were created equal was anything but obvious; most of the world thought it patently false. In 1776 a band of colonials had the audacity to declare the idea self-evident—and thereby began to make it come true.

SUSAN NEIMAN, MORAL CLARITY 43 (2008); *cf.* GEORGE ORWELL, *England Your England*, *in* A COLLECTION OF ESSAYS 252, 261 (1981) ("In England such concepts as justice, liberty, and objective truth are still believed in. They may be illusions, but they are very powerful illusions. The belief in them influences conduct, national life is different because of them.").

270. The compact view fosters a lack of transparency in government. The Bush administration was criticized for excessive secrecy and a lack of accountability for its antiterrorism policies. *See, e.g.*, COLE & LOBEL, *supra* note 233, at 40–47. The expanding sphere of government information that is classified and therefore withheld from the public has grown over the years in direct proportion with the assertion that the Constitution grants the executive branch an absolute power over national security matters. *See* WILLS, *supra* note 244, at 137–40.

President outside of congressional control. Beyond replacing the President via election or impeachment, the citizenry is left with no ability to employ their elected representatives in order to constrain executive action directed at outsiders. Insofar as it acts against "outsiders" to the Constitution, the compact view leaves the executive branch unchained from both the delegated powers of Article II and the structural constraints imposed by the separation of powers.

Finally, it can be argued that the delegation view promotes a greater regard for the protection of human rights than does the compact view.[271] This is because the unbounded power that the compact view places in the hands of executive branch officials is limited only by the individual moral compasses of those officials. For example, waterboarding and other extreme forms of interrogation are viewed as immoral by many persons.[272] Observers have questioned how such tactics could have been adopted as official government policy. One conclusion is that moral values of individual government officials are insufficient to prevent the adoption of morally questionable policies. "[M]ost evil is done by people who never made up their minds to be or do either evil or good."[273] Government officials will always be tempted to believe that they are "as intrinsically good as their opponents [are] intrinsically evil," and to assume that any policies that they adopt are morally justified.[274] Structural limitations that prevent absolute power from being lodged in the hands of any single government official provide greater security for human rights than does a blind faith in the moral compasses of the men and women in government.[275] The delegation view was favored by the Framers of the Constitution because it provides this very measure of security.

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271. *See* COLE & LOBEL, *supra* note 233, at 5.

272. The debate over the morality of torture continues to this date. *See, e.g.*, Mark Oppenheimer, *Catholic Defender of Waterboarding Gets an Earful from Critics*, N.Y. TIMES, Feb. 27, 2010, at A19.

273. HANNAH ARENDT, THINKING 180 (1978).

274. NEIMAN, *supra* note 269, at 338–39.

275. A faith in the moral compasses of individuals cannot prevent societies from committing immoral acts. *See* JONATHAN GLOVER, HUMANITY 401–04 (1999). Steven Pinker aptly summarizes Glover's key observations:

> No one is a saint, and most people calibrate their conscience against a level of minimum decency expected of people in their peer group or culture. When the level drifts downward, people can commit horrible crimes with the confidence that comes from knowing that "everyone does it." Euphemisms like "resettlement to work camps," phased decisions (in which bombing targets might shift from isolated factories to factories near neighborhoods to the neighborhoods themselves) and the diffusion of responsibility within a bureaucracy can lead conscientious people to cause appalling outcomes that no one would ever willingly choose on his own.

Steven Pinker, *All About Evil*, N.Y. TIMES BK. REV., Oct. 29, 2000, at14, 14–15 (reviewing JONATHAN GLOVER, HUMANITY (2000)).

After decades during which it appeared that the compact view of the Constitution was ascendant, it is possible that we are currently poised on the cusp of a re-ascendance of the delegation view. Once again, the current generation of voters is being presented with divergent views of the original understanding of the Constitution. As the foregoing discussion illustrates, both the delegation and compact view of the Constitution have deep roots in our nation's history. Regardless of which view captures the imagination of contemporary voters, the public will benefit from a debate that underscores the differences between reading the Constitution as a charter or a compact.