

RESTORATION OF LIMITED STATE CONSTITUTIONAL GOVERNMENT: A DISSENTER'S VIEW

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The prevailing view of courts and scholars alike is that because the federal government is a government of limited and enumerated powers, state governments have plenary powers subject only to those restrictions set forth in the federal and state constitutions.¹ This presumption gives rise to a theory of constitutional interpretation vesting virtually unlimited power in the state government, subject only to constitutional limitations expressly stated.² Yet, virtually every state in the Union has a constitutional provision memorializing the fact that “all just authority in the institutions of political society is derived from the people, and established with their consent.”³

We posit here the unorthodox view that the people have *retained* all powers of government except those expressly relinquished by the ratification of their respective state and federal constitu-

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1. See, e.g., THOMAS C. MARKS, JR., & JOHN F. COOPER, *STATE CONSTITUTIONAL LAW IN A NUTSHELL* 1–7 (1988); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 6–9 (1998); Daniel B. Rodriguez, *State Constitutional Theory And Its Prospects*, 28 N.M. L. REV. 271, 291–92 (1998); see also citations *infra* notes 9, 11.

2. MARKS & COOPER, *supra* note 1, at 2–5.

3. DEL. CONST. pmb; see also ALA. CONST. § 2; ALASKA CONST. art. I, § 2; ARIZ. CONST. art. II, § 2; ARK. CONST. art. II, § 1; CAL. CONST. art. II, § 1; CONN. CONST. art. I, § 2; FLA. CONST. art. I, § 1; GA. CONST. art. I, § 2, ¶ ii; HAW. CONST. art. I, § 1; IDAHO CONST. art. I, § 2; ILL. CONST. art. 1, § 1; IND. CONST. art. I, § 1; IOWA CONST. art. I, § 2; KAN. CONST. Bill of Rights § 2; KY. CONST. § 4; LA. CONST. art. I, § 1; ME. CONST. art. I, § 2; MD. CONST. Decl. of Rights art. 1; MASS. CONST. art. 5; MICH. CONST. art. I, § 1; MINN. CONST. art. 1, § 1; MISS. CONST. art. III, § 5; MO. CONST. art. I, § 1; MONT. CONST. art. II, § 1; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 2; N.H. CONST. art. I; N.J. CONST. art. I, ¶ 2; N.M. CONST. art. II, § 2; N.D. CONST. art. I, § 2; OHIO CONST. art. I, § 2; OKLA. CONST. art. II, § 1; OR. CONST. art. I, § 1; PA. CONST. art. I, § 2; R.I. CONST. art. I, § 1; S.C. CONST. art. I, § 1; S.D. CONST. art. 6, § 1; TENN. CONST. art. I, § 1; TEX. CONST. art. I, § 2; UTAH CONST. art. I, § 2; VT. CONST. ch. I, art. 6; VA. CONST. art. I, § 2; WASH. CONST. art. I, § 1; W. VA. CONST. art. II, § 2; WIS. CONST. art. I, § 1; WYO. CONST. art. I, § 1.

tions.⁴ As set forth below, state constitutions prescribe the nature and limits of the people's consent to be governed. They are contracts between the people and their state government, delegating limited authority to exercise certain powers not otherwise retained by the people. To the extent a state government exercises its power to undertake activities beyond those necessary to protect and maintain individual rights,⁵ courts must look for specific manifestations of the people's consent that evidence constitutional grants of that authority. But, where a legislature acts without express or necessarily implied authorization of the constitution, it exceeds its authority—even if there is no constitutional provision barring such actions.⁶

This alternative view was well-summarized in a Washington case that preceded its statehood:

A legislature with undefined powers has all legislative powers. It can lay down the laws in every direction, moulding all persons and things, and each particular person and thing, conclusively to what it says; determining absolutely and finally every question by its fiat. Its voice is the voice of the governing power, and the voice of the governing power is the voice of God. From that there is no appeal. Great Britain's parliament is an example of such a legislature. . . . American legislatures

4. This paper develops an idea previously advanced by Justice Richard B. Sanders, *Battles for the State Constitution: A Dissenter's View*, 37 GONZ. L. REV. 1 (2001/02).

5. The Washington Constitution states: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." WASH. CONST. art. I, § 1.

6. *But see* *Shea v. Olson*, 53 P.2d 615, 619 (Wash. 1936) (describing "the only limitation upon" the state's general police powers to be "that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution").

The position taken by this paper does not endorse a specific political agenda and is consistent with either a liberal or conservative orientation:

Thus, much of the political battle over the proper domain of government is not between regulators and free marketers, but rather between two different kinds of regulators. Post-New Deal liberals would remove the government from individual moral decision-making that does not produce obvious victims, but would intervene quickly in economic markets at any hint of market failure or assumed harmful redistribution. Conservatives, by contrast, are loath to regulate economic markets, but they enthusiastically use the state to impose politically triumphant moral values on others, even including institutionalized religious (Christian) practice within state-supported schools.

Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1428–29 (1997).

are different, simply because limited. Higher legislation than any one of them is capable of has at one breath called them into being and circumscribed their activities. The national and state legislatures have their bounds set by what the people have enacted in the national and state constitutions.⁷

I. PRESUMPTION OF INHERENT STATE POWERS

The proposition that the Federal Constitution created a federal government of delegated and limited powers is well-established and generally accepted.⁸ But after acknowledging that truth, many courts and scholars jump to the opposite conclusion about state constitutions.⁹ For example, an early decision of the Washington Supreme Court holds:

The Constitution of the United States is a grant of power; that is to say, Congress was granted such powers only as were expressed in the grant. The remaining powers rested in the people. And . . . the Constitution of the state is simply a limitation upon the powers of the Legislature, and all power which is not limited by the Constitution inheres in the Legislature as a representative body, and primarily in the people.¹⁰

Unfortunately this oft-repeated proposition is seldom if ever justified by reasoned analysis.¹¹ At times, some scholars have aug-

7. *Maynard v. Valentine*, 3 P. 195, 199–200 (Wash. 1880).

8. *See, e.g.*, *United States v. Curtiss–Wright Ex. Corp.*, 299 U.S. 304, 315–16 (1936) (stating the proposition that the “federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers”).

9. *See, e.g.*, *Pinellas County v. Laumer*, 94 So.2d 837, 840 (Fla. 1957); *Graham v. Illinois State Toll Highway Auth.*, 695 N.E.2d 360, 366–67 (Ill. 1998); *State ex rel. Lewis v. Smith*, 63 N.E. 25, 26 (Ind. 1902); *Aguillard v. Treen*, 440 So.2d 704, 707 (La. 1983); *Blank v. Dep’t of Corrections*, 611 N.W.2d 530, 556 (Mich. 2000); *State ex rel. Stenberg v. Douglas Racing Corp.*, 524 N.W.2d 61 (Neb. 1994); *State v. Ertelt*, 548 N.W.2d 775, 776 (N.D. 1996); *Jackson v. Freeman*, 905 P.2d 217, 221 (Okla. 1995); *Moseley v. Welch*, 39 S.E.2d 133, 137 (S.C. 1946); *Vincent v. Voight*, 614 N.W.2d 388, 430–31 (Wis. 2000). For examples of commentators sharing this view, see *infra* note 11.

10. *Walker v. Spokane*, 113 P. 775, 779 (Wash. 1911).

11. *See, e.g.*, ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 3.1, at 230 (2d ed. 2002); THOMAS COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF AMERICA UNION* 107 n.2 (5th ed. 1998) (1883) (citing cases, each of which recite the presumption without articulating a basis for it); G. ALAN TARR, *supra* note 1, at 6–9; Cornell W. Clayton, *Towards a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 72–75 (2001/2002); Jennifer Friesen, *State Courts as*

mented it with the corresponding idea that all powers reserved to the people are vested in the legislature.¹²

Yet, this idea is equally unsubstantiated and historically suspect. Indeed, *Federalist* Number 48 warns: "It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it."¹³ Similarly, Hamilton warned: "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves."¹⁴ Why would the people who were so protective of their liberty confer upon their own state government the virtually unlimited power of the British Parliament? Given the preoccupation with the corruptive influence of power in the eighteenth and nineteenth centuries, when most of our state constitutions were drafted,¹⁵ is it not more likely the powers conferred upon the state were few and surrendered reluctantly?¹⁶

The only authority that appears to support the presumption of plenary state power can be found in *Federalist* Number 45, and even there the text may be misinterpreted. Madison states:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . *The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives,*

Sources of Constitutional Law: How to Become Independently Wealthy, 72 NOTRE DAME L. REV. 1065, 1086–87 (1997); Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 279–80 (1994); Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 867–68 n.27 (2000); Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C.L. REV. 73, 87 (2001); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983).

12. COOLEY, *supra* note 11, at 105–06.

13. THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

14. BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 86 (2001).

15. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 59–61 (1967) (discussing the eighteenth century); TARR, *supra* note 1, at 109 (noting the Jacksonian influence of the nineteenth century).

16. *See generally* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 171–75 (1991) (describing the colonists' widespread support for liberty from British oppression and their reaction to British efforts to reduce popular political participation in government in the 1760s).

*liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.*¹⁷

This statement might be construed to reflect the presumption of plenary state power. But, the *Federalist* papers address the relationship of the states to the federal government, not the relationship of the people to their respective state.¹⁸ *Federalist* Number. 45 merely describes the powers the people may confer upon their state legislatures; it does not delineate powers inherent to state governments. Nor does it dispel the basic notion that “[e]very American legislature is the creature of the constitution, and strictly subordinate to it.”¹⁹

Nevertheless, the presumption that state governments have inherent powers underlies judicial interpretation of state constitutions.²⁰ State courts interpreting their own constitutions routinely place the burden to prove legislative action unconstitutional on the challenger.²¹ Moreover, state courts typically will uphold legislative action unless the challenger can point to a state constitutional provision prohibiting the exercise of such powers.²²

17. THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

18. See J. Michael Martinez & William D. Richardson, *The Federalist Papers and Legal Interpretation*, 45 S.D. L. REV. 307, 311 (1993).

19. COOLEY, *supra* note 11, at 104 n.1. Although Cooley begins with the premise that power resides in the people, he concludes they “have committed [the power to legislate] in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question.” *Id.* at 105.

20. See MARKS & COOPER, *supra* note 1, at 1–7.

21. *Merlin Myers Revocable Trust v. Yellowstone County*, 53 P.3d 1268, 1272 (Mont. 2002); *Gallivan v. Walker*, 54 P.3d 1069, 1112–13 (Utah 2002); *In re Stovall*, 45 P.3d 855, 858 (Kan. 2002); *Frantz v. Palmer*, 564 S.E.2d 398, 403 (W.Va. 2001); *Walton v. Commonwealth*, 497 S.E.2d 869, 872 (Va. 1998); *State ex rel. Shepherd v. Neb. Equal Opp. Comm’n*, 557 N.W.2d 684, 688 (Neb. 1997); *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996); *State Bd. of Health v. Greater Birmingham Ass’n of Home Builders, Inc.*, 384 So.2d 1058, 1061 (Ala. 1980); *Montgomery v. Daniels*, 340 N.E.2d 444, 451 (N.Y. 1975); *Royston v. Pima County*, 475 P.2d 233, 234 (Ariz. 1970).

22. See cases cited *supra* note 9; *cf. Island County v. State*, 955 P.2d 377, 384–92 (Wash. 1998) (Sanders, J., concurring); see also Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 507 (1984) (arguing that the presumption of constitutionality “seriously hampers the courts’ accomplishment of what article 1, section 1 of the Washington Declaration defines as the fundamental purpose of our state’s constitution and government: to protect and maintain individual rights”).

However this presumption of state plenary power does not accord with the political atmosphere of the American Revolution and the constitutional conventions of the original states. Akhil Reed Amar explains that the Colonial leaders were unwilling to accept the idea of authority vested in the British Parliament, and from there a distinctive idea of American sovereignty emerged.²³

Whereas the British adhered to the view that their sovereignty resided “in the indivisible entity consisting of King, Lords, and Commons” whose power was necessarily boundless, the colonists “came to define the British Constitution not merely as the structure and arrangement of governmental institutions, but also as a set of substantive legal principles limiting the legitimate exercise of government power.”²⁴

The colonial experience under corporate charters prepared the ground for revolutionary ideas.²⁵ “By the eve of the Revolution the charters that the crown had granted to many of the colonies in the previous century had come to be seen as just so many miniature magna cartas.”²⁶ The corporate charters provided for the establishment of a colonial government consistent with the terms expressed in the charter by circumscribing the rights and privileges to which the colonists were entitled and limiting the powers of the crown.²⁷ For example, the Virginia Charter of 1606 provided for a council with plenary governmental powers beyond the requirements of the English Privy Council.²⁸ But it also guaranteed the colonists would “HAVE and enjoy all Liberties, Franchises, and Immunities . . . to all Intents and Purposes, as if they had been abiding and born, within

23. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429 (1987).

24. *Id.* at 1431–32. As one commentator has remarked on the British view of limited government:

The English Bill of Rights [of 1689] was designed to protect the subjects not from the power of Parliament but from the power of the king. Indeed, it was inconceivable that Parliament could endanger the subjects' rights. Only the crown could do that. Parliament was the highest court in the land and was therefore the bulwark and guardian of the people's rights and liberties; there was no point in limiting it.

See also Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1425 (1999).

25. Wood, *supra* note 24, at 1432.

26. *Id.* at 1427.

27. *Id.*

28. Virginia Charter of 1606, *reprinted in* AMERICAN CHARTERS CONSTITUTIONS AND ORGANIC LAWS 3784 (Francis Newton Thorpe ed., 1977) (1909) [hereinafter AMERICAN CHARTERS].

this our Realm of England, or any other of our said Dominions.”²⁹ Even the Charter for the Province of Pennsylvania of 1681, which granted William Penn “absolute” authority to establish a code of laws, a judiciary, and a means of enforcement, required “[t]hat the said Lawes bee consonant to reason, and bee not repugnant or contrarie, but as neare as conveniently may bee agreeable to the Lawes and Statutes, and rights of this Our Kingdome of England.”³⁰

Over time the colonial charter experience resulted in a radical redefinition of governmental sovereignty whereby the people retained their sovereignty except to the extent they delegated the powers of governing to their federal, state, or local governments.³¹ This development informed American Revolutionaries, and most of the original state constitutions of the former colonies specifically provide that “all political power is vested in and derived from the people only.”³²

Most of the later-joining states obtained statehood through a federal enabling act.³³ Every congressional enabling act since 1864

29. *Id.* at 3788.

30. *Id.* at 3038. The Charter of North Carolina (1663) has a virtually identical provision. See AMERICAN CHARTERS, *supra* note 30, at 2746.

31. Amar, *supra* note 23, at 1434–35.

32. N.C. CONST. of 1776, ¶ 1; see also GA. CONST. of 1777 (“We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it IS hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State.”); N.H. CONST. of 1776, art. I (“[A]ll government of right originates from the people, is founded in consent, and instituted for the general good.”); N.Y. CONST. of 1777 (“By virtue of which several acts, declarations, and proceedings . . . all power whatever therein hath reverted to the people thereof, and this convention hath by their suffrages and free choice been appointed, and among other things authorized to institute and establish such a government as they shall deem best calculated to secure the rights and liberties of the good people of this State, most conducive of the happiness and safety of their constituents in particular, and of America in general.”); MD. CONST. of 1776, arts. I & II (“[A]ll government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole” and “the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof.”); PA. CONST. of 1776, arts. III & IV (“[T]he people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same” and “all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”); VA. CONST. of 1776, Bill of Rights, § II (“[A]ll power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them.”).

33. However, certain exceptions exist. For example, Vermont petitioned Congress as an independent revolutionary state and was granted admission under

requires the state to ratify a state constitution not “repugnant to . . . the principles of the Declaration of Independence.”³⁴ In pertinent part, the Declaration provides:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights Governments are instituted among Men, deriving their just powers from the consent of the governed³⁵

The Declaration articulates the first premise of American government, that sovereignty resides in the people and governments obtain the powers to govern by the consent of the people.³⁶ Thus, the power of government extends only insofar as it is delegated by the consent of the governed. This principle was adopted, for example, in the Washington Constitution, which provides a specific provision ensuring consent of the governed.³⁷

Against this historical backdrop and in the face of express state constitutional provisions advocating a government of limited powers, it is simply unfathomable that courts and scholars persist in the naked presumption of plenary state power.

II. LIMITATIONS ON STATE POLICE POWER

The Founders adopted John Locke’s view of a limited government, the essential function of which was to preserve life, liberty, and property.³⁸ They rejected the more expansive view of the inherent powers of government, which Blackstone would later describe as “the due regulation and domestic order of the kingdom,

the Vermont Act, 1 Stat. 191 (Feb. 18, 1791). See Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 373–74 (2002). Wyoming also obtained statehood without an enabling act. Peter Nicolas, *American-Style Justice in No Man’s Land*, 36 GA. L. REV. 895, 913 n.108 (2002).

34. Act of Feb. 22, 1889, § 4, 25 Stat. 676 (Enabling Act of Washington, Montana, North Dakota, South Dakota); see also Hawaii Statehood Act, § 1, 73 Stat. 4 (1959); Alaska Statehood Act, § 3, 72 Stat. 339 (1958); Act of June 6, 1906, § 3, 34 Stat. 267 (Enabling Act of Oklahoma); Act of July 16, 1894, § 3, 28 Stat. 107 (Enabling Act of Utah); Enabling Act of Colorado, § 4, 18 Stat. 474 (1875); Act of March 21, 1864, § 4, 13 Stat. 30 (Enabling Act of Nevada).

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

36. See, e.g., Bernard H. Siegan, *Separation of Powers & Economic Liberties*, 70 NOTRE DAME L. REV. 415, 471 (1995).

37. WASH. CONST. art. I, § 1; see also *supra* note 3 (citing similar provisions in other states).

38. Talmadge, *supra* note 11, at 862 n.16.

whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.”³⁹ Early on the Supreme Court recognized the limited nature of the state’s police power:

The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. . . . An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.⁴⁰

The Lockean essential function of government, sometimes described as the police power,⁴¹ is, therefore, to protect our lives, liberty, and property from transgressions by our neighbors.⁴² If a government is to do more, the evidence of delegation of that authority should reside in a specific provision of the constitution. State constitutions contain many such provisions. For example, the

39. *Id.* at 857 n. 1 (citing 4 BLACKSTONE’S COMMENTARIES 162 (St. George Tucker ed., Rothman Reprints, Inc. 1969) (1803)).

40. *Calder v. Bull* 3 U.S. (3 Dall.) 386, 388–89 (1798) (Chase, J., seriatim). Another case espoused this view of the limited nature of state police power:

“[P]ersons and property are subject to all kinds of restraints and burdens, in order to secure the general comfort, health, and general prosperity of the State”—the public, as represented by its constituted authorities, taking care always that no regulation, although adopted for those ends shall violate rights secured by the fundamental law nor interfere with the enjoyment of individual rights beyond the necessities of the case.

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 318 (1905).

41. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1913).

42. JOHN LOCKE, *Second Treatise of Government* § 124, in TWO TREATISES OF CIVIL GOVERNMENT 117, 180 (Ernest Rhys ed., J.M. Dent & Sons 1924) (1690).

Washington Constitution authorizes the legislature to establish educational institutions “for the blind, deaf, or otherwise disabled.”⁴³ However, the rule should remain that, absent express delegation of constitutional authority, the people have reserved to themselves all else.

But even the police power, understood in this narrow sense of preventing serious harm to individuals in violation of their legal entitlements,⁴⁴ does not authorize the state to encroach upon rights guaranteed in the state declaration of rights.⁴⁵

This intention is evident in the text of many of the declared rights, which prescribe the limits within which the right may be exercised free of interference. For example, Washington’s Religious Freedom Clause provides in relevant part:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.⁴⁶

Similarly, Washington’s Right of Petition and Free Assemblage Clause provides: “The right of petition and of the people peaceably to assemble for the common good shall never be abridged.”⁴⁷ The only exception to “absolute freedom” of religion is express, i.e., “acts of licentiousness or . . . practices inconsistent with the peace

43. WASH. CONST. art. XIII, § 1 (amended 1988).

44. The courts have adopted an increasingly broad definition of the police power. *See, e.g.*, *State ex rel. Clausen v. Burr*, 117 P. 1101, 1106 (Wash. 1911) (holding that the “possession and enjoyment of all rights are subject to [the] power” of the state to “prescribe regulations promoting the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity”); *Western Indem. Co. v. Pillsbury*, 151 P. 398, 401 (Cal. 1915) (quoting *Clausen* with approval); *People v. Faxlanger*, 1 A.D.2d 92, 93 (N.Y. App. Div. 1955) (holding that an individual’s “rights are not absolute, but are always subject to the proper exercise of the police power for the public good”); *see also* SIEGAN, *supra* note 14, at 211; *cf.* *Eckles v. State of Oregon*, 760 P.2d 846, 858 (Or. 1988) (“[T]he existence of [the police] power cannot explain the extent to which the power is constitutionally limited”).

45. *See* SIEGAN, *supra* note 14, at 51 (“[R]ights that are inalienable cannot be limited in the name of the public interest; instead, the public interest will be achieved by protection of these rights.”).

46. WASH. CONST. art. I, § 11.

47. WASH. CONST. art. I, § 4.

and safety of the state”; nor may the right to petition or assemble be limited unless it poses a serious risk of violence or other harm.⁴⁸

As originally expressed by Alexander Hamilton when advocating adoption of the Federal Constitution absent a national Bill of Rights, a bill of rights serves only one function: “to delineate exceptions to otherwise legitimate exercises of governmental powers.”⁴⁹ In the view of the founders, the very purpose of a declaration of rights is to except from the reach of government any power to abridge the rights secured thereby. If the rights guaranteed by a declaration of rights are not exceptions to governmental power, including otherwise legitimate exercises of the police power, then those rights are illusory because the government has no authority to exceed its legitimate functions in any case.⁵⁰

But how has this principle been applied to state constitutional provisions? Several states have subjected their constitutions’ unconditional guarantee of the right to bear arms to the state’s police power.⁵¹ A recent decision of the Washington Supreme Court held

48. See *Malyon v. Pierce County*, 935 P.2d 1272, 1278 (Wash. 1997) (religious freedom); *State ex rel. Lumber & Sawmill Workers v. Superior Court for Pierce County*, 164 P.2d 662, 668 (1945) (free assembly).

49. *State v. Schelin*, 55 P.3d 632, 648 (Wash. 2002) (Sanders, J., dissenting). Hamilton’s views on this point are emphasized by the following quotation:

[The] bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various *exceptions* to powers which are not granted; and, on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

FEDERALIST No. 84, at 513–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

50. *Schelin*, 55 P.3d at 648 (Sanders, J., dissenting).

51. See, e.g., *Hyde v. City of Birmingham*, 392 So. 2d 1226, 1227 (Ala. Crim. App. 1980) (interpreting ALA. CONST. art. I, § 26, which provides: “That every citizen has a right to bear arms in defense of himself and the state”); *Dano v. Collins*, 802 P.2d 1021, 1022–23 (Ariz. App. 1993) (interpreting ARIZ. CONST. art. II, § 26, which provides: “The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men”); *Robertson v. City and County of Denver*, 874 P.2d 325, 331 (Colo. 1994) (interpreting COLO. CONST. art. II, § 13, which provides: “The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons”); *People v. Green*, 580 N.W.2d 444, 449 (Mich. App. 1998) (interpreting MICH. CONST. art. I, § 6, which provides: “Every

even the free exercise of religion⁵² may be subject to zoning regula-

person has a right to keep and bear arms for the defense of himself and the state"); *People v. McFadden*, 188 N.W.2d 141, 144 (Mich. App. 1971) (interpreting MICH. CONST. art. I, § 6, which provides: "Every person has a right to keep and bear arms for the defense of himself and the state"); *State v. Ricehill*, 415 N.W.2d 481, 482–83 (N.D. 1987) (interpreting N.D. CONST. art. I, § 1, which provides: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed"); *Arnold v. Cleveland*, 616 N.E.2d 163, 172 (Ohio 1993) (interpreting OHIO CONST. art. I, § 4, which provides: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power"); *Tsokas v. Bd. of Licenses & Inspections Review*, 777 A.2d 1197, 1201 n.2 (Pa. Commw. Ct. 2001) (interpreting PA. CONST. art. I, § 21, which provides: "The right of the citizens to bear arms in defense of themselves and the State shall not be questioned"); *McGuire v. State*, 537 S.W.2d 26, 28–29 (Tex. Crim. App. 1976) (interpreting TEX. CONST. art. I, § 23, which provides: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime"); *State v. Rupe*, 683 P.2d 571, 596 n.9 (Wash. 1984) (interpreting WASH. CONST. art. I, § 24, which provides: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men"); *Carfield v. State*, 649 P.2d 865, 870–73 (Wyo. 1982) (interpreting WYO. CONST. art. I, § 24, which provides: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied").

Nothing bars states from amending their constitutions to provide for governmental regulation. *See, e.g.*, ILL. CONST. art. I, § 22 ("Subject only to the police power, the right of the individual to keep and bear arms shall not be infringed."); *see State v. Schelin*, 55 P.3d 632, 640–52 (Wash. 2002) (Sanders, J., dissenting).

52. WASH. CONST. art. I, § 11 provides:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: *Provided, however*, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of

tions enacted pursuant to the state's police power.⁵³ What is next? Privacy? Press? Speech? Assembly? Can it not be argued that these are also at the mercy of the state—a power that some argue only ends where the declaration of rights begins, but now predominates over even that?

IV. CONCLUSION

The practice of interpreting state constitutions as granting the state legislature plenary power except where such power has been expressly limited by the constitution presumes that state governments have inherent powers, that sovereignty resides with the servant rather than the popular masters. However, this presumption contradicts the basic premise of American government that all power resides in the people except as it has been delegated to the government. Because courts have uniformly and uncritically adopted this presumption, they have interpreted state constitutions contrary to the clear meaning of the text and allowed an unwarranted expansion of state power that threatens individual rights. Once this presumption is debunked, a defensible theory of constitutional interpretation emerges that embodies that principle of limited government expressed by the people who ratified their state constitutions.

religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

WASH. CONST. art. I, § 11.

53. See *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 48–49 (Wash. 2000) (Sanders, J., dissenting).

