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Charters, Compacts and Tea Parties: The Decline and Resurrection of a Delegation View of the Constitution

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

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TABLE OF CONTENTS

I. Introduction

II. Competing Theories of Constitutionalism
   A. The Constitution as a Compact
   B. The Constitution as a Charter of Delegated Powers
   C. Compact and Delegation Contrasted

III. Delegation and Original Understanding
   A. The Constitution is a Charter, Not a Compact
   B. Executive Power is Limited to Delegated Powers
   C. The People Retain Absolute Sovereignty
   D. Popular Sovereignty Cannot be Severed from the People
   E. The Delegation View Post-Ratification

IV. Historical Expressions of the Compact View
   A. The Framers and the Compact View
   B. The Alien and Sedition Acts
   C. Supreme Court Assimilation of the Compact View
      1. Utility of Compact View in the Defense of Slavery
      2. Compact and Immigration Law
         a. External Borders Define the Parties to the Compact
         b. The Interior Remains Borderless
      3. The Compact View Moves into the Interior
         a. Unlawful Border Crossers
         b. Lawful Border Crossers
   D. Contemporary Executive Branch Expression of the Compact View: The Unitary Executive

V. Conclusion: The Delegation View Re-Ascendant

I. Introduction

Originalism is widely acknowledged to be the dominant method of constitutional interpretation today.¹ However, recent scholarship advancing an originalist interpretation of the

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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 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 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 using contract law theory as a means of ascertaining the underlying assumptions of the party 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. 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. 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 -- it appears that the popular understanding of the Constitution may be poised to revert towards its original nature as a charter. Indeed, in many ways the ideological underpinnings of the Tea Party Movement can be traced to this original understanding of the Constitution.

Part II of this article discusses the two theories most commonly used to define the scope of the constitutional domain, which provide that the Constitution should be interpreted as either a charter of delegated power or a compact, and explains the distinctive characteristics of each theory. Part III 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 IV traces the history of how the compact view of the Constitution came to

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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. 9, 11-12 (2007) (listing alternative forms of originalism).


3 Id. at 525.

4 See id. at 526.


6 Id. at 616.

7 Id.

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.
predominate over the delegation view in more recent expressions of the scope of the federal government’s power. Finally, Part V concludes by identifying the reasons for the recent resurgence of the idea that the Constitution should be read as a charter.

II. 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 “defining the domain of constitutionalism.” 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 in the Constitution, are ultimately functions of the locus of sovereignty in the constitutional system. 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, is the fundamental inquiry at the heart of constitutionalism. The Framers of the Constitution debated this question, and the Tenth Amendment was adopted in an attempt to provide an express resolution of the problem.

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. 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 authority that the federal government possesses is the authority to exercise the powers expressly delegated to it in the Constitutional text. 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.” 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.”

9 GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 3 (1996).
10 See T. ALEXANDER ALENIKOFF, SEMBLANCES OF SOVEREIGNTY 3 (2002) (emphasizing the connection between sovereignty, membership and government power).
11 JAMES H. READ, POWER VERSUS LIBERTY 1-10 (2000).
14 This strand of American political philosophy is sometimes called “democratic nationalism” or Hamiltonianism. See LIND, supra note 13, at xlii-xliii.
15 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 (2007). 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 MAG. January 17, 2010 at 33.
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. 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. 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. 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. 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 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. The view that the Constitution should be interpreted as a compact among the several states was influential early in our nation’s history, 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.

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.” 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 towards conceptualizing the Constitution in order to define its reach: universalism; membership; mutuality of obligation; and global due process. The first approach, “universalism,” treats all people in all places as persons protected by the text of the

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17 See id.
18 See id. at 57-61.
19 See infra notes 99 - 110 and accompanying text.
20 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, 1429-1433 (2007); but see SANFORD LEVINSON, CONSTITUTIONAL FAITH 110-111 (1988) (arguing that the Constitution should be read as a covenant rather than in purely contractual terms).
21 See Peter H. Schuck, Citizenship in Federal Systems, 48 AM. J. COMP. L. 195 (____) (“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 . . .”).
22 See NEUMAN, supra note 9, at 5-8.
Constitution. 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. Neuman’s third approach is “mutuality of obligation,” which equates the reach of the Constitution to the sphere within which non-residents are obligated to obey U.S. municipal law. This model denies constitutional rights to persons outside of our borders who are not bound to respect our laws. Finally, Neuman identifies a fourth approach that he calls “global due process.” 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 non-citizens outside of our borders against government interests that counsel against recognizing such protections.

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. Indeed, it appears that all four of Neuman’s separately identified approaches ultimately rely on a “social contract” model of the Constitution. That is, each of his approaches is fundamentally premised upon 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 and 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 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). 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. Finally, the Fourteenth 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.

23 See id. at 5-6.
24 See id. at 6-7.
25 See id. at 7-8.
26 See id. at 8.
27 Id.
29 See generally NEUMAN, supra note 9, at 9-15 (describing the “social contract” tradition that illuminates his four interpretive models); Akash R. Desai, Note, How We Should Think About the Constitutional Scope of the Suspected Terrorist Detainees at Guantanamo Bay: Examining Theories that Interpret the Constitution’s Scope, 36 VAND. J. TRANSNAT’L L. 1579, 1604-1608 (2003) (discussing Neuman’s membership and mutuality of obligation approaches as variants of social contract theory).
30 Cf. Citizens United v. FEC, 175 L. Ed.2d 753, 839-840, 210 U.S. LEXIS 766 (January 21, 2010) (Stevens, J., dissenting) (disputing the idea that the original understanding of free speech protected by the First Amendment extends to corporations).
Sometimes called a “limited government” approach, sometimes identified as a “structural” approach, and alluded to by Neuman as a type of “organic utilitarianism,” this approach to interpreting the Constitution posits that the United States government simply does not possess the power to act in certain situations. Therefore, a delegation approach conceptualizes the reach of the text in a way that is not dependent upon 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 non-members. 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. Under this view of the nature of federal power, the government’s ability to perform an act does not depend upon the identity of the individual who is the subject of government action. Neither a citizen nor a non-citizen can be subjected to any exercise of government power that is an *ultra vires* act. Therefore, it is unnecessary to classify an individual as a member or a non-member 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. 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. 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 a delegation of authority to the federal legislature.

C. Compact and Delegation Contrasted

33 See NEUMAN, supra at note 9, at 6.
34 See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (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.”).
35 See, e.g., Downes v. Bidwell, 182 U.S. 244 (1901) (noting the existence of constitutional prohibitions that go to “the very root of the power of Congress to 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. at ___.
37 See id. at 1754-1755.
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 counter-weight to the federal government. Second, individual interests are protected by strictly policing the separation of powers between the three federal branches.

In regards to those individual rights guaranteed in the text of 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. 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 non-parties, 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.

This social contract view of the Constitution relies upon 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 upon the United States without the consent of our government. In addition, models that recognize membership status for non-citizens for some purposes beg the question of whether non-citizens 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. 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. 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 upon 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 lives. 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. 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.

40 In addition to forming a more perfect union between the States, the Preamble to the Constitution lists the document’s goals as establishing “justice,” insuring “domestic tranquility,” providing for “common defense,” promoting “general welfare” and securing “the blessings of liberty.” U.S. CONST. pmbl.; see also James Madison, Speech to the House of Representatives Presenting the Proposed Bill of Rights, June 8, 1789, reprinted in GALES & SEATON, HISTORY OF DEBATES IN CONGRESS 448-459 (“... Government 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.”).
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. 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 where the Constitution does not expressly guarantee any identifiable right that the government is accused of infringing.

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. The right of free speech guaranteed by the Constitution does not reach around the world, for example. 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.

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 extra-territorially, 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 to where that power is exercised and without regard to who is the target of the power. Membership status is rendered irrelevant under the delegation view.

III. 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. 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 co-exists 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

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42 For example, a person aggrieved by an act of Congress need not challenge that act by pointing to an individual right guaranteed by the text that the act violates. They 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 charged that Congress lacks the power under the Constitution to compel private individuals to purchase health insurance. See, e.g., Orrin G. Hatch, J. Kenneth Blackwell & Kenneth A. Kluwkoski, Why the Health-Care Bills are Unconstitutional, WALL ST. J., January 2, 2010.
43 See Clinton v. City of New York, 524 U.S. 417, 422 (1998) (Kennedy, J.) (“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.”).
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, adopted upon our nation’s independence from Great Britain. The Articles of Confederation created a federal government with a structure that was purely contractual in nature. Under the Articles, each of the newly independent colonies retained their status as separate sovereigns. 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 of Confederation failed in practice because the obligations that it placed upon the individual states were ultimately unenforceable.

In contrast to the Articles of Confederation, the United States Constitution is not a compact amongst independent sovereign states. The architects of the new national government in the Constitution drafted 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. The intent of the Constitution, expressed initially in the “Virginia Plan” that 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.

45 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 of Confederation, using 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.” Letter of Thomas Jefferson to Edward Carrington (Aug. 4, 1787) (quoted in DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 161 (1951).
46 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 RAKOVE, ORIGINAL MEANINGS ___ (1997). 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 of Benjamin Franklin to Dupont de Nemours (June 9, 1788), reprinted in THE AMERICAN ENLIGHTENMENT 107 (Adrienne Koch, ed.) (1965) [hereinafter “THE AMERICAN ENLIGHTENMENT”].
47 The initial debates at the Constitutional Convention found the 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 n. 46, 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
The distinction between charters and compacts was well understood at the time of the
Constitution’s drafting. 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. James Madison
contrasted the American experience to earlier parliamentary bodies that had been created by
European monarchies, which Madison described pejoratively as “charters of liberty . . . granted
by power.” 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.” 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. However, a

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 upon 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.” See id. at 68.

James Madison, for one, frequently used the word “charter” to describe the scope of the power than
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 of
James Madison to Spencer Roane ( June 29, 1821), reproduced in THE AMERICAN ENLIGHTENMENT, supra n. 46, at 461-62 (“Our Governmental System is established by a compact, not between the Government of the U. 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 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.

In an 1830 letter to A. 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 of James Madison to A. Stevenson (Nov. 27, 1830), reproduced in THE AMERICAN ENLIGHTENMENT
at 479). Similarly, in an article in the National Gazette dated January 19, 1792, Madison described the
governments created by the American and French Revolutions as a “charters of power granted by liberty.”
James Madison, Charters, NATIONAL GAZETTE, Jan. 19, 1792, reproduced in THE AMERICAN
ENLIGHTENMENT, supra n. 46, at 508.

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. STEPHEN B. PRESSER, AN INTRODUCTION TO THE
LAW OF BUSINESS ORGANIZATIONS 79 (2008). 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
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. Interpretation of the Constitution under a delegation view faithfully reflects the nature of the Constitution as a charter.

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. 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. 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.”

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. 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 turnpikes, bridges and canals.” Presser, supra, at 79. 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 James Willard Hurst, The Legitimacy Of The Business Corporation In The Law Of The United States, 1780-1970, at 15 (1970); see also Citizens United v. FEC, 175 L. Ed.2d 753, 837, 2010 U.S. LEXIS 766 (January 21, 2010) (Stevens, J., dissenting). 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 R. Kent Newmyer, John Marshall And The Heroic Age Of The Supreme Court 246-248 (2001).

This traditional understanding of the law of contract was at issue in the dispute between the trustees of Dartmouth University, who claimed that the terms of the University’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. Thomas Jefferson rejected the idea that the legislature lacked the power to alter the University’s charter, calling it equivalent to the idea “that the earth belongs to the dead, and not to the living.” Letter of Thomas Jefferson to William Plumer (July 21, 1816), quoted in William Plumer, Jr., Life Of William Plumer 440-441 (1856). In the case of Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819), the Supreme Court decided the issue in favor of the trustees, thereby revolutionizing the American law of contract and making possible the rise of modern corporations.


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 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.’”).

Read, supra n. 11, at 13.

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.

specified in the text but also an inherent power of government to do all that is necessary for its own preservation.\textsuperscript{59} 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 \textit{not delegated} by the Constitution is the same as a power that is \textit{withheld} from the federal government.\textsuperscript{60} It makes no difference whether the advocates of expansive powers label them as “inherent, implied, or expedient.”\textsuperscript{61}

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. 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.

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 \textit{any} power if it was 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.”\textsuperscript{62} 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.

\textbf{C. The People Retain Absolute Sovereignty}

The delegation view presupposes that the people retain the ultimate authority under our constitutional system.\textsuperscript{63} It therefore stands in contrast to theories of executive power which posit the existence of an inherent and unbounded executive branch authority in the field of foreign affairs, such as the theory of the “unitary executive.”\textsuperscript{64} 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 upon the writings of Alexander Hamilton to provide an originalist justification for their views.\textsuperscript{65} Hamilton argued that a unitary federal government, rather than a confederation of states, was best suited to defend the nation as a whole.\textsuperscript{66} He also argued that the powers of the executive branch of the federal government should be lodged in the hands of one individual rather than in a multi-person council so that those powers could be exercised with energy in the face of exigencies.\textsuperscript{67} From these two propositions, supporters of the theory of the unitary executive arrive at the conclusion that

\textsuperscript{59} See \textsc{Read}, \textit{supra} n. 11, at 12 (“What Madison argued against . . . was the use of implied powers in a way that allowed the indefinite expansion of governmental power.”).

\textsuperscript{60} See James Madison, Report on the Virginia Resolutions (January 7, 1800), \textit{reproduced in The American Enlightenment}, \textit{supra} n. 46, at 518.

\textsuperscript{61} \textit{Id}.

\textsuperscript{62} \textsc{Read}, \textit{supra} n. 15, at 28.

\textsuperscript{63} See Amar, \textit{supra} n. 54, at 1435-36.

\textsuperscript{64} See notes 160 - 189 and accompanying text.

\textsuperscript{65} See, e.g., \textsc{John Yoo, War By Other Means} 119-120 (\textit{\ldots}) [hereinafter “\textsc{War By Other Means}”].

\textsuperscript{66} See \textsc{The Federalist} No. 23 at 184 (1987) (A. Hamilton).

\textsuperscript{67} See \textsc{The Federalist} No. 70 at 402 (1987) (A. Hamilton).
Hamilton supported an executive branch of almost unbridled power when it acted in the realm of national security. 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. 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 upon 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. 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 upon individual liberties. Hamilton did not consider a bill of rights to be necessary because the Constitution expresses a system whereby the sovereign people retain the ultimate power.

The main distinction between 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. 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 their approval of the new boundaries. 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. Significantly, however, while he

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68 See WAR BY OTHER MEANS, supra n. 65, at 119-120 (“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.”).

69 Hamilton asked in The Federalist No. 84: “[w]hy declare that things shall not be done which there is no power to do?” 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 James Madison, Speech to the House of Representatives Presenting the Proposed Bill of Rights (June 8, 1789), reprinted in GALES & SEATON, HISTORY OF DEBATES IN CONGRESS 448-459.

70 See AMAR, supra n. 44, at 7-9 (calling the pre-existing sovereignty of “the people” 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 as examples of bills of rights the Magna Carta, the Petition of Right under the reign of Charles the First, and the Declaration of Right in 1688). The FEDERALIST No. 84 at 475 (1987) (A. Hamilton). Hamilton argued that a constitution is a fundamentally different text than a bill of rights, because under a constitution the people retain their ultimate sovereignty. Id. (“[U]nder a constitution, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations . . .”). Therefore, he argued, the United States Constitution as originally drafted had no need for a bill of rights. But see READ, supra n. 11, at 75 (arguing that Hamilton did not accept the concept of an active sovereignty of the people other than in some “nebulous sense”).

71 See READ, supra n. 11, at 58.

72 See id. at 85-87.

73 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 re-draws the lines of sovereignty through the government’s instigation of a constitutional crisis. See id. at 86.
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 sovereignty. If the people are truly sovereign in the United States, then the government created by the people cannot possess more power than the people. 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” pre-existed the creation of both the state and federal governments.\(^\text{74}\) 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.\(^\text{75}\) The delegation view reflects this understanding of the fundamental nature of the sovereignty possessed by the people.

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 Ant-Federalists in opposition to the 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 \textit{Cornell, supra} n. 56, at 187-91. 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. See \textit{Read, supra} n. 11, at 29; see also \textit{Newmyer, supra} n. 52 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.\(^\text{74}\) \textit{Read, supra} n. 11, at 17; \textit{see James Wilson, Speech Before the Ratifying Convention of Pennsylvania} (October 6, 1787) (“The truth is that, in our governments, the supreme, absolute, and uncontrollable power remains in the people.”).\(^\text{75}\)

Fundamentally, Wilson rejected the idea that “the people” could ever completely delegate away their sovereign powers to any governmental unit. \textit{Wayne D. Moore, Constitutional Rights And Powers Of The People} 109 (1996). 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. \textit{Id.} at 107; \textit{Read, supra} n. 11, at 43. “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.” \textit{Read, supra} n. 11, 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. \textit{Moore, supra.} at 108. 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 upon whether the relevant state constitution allocated that residual power to the state government or preserved it as a part of individual liberty). \textit{Id.} Under Wilson’s constitutional design, therefore, each of the three sovereigns – the newly created federal government, the pre-existing states, and a national community of “the people” --
The case of *Schneiderman v. United States* demonstrates how the residual sovereignty of the people continues to be preserved from government encroachment. The federal government sought to revoke the citizenship of Mr. Schneiderman, on the grounds that his membership in the Communist Party rendered it impossible for him to truthfully claim an “an attachment to the principles of the Constitution” as required under the naturalization statute. 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. In dissent, Chief Justice Stone claimed that the majority was denying the existence of any unchangeable principles in the Constitution.

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. 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 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 peoples’ prerogative to exercise its sovereign power in the future.

Therefore, it is incompatible with the Framers’ original intent to read the Constitution as a contractual devise 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. Instead, comprised distinct actors that contemporaneously exercised independent authority in a three part confederation. *Id.* at 107 (“[W]ilson 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 where 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 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 *LIND*, *supra* n. 13, at 85; see also *NEWMYER*, *supra* n. 52, at 173-174.  

76 320 U.S. 118 (1943).

77 See *LEVINSON*, *supra* n. 20, at 148-149.

78 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 to the explanations of the Framers during the debate over ratification and emphasizing
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 to accurately reflect their underlying assumptions concerning the proper scope of federal authority. This original understanding of 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 *Chisolm 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. Chief Justice John Jay concurred with Justice Wilson, going so far as to refer to the people as “joint sovereigns” with the states.

In later Supreme Court cases such as *McCulloch v. Maryland* and *Gibbons v. Ogden*, Chief Justice John Marshall espoused a particularly expansive view of the federal sovereign power in contraposition to the power reserved to the states. However, Marshall’s opinions in these cases were premised upon his determination that the federal government was acting within the delegated spheres of authority envisioned by the Framers. Marshall frustrated attempts to subordinate federal sovereignty to state control, but his opinions left the sovereignty of the people unscathed.

Many of these early cases were argued before the Court by Daniel Webster, who drew upon Madison’s and Hamilton’s writings in order to dispute the idea that the United States

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79 The usage of ambiguous language in the Constitution does not require the reader to acquiesce in “an indefinitely expansive rule of construction.” See READ, supra n. 11, at 39. As explained by historian James Read, “[t]here 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.

80 It must be conceded that not everyone read 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 co-extensive 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, Federalists argued against the inclusion of a bill of rights, promising that federal power would be interpreted narrowly under the text. MOORE, supra n. 75, at 106. Ant-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.

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 re-emerged as Jeffersonian Republicans who now asserted a reading of the constitutional text premised upon the assumption that the document only delegated limited authority to the national government. Id.; see CORNELL, supra n. 56, at 164-168.

81 *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, ___ (1793). The decision of the Supreme Court was overturned by the Eleventh Amendment, which limited federal court jurisdiction in cases where states are a party. See READ, supra n. 11, at 105-107; Randy Barnett, *The People or the State?: Chisolm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1731-1734 (2007) [hereinafter “The People or the State?”].

82 2 U.S. at ___ (Jay, J., concurring).

83 17 U.S. (4 Wheat.) 316 (1819).

84 22 U.S. (9 Wheat.) 1 (1824).

85 See NEWMYER, supra n. 52, at 337-353.

86 “The government of the Union . . . [is] emphatically and truly, a government of the people . . . . Its powers are granted by them, and for their benefit.” McCulloch v. Maryland, 17 U.S. at 404-405. See NEUMAN, supra n. 9, at 60-61 (discussing Marshall’s resistance towards interpretations of the Constitution as a compact).
was a “compact” among sovereign states. Webster agreed with James Wilson that the United States was a single nation from the moment of revolution, before the individual states even existed as separate political entities.

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 anti-compact ideas of John Marshall and Daniel Webster. Delegation ideas also influenced early states rights advocates such as John Taylor of Caroline.

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. 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. As a consequence, Lincoln believed that only the people acting as a whole nation possessed the power to dissolve the union. 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.”

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. Enforcing a textual limit on the power of the federal government to exercise non-delegated powers is consistent with the Framers’ intention to preserve the ultimate sovereign power in “the people.” Recognizing that all humankind can object to overreaching 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. 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 -- a dialogue that

87 See Garry Wills, *Lincoln at Gettysburg* 129-133 (1992) [hereinafter “Lincoln”]; Neuman, supra n. 9, at 78-79. Webster also served as a United States Senator, and his most famous speech in the Senate was a rebuke to the compact theory of the Constitution. See Daniel Webster, *Second Reply to Hayne*, United States Senate, (January 26, 1830).

88 See Lincoln, supra n. 87, at 129-133; Read, supra n. 11, at 110.

89 Lincoln, supra n. 87, at 129-133; Read, supra n. 11, at 110; Newmyer, supra n. 52, at 384-385.

90 See Neuman, supra n. 9, at 57-58; *The People or the State?*, supra n.81, at 1735-1736.

91 See Lind, supra n. 13, at 108 (noting that Lincoln’s Gettysburg Address reflects a conscious attempt to invoke the language of Webster’s famous “Second Reply to Hayne” speech).

92 Lincoln, supra n. 87, at 129-133; Read, supra n. 11, at 117.

93 See Abraham Lincoln, *Message to Congress in Special Session, July 4, 1861*, in Vol. II Speeches and Writings 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.”).

94 See Lind, supra n. 13, at xiv.

95 See *The People or the State?*, supra n. 81, at 1757-1758.

96 See Gordon S. Wood, *The Radicalism Of The American Revolution* 187 (1993) (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 society). There are countless examples where the Framers recognize 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 of John Adams to John Taylor (1814), reprinted in *The American Enlightenment*, supra n. 46, at 222.

97 See Cornell, supra n. 56, at 303-307.
ensures that the Constitution continues to be relevant in an ever changing world\textsuperscript{98}-- has often favored the compact view of the Constitution over the delegation view. Precisely how the compact view came to pre-dominate this debate is the subject of the next Section.

IV. Historical Expressions of the Compact View

The compact view has long exerted an influence over 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 the people. Meanwhile, the compact view has often been used in order to support an expansive scope of federal power in the areas of immigration and foreign affairs -- instances where 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 re-accession to the throne.\textsuperscript{99} 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.\textsuperscript{100} 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.\textsuperscript{101}

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.\textsuperscript{102} Their experience with commercial contracts acculturated the colonists 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.”\textsuperscript{103} It was a natural evolution to come to view the relationship between the people of a nation and their government in similar terms.\textsuperscript{104}

\textsuperscript{98} See Read, supra n. 15, at 169-171.
\textsuperscript{99} See Wood, supra n. 96, at 155-156.
\textsuperscript{100} Mcafee, Bybee & Bryant, supra n. 12, at 5-6.
\textsuperscript{101} Id.
\textsuperscript{102} See Newmyer, supra n. 52, 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].”).
\textsuperscript{103} See Wood, supra n. 96, at 162.
\textsuperscript{104} The compact view also displays the influence the method of biblical interpretation that views the Bible as a compact between God and a chosen people. See Mcafee, Bybee & Bryant, supra n. 16, 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.
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.105 Colonists aggrieved by the arbitrary dictates of a distant 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 considerations.”106 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 towards the American colonies the Crown had forfeited any right to expect their allegiance or loyalty.107

The compact view adopts these influences and assumes a purely contractual source of governmental authority. As applied to the United States 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.108 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 the Constitution, those who advocated the creation of a truly national federal government prevailed over those who

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WOOD, supra n. 96, 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. See id. After independence, economic forces built upon 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 n. 52, at 242; see also id. at 264-266 (discussing the influences on John Marshall’s Contract Law jurisprudence).

In 1774, James Wilson wrote that “protection and allegiance are the reciprocal bonds . . . which connect the prince and his subjects.” WOOD, supra n. 96, at 166. Wilson went on to write, “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.” See id. at 397 n. 41 (quoting Considerations, Vol. II THE WORKS OF JAMES WILSON 736-37 (1967)).

Id. at 165.

MCAFEE, BYBEE & BRYANT, supra n. 12, at 6-8.

See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, ___ (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: IMPERIUM IN IMPERIO 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 to them by their state constitutions. Id. at 8. The United States 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 United States 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 n. 56, at 61-62.
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. 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.

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. 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 in 1798 into a political movement that was premised upon 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. Second, the Federalists firmly believed that opposition to their policies was premised upon, and indistinguishable from, opposition to the Constitution. When 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 as the Alien and Sedition Acts.

109 See Newmyer, supra note 52, at 103.
110 Id. at 105.
111 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 n. 9, at 73-76.
113 Id. Federalist policy was motivated by political considerations to a very great extent. 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 maintaining political power. The authoritarian alien and sedition system was a logical culmination of the Federalist political philosophy.

114 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 n. 1112, at 47. The Act Respecting Enemy Aliens passed 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 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 50-51. 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 attempt to weaken or defame the government and laws of
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. The Secretary of State under President Adams, Timothy Pickering, 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.”

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 “We, the people,” they were referring to a discrete community of individuals who were a party to that document. 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.” These arguments clearly reflect the view of the Constitution as a “compact” that only creates rights enforceable by the parties to the agreement.

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. The Constitution did not delegate a power to expel aliens to Congress any more than it delegated a power to expel natives. While the states might pass laws governing the terms of residence by aliens, Congress could not. The fact that Congress was acting against non-citizens did not save an unconstitutional attempt to exercise a non-delegated power. Republican critics of the law also rejected the argument that the Constitution applied only to citizens. Representative 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.

The Alien Act is significant in our nation’s constitutional history in the conceptualization of the Constitution as a compact. First, Federalist advocates of a 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 the United States. Id. at 66-70. While the Naturalization Act and the Alien Act were an attempt 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.

Miller, supra n. 112, at 164.

Smith, supra n. 113, at 86.

Id.

See Daniel Kastroom, Deportation Nation 59 (2007); Neuman, supra n. 9, at 3, 54-55.

Neuman, supra n. 9, at 68; Kastroom, supra n. 118, at 57.

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.” James Madison, The Alien and Sedition Acts: Address of the General Assembly to the People of the Commonwealth of Virginia (January 23, 1799), reprinted in The American Enlightenment, supra n. 46, at 516. Federalists, in contrast, believed that the distinction between natives and aliens was important. At least insofar as it was directed at non-citizens, 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. See Miller, supra n. 112, at 164.

Smith, supra n. 113, at 71; Kastroom, supra n. 118, at 57.

Smith, supra n. 113, at 72.

Smith, supra n. 113, 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). 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.
assertion that the federal government possessed inherent powers of self-preservation that were not expressed in the constitutional text. These inter-connections between the compact view, the rights of immigrants, and the justification of a non-textual inherent power is a persistent theme in our nation’s history.  

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 Dred Scott v. Sanford. 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. 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. This was the compromise necessary to get the Constitution adopted. 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 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. The

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 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 n. 56, at 238-239. 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.

See NEWMYER, supra n. 52, at 424-425.

See id. at 434 (concluding that John Marshall’s theory of federalism “deferred to the states on the question of slavery”).
original constitutional text is concerned with the power (and lack of power) of the federal government.\textsuperscript{127}

The difficulty facing the majority of the Supreme Court in the \emph{Dred Scott} case was that the Constitution did delegate to Congress the power to legislate for the territories. Therefore, while reliance upon the delegation view might lead to the conclusion that the Constitution offered no protection to slaves located 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 entered into the Constitution if the text required the federal government to treat slaves as “persons.” This argument reduces the Constitution to a contract whose terms are to be defined in accord with the intentions of the parties, whilst ignoring the interests of non-parties to the agreement.\textsuperscript{128}

After the Civil War, the Fourteenth Amendment was adopted in order to overturn the \emph{Dred Scott} decision. The Fourteenth Amendment mandated equality of all persons under the law of the states, thereby fundamentally re-structuring federal-state relations. 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 \emph{Dred Scott}, and this rejection should have put the compact theory to rest.\textsuperscript{129} No longer could the 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

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\textsuperscript{127} Baron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

\textsuperscript{128} See NEUMAN, supra n. 9, at 61.

\textsuperscript{129} Rejection of the compact theory does not threaten the continued vitality of the “states rights” jurisprudence that was often the Supreme Court’s focal point during the term of Chief Justice Rehnquist. Under Chief Justice 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 build up of the content of the Tenth and Eleventh Amendments. See Barnett, supra n.55, at 292-293. Both aspects of this states’ rights approach explicitly rely upon 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 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 use their federal representatives to act upon 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.
immigrants have co-extensive constitutional rights with citizens. Nor did it address whether co-
estensive 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 re-insert 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 whether the Constitution provided any rights
to “outsiders.” This resurrection of the compact view occurred in the context of immigration law.
In 1889, the Supreme Court decided the seminal immigration law case known as the Chinese
Exclusion Case.\footnote{Chae Chan Ping v. U.S., 130 U.S. 581 (1889).} Congress had passed a law barring the entry of Chinese nationals into the
United States. Mr. Chae Chan Ping, the plaintiff alien in the case, argued that Congress could not
pass laws regulating the entry of non-citizens because the constitution did not expressly grant
such a power to Congress. The premise of his argument was that the Constitution leaves it to the
individual states to regulate immigration of persons across borders.\footnote{See Gerald Nueman, The Lost Century of Immigration Law (1776-1875), 93 COLUM. L. REV. 883, ___ (1993) (arguing that state laws served the function of regulating immigration during the first century of American independence).}

      The argument put forth by Mr. 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’ authority was a non-
citizen. 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 Mr. Chae Chan Ping’s entry.

      Justice Field’s opinion for the majority of the Court holds that Congress does indeed
possess the power to exclude non-citizens 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 argues that the locus of the federal government’s
immigration power lies outside of the Constitution, in the sovereign power of nations. Obviously,
this interpretation is problematic. While occasionally invoked by the Supreme Court during its
history,\footnote{See, e.g., United States v. Curtiss-Wright, 299 U.S. 304 (1936).} the idea that the federal government derives any authority from sources outside of the
constitutional text has been criticized by legal scholars.\footnote{See David Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory, 55 YALE L.J. 467, ___ (1946); but see JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 ___ (2005) [hereinafter “THE POWERS OF WAR AND PEACE”].}

      Second, Justice Field suggests 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. 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.\textsuperscript{134} 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.

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 \emph{Chinese Exclusion Case} to a greater extent than the first two rationales because constitutional limits on government power do not apply to non-members. Non-citizens 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” that is entitled to avail itself of the constitutional bargain.

The possibility that the compact view provides an unexpressed rationale in the \emph{Chinese Exclusion case} is was furthered in a subsequent case. \emph{Fong Yue Ting v. United States}\textsuperscript{135} extended and expanded 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. 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 non-citizens within our borders. The opinion of the majority of the Court upheld the power of Congress to pass deportation laws, relying upon the first and second rationales expressed in Justice Field’s opinion in the \emph{Chinese Exclusion Case}.

Justice Field wrote a vigorous dissent in the \emph{Fong Yue Ting} case. In light of his prior opinion for the majority in the \emph{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 extra-constitutional sovereign power, or, in any event, that the Constitution impliedly delegates the power to regulate immigration to the federal government as a type of “foreign affairs.” Why, then, does he draw a distinction between the congressional power to exclude and the congressional power to deport?\textsuperscript{136}

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 Justice Field. The majority considered non-citizens to be present within our borders at the pleasure of Congress, and it denied the existence of any constitutional command for Congress to treat non-citizens fairly if they are to be expelled. For the majority, therefore, the presence of Mr. 134 Indeed, the very congressional statute that barred the plaintiff from entering the United States in the \emph{Chinese Exclusion Case} was passed in contravention of guaranteed rights of re-entry that had been acceded to by the executive branch in a treaty with China.  
135 \emph{Fong Yue Ting v. U.S.}, 149 U.S. 698 (1893).  
136 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. \textit{See Kanstrom, supra} n. 118, at 97.
Fong Yue Ting within our borders was not presumptively sufficient to bring him within the constitutional compact. Significantly, however, the majority did not rely upon a compact rationale in deciding the case. Instead, the rationale of the *Fong Yue Ting* majority builds upon the holding of the *Chinese Exclusion Case* in order to hold that the immigration power is founded upon the sovereign 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.\(^\text{137}\) 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. The equality of rights promoted by the Court during this period can be justified under either a delegation lens or through a compact lens. Under a delegation view, the federal government lacks the power to infringe upon 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 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*\(^\text{138}\) demonstrates the Supreme Court’s acceptance of the inclusive nature of the rights guaranteed to all individuals standing within the national boundary. The Court’s holding applied the command of equal protection under the law set forth in the Fourteenth Amendment to strike down a state law that discriminated against non-citizens. Similarly, in *Yamataya v. Fisher*,\(^\text{139}\) the Supreme Court held that the constitutional guarantee of due process applied to non-citizens present within our nation’s borders. In the case of *Wong Wing v. United States*,\(^\text{140}\) 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.\(^\text{141}\)

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137 This anomalous characteristic of immigration law has come to be known as the *plenary power doctrine*. *See also* Nishimura Ekiu v. United States, 12 S. Ct. 336 (1892).

138 118 U.S. 356 (1886).

139 189 U.S. 86 (1903).

140 163 U.S. 228 (1896).

Up 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.\footnote{Even \textit{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. The \textit{Korematsu} Court was simply not brave enough, during wartime, to follow this premise to its logical conclusion and rule the internment unconstitutional.} 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 period, the Supreme Court decided a series of immigration cases that invoked the plenary power doctrine and that drew upon the compact theory to deny the reach of the Constitution \textit{outside} our borders. These Cold War cases made clear that the underlying rationale beneath the plenary power doctrine was not judicial deference to Congress’ 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 non-members of the compact. For example, in \textit{United States Ex Rel. Knauff v. Shaughnessy},\footnote{338 U.S. 537 (1950) (holding “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”).} the Court ruled that the German bride of an American soldier could be prevented from making her initial entry into the country without any explanation and with virtually no opportunity to be heard. In \textit{Shaughnessy v. United States Ex Rel. Mezei},\footnote{345 U.S. 206 (1953).} the Court held that the same unfettered government power could be applied to prevent the re-entry of a lawful resident alien of long standing who was returning from a trip abroad. 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 \textit{within} our borders from the “community” entitled to assert constitutional protection.\footnote{\textit{See Louis Henkin, The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and its Progeny}, 100 HARV. L. REV. 853, 862-863 (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. In fact, it is the mainstream that has been influenced by these outlier cases.} This process can be observed in cases that considered whether \textit{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 where the Supreme Court has questioned whether even \textit{lawful} immigrants within our borders should enjoy the identical constitutional rights 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. The Supreme Court’s struggle reflects an unsuccessful attempt to integrate the extra-constitutional dimension of the plenary power doctrine within the normal constitutional framework.

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 difficulty in maintaining 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 for lawful residents who seek to re-enter 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.

Nothing in the constitutional text supports the idea that different populations within our borders possess 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 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.

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” who is part of the bargain with the federal government. Because the plenary power doctrine is tied to extra-constitutional 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 political community and instead to become more selective regarding the groups within our borders who qualify for membership.

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

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. He based this conclusion on the assertion that the words “the people” in the Fourth Amendment referred to a specific community of persons who

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146 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 without positing a convincing rationale. See also Graham v. Richardson, 403 U.S. 365 (1971).


possess cognizable ties to the United States. 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. Although his reasoning was intended to limit the reach of the Constitution to aliens outside of the United States 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 violation of the law can be excluded from “the people” who can claim the protections of the Constitution.

The legislative and executive branches of the federal 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, applicable to aliens who lack proper documentation, that operate to remove aliens under streamlined proceedings and without the benefit of a hearing. The 1996 legislation also granted the Attorney General the authority to expand the use of expedited procedures. In 2004, the Department of Homeland Security announced that it was doing just that. The new policy permits the deportation without hearing of non-Mexican aliens apprehended inside the United States, so long as their apprehension occurred within 100 miles of the United States border and less than 14 days after the alien’s illegal entry into the country. 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 upon 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. In particular, Congress’ creation of the “aggravated felon” provisions of the immigration law fostered the application of extraterritorial norms to lawful border crossers. These provisions operate to substantially reduce the procedural rights possessed by those who are deemed to fall within the perpetually expanding definition of “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.

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149 The First, Second, Ninth and Tenth Amendments also reference “the people.”
150 Mr. Verdugo-Urquidez’ 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.
151 The First, Second, Ninth and Tenth Amendments also reference “the people.”
152 See id. at 227-228 (discussing the expanding definition of the “aggravated felon” category between 1988 and 1994).
153 Id. (“[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.”).
The Court initially expressed some discomfort at this prospect when it decided the case of *Zadvydas v. Davis*\(^{155}\) in 2001. Kestutis Zadvydas immigrated to the United States from a displaced persons camp at the age of eight. 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. 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 Mr. Zadvydas. Although section 241(a)(6) of the INA provides that a removal order must be effectuated within 90 days, it also provides that the Attorney General can determine that certain aliens “may be detained beyond the removal period.” 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. 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.

Justice Breyer’s majority opinion held that it would raise constitutional concerns under the Fifth Amendment to interpret INA section 241(a)(6) to grant 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. The doctrine of substantive due process requires that government action to deprive an individual or 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 continuing to detain Mr. Zadvydas. 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. Given the “constitutional problem” that would arise if the statute were interpreted to permit indefinite detention, Justice Breyer held that the language of INA section 241(a)(6) should be read to authorize detention beyond 90 days only so long as the removal of the alien is “reasonably foreseeable.”

Justice Scalia dissented. He viewed Mr. Zadvydas’ situation through the lens of the compact 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.” Instead, such an alien stands in the exact same relation to the United States as 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.\(^{156}\)


\(^{156}\) While written in broad language that clearly invoked constitutional concerns as a backdrop for the Court’s interpretation of INA sec. 241(a)(6), the majority opinion 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 sec. 241(a)(6) to the situation of aliens being detained as inadmissible at the border. In *Clark v. Martinez*, Justice Scalia wrote a majority opinion that 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. 543 U.S. ___ (2005). 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 90 days merely underscores the mistake the majority made in *Zadvydas* when it interpreted the statute to grant non-citizens rights that approach those accorded to “the people” by the Constitution. Non-citizens *outside* of the border can often make claims of membership that are equally compelling as the claims of non-citizens *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
When the Supreme Court next considered the due process rights of non-citizens, in the case of *Demore v. Kim*,[157] 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. These convictions fell within the definition of “aggravated felonies,” and in INA 236 Congress provided that all aliens convicted of aggravated felonies must be taken into custody and detained during the pendency of their removal hearings. Mr. Kim challenged his detention under the doctrine of substantive due process. He argued that the federal government had to have reason to detain him while he awaited his deportation hearing. 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. 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 they had already ceased to be part of the national compact. The Fifth Amendment simply placed no constraints upon the procedures that Congress chose to employ. Justice Rehnquist’s majority opinion adopts the same compact view of the Constitution as 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 forfeiting 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. 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 in detention after the entry of a removal order and whose removal is no longer practically attainable. Very few cases will arise under this limited factual context.

The Supreme Court’s treatment of the alien in *Demore* serves to strengthen the application of the “compact” view within our borders. The Court’s decision suggests that a non-citizen 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 a foreigner abroad.[158] Mr. Kim’s criminal conviction acted to expel him from the community of “the people.” He therefore lost the right to demand that the federal government act in compliance with the limits imposed upon it by the substantive due process clause of the Fourteenth Amendment.[159]

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[158] While both *Zadvydas* and *Demore* frame their holdings as 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 (1990).

[159] See DAVID COLE, ENEMY ALIENS 224 (2003) (noting the difference in the due process rights accorded to foreign nationals within our borders) [hereinafter “ENEMY ALIENS”].
Congress can presumably identify whole categories of individuals and declare that they are no longer in privity with the federal government. For example, the *Demore* case implies that engaging in conduct defined to constitute an “aggravated felony” terminates that 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 *Demore* 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 September 11, 2001 attacks was the Authorization for the use of Military Force Against September 11 Terrorists (AUMF). 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. President Bush invoked the AUMF when he issued an Executive 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. Although the original Executive 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.

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. These individuals could be held and interrogated for however long the government considered them to either possess useful intelligence or to 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.

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161 *Id.* at sec. 2.
163 In *Hamdi v. Rumsfeld*, 542 U.S. 507, 601 (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.” In response to this decision, the Department of Defense established bodies called Combatant Status Review Tribunals (CSRT) that were intended to hear challenges to an enemy combatant designation by all detainees, whether citizen or not. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that non-citizen 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. By focusing on the content of the right of habeas corpus under the Constitution, the Supreme Court avoided consideration of whether non-citizen detainees possessed the constitutional right of due process. See *Boumediene* at ___ (Roberts, C.J., dissenting). Therefore, the extent to which the Constitution grants non-citizen detainees any rights beyond habeas corpus remains undecided to this day.
conducted in federal court, nor would such persons be entitled to claim the international law protections accorded to prisoners of war. 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 their detention.\textsuperscript{164}

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.\textsuperscript{165} 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").\textsuperscript{166} This Convention, ratified by Congress in 1990, prohibits the use of torture under all circumstances.\textsuperscript{167}

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\item[164] 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 law. Unlike the case with "aggravated felons," however, the category of "unlawful enemy combatant" has the potential to include within it citizens as well as non-citizens. See \textit{War By Other Means}, \textit{supra} n. 65, at 131-133. 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 \textit{Enemy Aliens}, \textit{supra} n. 159, at 3-4 & 43-46. While at 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 to conduct trials of United States citizens, not the military commissions that were conducting trials of Guantanamo detainees designated as unlawful enemy combatants. See \textit{id.} at 144; see, e.g., \textit{Al-Marri v. Pucciarelli}, 534 F. 3d 213 (4th Cir. 2008), \textit{vacated sub. nom.}, \textit{Al-Marri v. Spagone}, 129 U.S. 1545 (2009). It is troubling to consider that the existence or non-existence 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. \textit{Cf. Kanstrom, supra} n. 118, at 18 ("Citizens . . . may be transformed into foreigners in order to be ostracized and banished.").

\item[165] Using the same preventive rationale, the Bush Administration also “disappeared” certain high value suspects into C.I.A. operated “black sites” – a series of prisons in undisclosed global locations where the government’s conduct could not be monitored and where the suspect was completely cut off from the outside world. In other instances, where these secret detention centers and coercive methods were not deemed sufficient, the Bush Administration “rendered” suspects to be interrogated by agents of foreign governments who possessed even fewer scruples about their methods. \textsc{David Cole & Jules Lobel, Less Safe, Less Free}: 3 (2007) [hereinafter “\textit{Less Safe}”].

\item[166] \textit{See id.} at 34-36. For a defense of the legality of these interrogation methods, see \textit{War By Other Means}, \textit{supra} n. 65, at 165-203. For criticism of Yoo’s reasoning, see \textsc{Less Safe, supra} n. 165, at 56-57. For an argument that customary international law is not binding on the President, see \textsc{Powers Of War And Peace, supra} n. 133, at 171-172.

\item[167] The universality of the CAT prohibition on torture would seem to be beyond doubt. \textit{See Less Safe, supra} n. 165, at 55. However, the Bush Administration advanced its own interpretation of the CAT that gives 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.

In putting forth this interpretation, Gonzales relied upon the of statutory construction of the congressional legislation ratifying the Convention Against Torture. 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
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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. For example, while Congress responded to the September 11 attacks by passing the USA Patriot Act, which broadened the government’s ability to wiretap and search individuals without any showing of probable cause that they had engaged in criminal activity, 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 FISA, allowing the National Security Agency (NSA) to spy on Americans without first obtaining a court order. The Bush Administration also embarked upon a large scale data mining effort under the auspices of the

where those practices had had been upheld by the federal courts as permissible under the Eighth Amendment. 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. See id. at 34-35. During his confirmation, Gonzales argued that Congress’ 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 Amendments rights possessed by foreign detainees. See id. at 35. Since the United States 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 United States government’s treatment of foreigners held abroad. See 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 where that interpretation appears contrary to the intent of the Senate. See POWERS OF WAR AND PEACE, supra n. 133, at 192-195.

After Gonzales was confirmed as Attorney General, Congress passed the McCain Amendment in order to clarify the effect of its 1990 CAT reservation on domestic law. 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. LESS SAFE, supra n. 165, 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 upon an interpretation of congressional legislation passed as part of the ratification of the CAT. Instead, the sole justification relied upon 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. See id.

168 See generally, Bruce Fein, A Defining Constitutional Moment, WASH. LAWYER, vol. 20 no. 9 at 35 (May 2006) (discussing legality of Bush Administration’s expanded surveillance efforts).

169 See WAR BY OTHER MEANS, supra n. 65, at 71-73; ENEMY ALIENS, supra n. 159, at 66-68.

170 See LESS SAFE, supra n. 165, at 31; WAR BY OTHER MEANS, supra n. 65, at 73-74.

171 LESS SAFE, supra n. 165, at 32. While the warrantless NSA surveillance program authorized by President Bush started with the premise that only extra-territorial conversations would be monitored, it eventually led to the monitoring of some conversations within the United States. See ATHAN THOHRIS, 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. LESS SAFE, supra n. 165, at 43. In a similar example of executive branch disregard for FISA procedures, FBI 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 THEOHARIS, supra, at 255-256 & n. +; see generally SUSKIND, supra n. 15, at 36-41.
the time of the American Revolution, minus whatever military power the Constitution expressly
executive branch possesses all of the military power that was possessed by the King of England at
authorization must have some constitutional basis.  While seemingly separate undertakings, both of 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. The September 11 attacks had exposed how little the United States 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. Therefore, the overriding purposes behind the detention policy were forward 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 to this day, what is undisputable is that any action taken by the President without specific congressional authorization must have some constitutional basis. 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 upon 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. 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 power to limit the President’s definition of a terrorist threat, lacks power to limit the amount of military force that the President determines is appropriate to respond to that threat, and lacks power to limit the President’s decisions as to the method, timing or nature of the a military response. According to Yoo, the Constitution preserves these decisions for the President alone, without congressional interference.

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 Constitution expressly

\[172 \text{ See } \textit{War By Other Means}, \textit{supra} n. 65, at 99, 107-108.\]

\[173 \text{ See } \textit{Less Safe}, \textit{supra} n. 165, at 51. \text{ As stated by John Yoo, } \text{“[m]ilitary detention is . . . one of our most important sources of intelligence, which in turn is our most important tool in this war.” } \textit{War By Other Means}, \textit{supra} n. 65, at 151; see also id. at 147.\]

\[174 \text{ See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (Black, J.) (“The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”).}\]

\[175 \text{ See Robert D. Sloane, } \textit{The Scope of Executive Power in the Twenty-First Century: An Introduction}, 88 B.U. L. REV. 341, 341-351 (2008); see generally } \text{\textit{Steven Calabresi & Christopher S. Yoo, The Theory Of 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. \textit{See generally Garry Wills, Bomb Power} 209-236 (2010) [hereinafter “Bomb Power”].}\n
\[176 \text{ See } \textit{Jack Goldsmith, The Terror Presidency} 98 (2007) (quoting Memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001); see generally } \textit{POWERS OF WAR AND PEACE}, \textit{supra} n. 133, at 17-24.\]
grants to Congress. The scope of the executive power is therefore defined only by the scope of
the President’s responsibilities. The logical consequence of the theory of the unitary executive
is that the President has 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.

The influence of the compact theory is reflected in two separate premises that underlie
the theory of the unitary executive in two ways. 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. In other words, natural rights are not inalienable but
rather can be bargained away by one generation for itself and for their descendants.

For example, John Yoo’s argues that the Fourth Amendment of the Constitution simply
does not apply to military searches intended to uncover al Qaeda activities within the United
States. 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. 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.”

In 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 outside threats. Of course, whether the nature of the threat merits this surrender,

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177 See GOLDSMITH, supra n. 176, at 97; see also Curtiss-Wright Export Corp. v. United States, 299 U.S.
304 (1936); see generally POWERS OF WAR AND PEACE, supra n. 133, at 39-45 (locating the source of the
broad executive branch power over foreign affairs in the 18th century conception of the authority of the
Crown).
178 See GOLDSMITH, supra n. 176, at 79.
179 See Reinstein, supra n. 38, at 299-304; see, e.g., THE FEDERALIST No. 69 at 398 (1987) (A. Hamilton)
(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”) (emphasis in original); see generally BOMB POWER, supra n. 175, at 209-236
(criticizing both the theory of the unitary executive and its application in legal memos written by John
Yoo).
180 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 JOHN YOO, CRISIS AND COMMAND xii-xv (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 transgressing constitutional bounds. See, e.g., CARNES LORD, THE
MODERN PRINCE: WHAT LEADERS NEED TO KNOW NOW 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., 343 U.S. at 649-650 (Jackson, J.) (“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.”).
181 WAR BY OTHER MEANS, supra n. 65, at 82.
182 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
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.” 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. That framework, according to Yoo, only applies to the relationship between the people and their government during peacetime. 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 projects onto its enemies.

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 that therefore 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. Under this theory, the executive branch alone

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183 WAR BY OTHER MEANS, supra n. 65, at 16.
184 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 members.”).  
185 Id. at 16.  
186 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 U.S. 1545 (March 6, 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.

534 F.3d at 247.
187 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.
possesses the authority to decide which individuals receive enemy combatant status.¹⁸⁸ Yoo’s explanation of the theory 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.¹⁸⁹

V. 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 have 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 upon 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.¹⁹⁰ 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 the imposition of an individual mandate to purchase private health insurance.¹⁹¹ 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.¹⁹²

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

¹⁸⁸ 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 n. 176, at 110. Jack Goldsmith, former Assistant Attorney General at the Office of Legal Counsel in the time period immediately following the formulation of the Bush Administration’s policy on military tribunals and interrogation techniques, defends this result. He writes, “[t]he 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 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.

¹⁸⁹ See ENEMY ALIENS, supra n. 159, at 69-71 (discussing citizenship stripping provisions of the draft Domestic Security Enhancement Act); see also Al-Marri v. Wright, 487 F.3d 160, 186-187 (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 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.”).

¹⁹⁰ See Andrew Napolitano, Unconstitutional Bailout, N.Y. SUN, July 17, 2008.


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: “[a]s metes and bounds of government, [charters] transcend all other land-marks, because every public usurpation is an encroachment on the private right, not of one, but of all.”193 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 non-parties.194 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 upon 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 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.195 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.196 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.197

193 James Madison, NATIONAL GAZETTE (Jan. 19, 1792), reprinted in THE AMERICAN ENLIGHTENMENT, supra n. 46 at 508. It is because of this common interest that all citizens share 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.
194 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.
195 See BERNARD CRICK, IN DEFENSE OF POLITICS ____ (1962); see also READ, supra n.11, at 116. 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 n. 52, at 345.
196 READ, supra n. 11, at 116.
197 Id. (citing EDMUND MORGAN, INVENTING THE PEOPLE 13-14 (1988)).
The delegation view of the Constitution inspires government officials to adopt policies that subject all official action to public accountability and control. 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 president outside of congressional control. Other than the replacement of 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. 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 compass of those officials. For example, waterboarding and other extreme forms of interrogation are viewed as immoral by many persons. 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 their minds up to be or do evil at all.” 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. Structural limitations that prevent absolute power from being lodged in the hands of any government official provide greater security for human rights than a blind faith in the moral compass of the men and women in government. The delegation view was favored by the Framers of the Constitution because it provides this very measure of security.

After decades in 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

198 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 anti-terrorism policies. See LESS SAFE, supra n. 165, 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 BOMB POWER, supra n. 175, at 137-196.
199 See LESS SAFE, supra n. 165, at 5.
200 The debate over the morality of torture continues to this date. See Mark Oppenheimer, Catholic Defender of Waterboarding Gets an Earful From Critics, N.Y. TIMES, Feb. 27, 2010 at A15.
201 HANAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL ___ (1964).
203 A faith in the moral compass of individuals cannot societies from committing immoral acts. See JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY ___ (2000). 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 (October 29, 2000).
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 which underscores the differences between reading the Constitution as a charter or a compact.