

Making the Case
That People Possess an Inalienable Right to Local Self-Governance

FROM

The Memorandum of Law and History in Support of
Defendant's Motion to Dismiss

**PENN RIDGE COAL, LLC and
ALLEGHENY PITTSBURGH COAL
COMPANY**

Plaintiffs,

v.

BLAINE TOWNSHIP

CIVIL ACTION NO. 08-1452

**Donetta W. Ambrose
United States District Judge**

Community law-making as the legitimate expression of self-government by people *where they live* has generated mostly negative attention from the courts and legislatures, state and federal, since the time of the American Revolution. Given the mythic quality attached to the idea of “democracy” in America, it is strange that the notion of communities making important decisions with the force of law is so foreign to American jurisprudence.

The American Revolution can fairly be characterized as nothing less than a rejection by American communities of the denial of local self-government by the British Empire. As noted by historian Jack P. Greene, “to emphasize their subordinate status. . . [English] authorities always insisted that the [colonial]

assemblies existed not as a matter of right - not because they were necessary to provide for colonials their just rights as Englishmen - but only through the favor of the Crown.”¹

That royal deprivation of community self-governance over issues of immediate local concern formed the impetus and rationale for people to ignore - and eventually to openly defy as illegitimate - British laws and expectations of compliance with those laws. Greene’s history of colonial governance before the American Revolution illustrates that the conflict arose predominantly over the English [“metropolitan,” as Greene refers to it] government’s repudiation of the natural right of communities to community self-government:

To the very end of the colonial period, metropolitan authorities persisted in the views that colonial constitutions were static and that the lower houses were subordinate governmental agencies with only temporary and limited lawmaking powers --- in the words of one metropolitan official, merely ‘so many Corporations at a distance, invested with an ability to make Temporary By Laws for themselves, agreeable to their respective Situations and Climates.’

Rather than consciously working out the details of some master plan designed to bring them liberty or self-government, the lower houses moved along from issue to issue and from situation to situation, primarily concerning themselves with the problems at hand and displaying a remarkable capacity for spontaneous action, for seizing any and every opportunity to enlarge their own influence.

Because neither fundamental rights nor imperial precedents could be used to defend practices that were contrary to customs of the mother country or to

¹ Jack P. Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History* 58 (1994).

the British constitution, the lower houses found it necessary to develop still another argument: that local precedents, habits, traditions and statutes were important parts of their particular constitutions and could not be abridged by a royal or proprietary order.

Between 1689 and 1763, the lower houses' contests with royal governors and metropolitan officials had brought them political maturity, a considerable measure of control over local affairs, capable leaders, and a rationale to support their pretensions to political power within the colonies and in the empire. The British challenge after 1763 threatened to render their accomplishments meaningless and drove them to demand equal rights with Parliament and autonomy in local affairs, and eventually to declare their independence. At issue was the whole political structure forged by the lower houses over the previous century. In this context, the American Revolution becomes in essence a war for political survival, a conflict involving not only individual rights, as historians have traditionally emphasized, but assembly rights as well.

(*Id.* at 46-47, 58, 163, 170, 173 176, 183.)

During the late seventeenth and early eighteenth centuries, royal and proprietary governors of chartered colonies, who were to have been locally administering the power of the central British government, lost significant amounts of their coercive power over American communities. Apart from sheer distance from London, the English Civil War saw the agitation of groups such as the Levelers, Diggers, Quakers and Ranters for civil liberties and self-government. On the basis of false promises that they would see such reforms, they helped propel Oliver Cromwell's Parliament into power and made it possible for the rebellious

legislature to behead a king. These and other events contributed to turning the empire's attention away from the American colonies.²

With colonial governors increasingly dependent upon dissipating community cooperation, the autonomy of local assemblies blossomed. Two years before the Declaration of Independence was adopted by the Continental Congress, war had already been initiated against the oppressive British Empire by communities in western Massachusetts. Historian Ray Raphael has recounted how, in 1774, residents of several Massachusetts Towns, including Worcester, Springfield, and Great Barrington, forced appointed British officials to resign their posts:

When British Regulars fired upon a small group of hastily assembled patriots on the Lexington Green, they were attempting to regain control of a colony they had already lost. The real revolution, the transfer of political authority to the American patriots, occurred the previous summer when thousands upon thousands of farmers and artisans seized power from every Crown-appointed official in Massachusetts outside of Boston.

. . .

The Revolution of 1774 can be seen as the crowning achievement of communal self-government in colonial New England. More than ever before, people assumed collective responsibility for the fate of their communities.

Above all, the revolutionaries of 1774 pioneered the concept of participatory democracy, with all decisions made by popular consent. Half a century

² See Greene at 36-45, and particularly, at 83-84: "...as Carter has pointed out, another consequence of the [English] revolution was 'a distinct, though not complete, withdrawal of central authority from local affairs.'" (quoting Jennifer Carter, "Revolution and the Constitution," in Geoffrey Holmes, ed., *Britain and the Glorious Revolution, 1689-1715* at 53 (1969)).

before the so-called Jacksonian Revolution, they seized control of their government. While more learned patriots expounded on Lockean principles, these country folk acted according to those principles by declaring their social contract with the established government null and void. Although the consequences were frightening and potentially disastrous, the townfolk of Massachusetts were the first American colonists to follow revolutionary rhetoric to its logical conclusion.

All authority derives from the people, they proclaimed, as they deposed British officials. As much as any revolutionaries in history, they applied this statement reflexively to themselves. They abrogated no authority as they went about their business.

Ray Raphael, *The First American Revolution: Before Lexington and Concord* at 1, 218-219 (2002).

New England's role in leading the rest of the colonies toward independence from the British Empire is entirely attributable to the local habits and traditions of their self-governing communities. While elsewhere in the colonies, Committees of Correspondence and Congresses were devised as ad hoc community governing bodies to replace chartered colonial governments and municipal corporations, more inclusive and participatory local assemblies and town meetings were already well established in New England. It was this tradition – a rejection of the traditional English municipal corporation premised entirely on promoting commerce, rather than on self-governance - that formed the basis for the American Revolution. As historian Jon Teaford explains:

The basic unit of both urban and rural government in New England was the town...By the mid eighteenth century, each of these bodies had reviewed the respective merits of the town and municipal corporation and had specifically rejected the latter as an instrument of urban rule. For New Englanders had

grown accustomed to the freedom of unfettered commerce and the privilege of direct participation in town meetings, and they were not ready to sacrifice these for a government of aldermen, councillors, markets, and monopolies.

Jon C. Teaford, *The Municipal Revolution in America: Origins of Modern Urban Government, 1650-1825* at 37 (1975).

When the American people declared independence from Great Britain in 1776, they did so with a fundamental document that marked the first time in western history that a nation state founded itself upon the inalienable right of the people to govern themselves. That document, the American Declaration of Independence, was not composed in a vacuum through the spontaneous inspiration of the colonial gentry. Before Thomas Jefferson and his committee penned it, Towns, Counties and Colonial Assemblies throughout the American settlements had drafted and adopted their own local declarations of independence. After adopting them, they gave them in varying forms to their delegates, and sent them to the Continental Congress with instructions to support a single Declaration of Independence for all the colonies.

Pauline Maier, in her book about the making of the Declaration of Independence, writes:

There are, in fact, at least ninety documents in that category, and perhaps still more waiting to be found. Most have been forgotten under the influence of our national obsession with ‘the’ Declaration of Independence, although the bulk of them were published almost a century and a half ago, scattered through the pages of Peter Force’s voluminous *American Archives*.

....

...the differences that distinguished one set of instructions and resolution from another proved relatively insignificant. For all practical purposes, the contents of the various state and local resolutions on Independence are virtually identical...They characteristically 'empowered' their representatives to 'concur with the Delegates of the other Colonies in declaring Independency' . . .

Pauline Maier, *American Scripture: Making the Declaration of Independence*, at 48-49, 74-75 (1998).

The resulting document, now the cornerstone on which an independent America has been built, said:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration of Independence, ¶ 2 (U.S. 1776).

Thomas Jefferson, the primary author of this document, packed many principles into these sentences. Government receives its power only from the consent of the governed, governmental power is constrained by foundational principles imposed by the people, and the people have the right to alter or abolish government that is destructive of the people's fundamental rights. These principles on the source, scope, and abolition of governmental power are nothing less than a

statement of the inalienable right of self-government, a right held by all people in a free society.

The Declaration reflected the intent and values of the people who would have to fight to see it realized. It purported to secure not only the “consent” of the governed, but also to guarantee the participating will of the people over governing decisions having direct effect within and upon their communities. Among the reasons for separating from the British Empire (personified by the King), these were stated unequivocally, declaring that separation was necessary because

He has refused his Assent to Laws, the most wholesome and necessary for the public Good.

[He has] suspend[ed] our own Legislatures and declar[ed himself and others] invested with Power to legislate for us in all Cases whatsoever.

The Declaration of Independence, ¶¶3, 24 (U.S. 1776)

The Declaration’s language on the right to self-government was a fundamental departure from prior statements on the rights of citizens. Whether in the Magna Carta of 1215, the Pennsylvania Frame of Government of 1682, or the Pennsylvania Charter of Privileges of 1701, prior foundational documents acknowledged only specific rights concerning property, religion, criminal procedure, and other aspects of individual freedom³ in the context of a civil

³ Freedom, at least, for the minority of humans counted as “free persons” at the time. Women, Native Americans, Slaves, indentured servants, white males without property, and others were not afforded those protections.

structure devoid of community freedom. The Declaration of Independence was the first foundational document in western history to recognize - at least in theory - the fundamental notion that people as a community have a civil right to self-government that cannot be alienated to any person, power, or governmental institution.

Following the American Revolution, this right to self-governance was codified when the royal proprietorships and colonial corporations were dissolved and replaced by constitutionalized states. During this process, people acted from within self-governing municipal units of government. The classic study of the first constitutions drafted by Americans during the Revolutionary era has this to say:

...In the Whig theory of social contract, 'the people' were the final authority to which all political power reverted in cases of flagrant abuse of delegated governmental power. But in the actual assumption of political power, no unit as vast and amorphous as 'the people' could possibly act as the vehicle of the political process. It was instead the remarkably stable territorial units of towns, cities, counties, and colonies that took control. The economic, political, and, in the broadest sense, social authority established within these familiar units did not actually melt away in a single stroke of revolutionary integration. Indeed, the system of political representation, which was generally accepted despite cries of 'Anarchy!' and 'Mob rule!' was itself based on the continuing existence of this local authority.

The very form of the organized resistance of the colonists was determined by a clear sense of the independence of territorial units that had evolved during the past 150 years. The borders England had drawn between the colonies continued to be respected as political demarcation lines even during the struggle against the mother country. Perhaps even more important for building a new governmental system was the integrity of the smaller units, called counties or districts in different colonies, and of the lowest level of political organization, cities, towns, townships, and parishes. All these units

remained intact during the Revolution, and only the quasi-feudal manors in the Hudson River valley disappeared as political entities.

See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* at 4-5, 29-30 (1980).

When state governments gathered to form a national American government, the Federalists sought to construct a preemptive, centralized federal government, while the Anti-Federalists sought to preserve the right of self-government at the state level. This struggle, won by the Federalists in most respects, set the stage for a preemptive federal/state relationship which then influenced and steered the development of a preemptive state/local relationship. Thus, the counter-revolutionary tendencies of federalism undid the community self-governing institutions and traditions that the Revolution had established.

Before the 1830s, Hendrik Hartog tells us, “the law of municipal corporations had not been invented,” and the courts had rarely ruled on issues about the nature and scope of local government authority.⁴

Turning to models of governance pioneered in the colonial area, federalist politicians worked steadily until the state-municipal relationship came to look eerily similar to the one established earlier by Parliament’s Board of Trade over the

⁴ Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* at 184 (1983).

American colonies. Possessing the power to revoke local laws and charters, the Board had

articulated a cluster of working assumptions about the nature of the relationship between Britain and the colonies... The first and most fundamental was implied in the familiar parent-child metaphor employed increasingly to describe the metropolitan-colonial connection. If England was the mother country and the colonies were her offspring, it clearly followed that the colonies were dependents, who needed the protection of, and who were obliged to yield obedience to their parent state. In any conflict of wills or judgment, the colonies had to defer to the superior strength and wisdom of the metropolitan government.”⁵

Former railroad bond lawyer and later Iowa Supreme Court Justice John Forrest Dillon had the dubious honor of codifying that prevailing argument as the frame for the new state-municipal legal framework. “Dillon’s Rule” continues to serve as legal shorthand for usurped local governing rights under which American communities continue to struggle for democratic survival. As Dillon explained,

It must be conceded that the great weight of authority denies *in toto* the existence, in the absence of special constitutional provisions, of *any inherent right of local self-government which is beyond legislative control*. Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation ... the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, to phrase it, the mere tenants at will of the legislature.

⁵See Greene at 56.

It is not necessary to a municipal government that the officers should be elected by the people. Local self-government is undoubtedly desirable where there are not forcible reasons against its exercise. But it is not required by any inexorable principle.

John Forrest Dillon, LL.D, *Commentaries on the Law of Municipal Corporations*, at 154-156 (5th Ed. 1911) (emphasis in original).⁶

This parallel between the governance of American colonies by the British Empire, and of our municipalities by the Commonwealth of Pennsylvania today, reveals the incompatibility of a colonial governing framework with one premised on the principles of self-government. The impulse to throw off the bonds of monopolistic governance, whether monarchical, aristocratic or incorporated, more truly comports with American ideals of justice than the structure of law under which municipalities, ruled by preemptive state fiat, are pitted against the rights of publicly chartered, privileged and empowered -- but privately governed -- business corporations.

⁶ For a sense of the prevailing attitude among Dillon's contemporary municipal "reformers" see Martin J. Schiesl's account. He writes:

Simon Sterne, a reform lawyer and member of the Tilden commission [formed in 1875 to investigate the Tweed ring in New York], argued in 1877 that the 'principle of universal manhood suffrage' only applied to 'a very limited degree' in municipal administration because the city was 'not a government, but a corporate administration of property interests in which property should have the leading voice.' In the same vein, Francis Parkman saw the notion of 'inalienable rights' as an 'outrage of justice...when it hands over great municipal corporations...to the keeping of greedy and irresponsible crowds.'

Martin J. Schiesl, *The Politics of Efficiency: Municipal Administration and Reform in America: 1880-1920* at 9 (1977).

Blaine Township is not alone among the disaffected municipalities of Pennsylvania, or indeed, of this nation. The struggle for self-government on issues of direct import to communities is long-standing. More than one hundred years ago, local government reformers tried to drive first principles to the forefront of the struggle for community rights. Frederic C. Howe's words of a century ago make clear that Blaine Township's adoption of self-governing local laws is part of an enduring campaign for fundamental rights⁷:

This agitation for home rule is but part of a larger movement. It is more than a cry for charter reform; more even than a revolt against the misuse of the municipality by the legislature. It partakes of a struggle for liberty, and its aim is the enlargement of democracy and a substitution of simpler conditions of government. It is a demand on the part of the people to be trusted, and to be endowed with the privileges of which they have been dispossessed... The state at large can have no more interest in [local] matters than it has in the methods of the corporations which it creates."

Frederic C. Howe, *The City: The Hope of Democracy* at 167-168 (1905).

The people's right to self-governance is reflected in (though not dependent upon) the democratizing institutions of popular government that emerged from America's revolutionary period. An honest interpretation of history and law depends upon a correct deference to the "original intent" of those upon whose aspirations independence was contingent. The founders of America's independence, of its' pre-revolutionary local constitutions and post-revolutionary

⁷"Public freedom [is] the ability to participate actively in the basic societal decisions that affect one's life." Gerald E. Frug, *The City As A Legal Concept*, 93 Harv. L.Rev. 1069 (1980).

national constitutions, of its' commitment to rights and consent of the governed as the foundation of just government, were not the enfranchised few white men of wealth and property who wrote the national constitution⁸ and privatized public institutions. Those revolutionary founders were the disenfranchised men and women who fought for - and thought they had won – the right to govern themselves.

(A)The People Possess an Inalienable Right to Local Self-Governance.

⁸ In James Madison's own notes from the Philadelphia Convention of 1787, he expressed the irrelevance of determining what the will of the people was as the drafters of the U.S. Constitution went about their task. He wrote:

Mr. MADISON, observed that if the opinions of the people were to be our guide, it would be difficult to say what course we ought to take. No member of the convention could say what the opinions of his Constituents were at this time; much less could he say what they would think if possessed of the information & lights possessed by the members here; & still less what would be their way of thinking 6 or 12 months hence. We ought to consider what was right & necessary in itself for the attainment of a proper Government. A plan adjusted to this idea will recommend itself ---The respectability of this convention will give weight to their recommendation of it. Experience will be constantly urging the adoption of it, and all the most enlightened & respectable citizens will be its advocates. Should we fall short of the necessary & proper point, this influential class of Citizens will be turned against the plan, and little support in opposition to them can be gained to it from the unreflecting multitude.

James Madison, (June 12, 1787) in Adrienne Koch, *Notes of the Debates in the Federal Convention of 1787 Reported by James Madison*, at 107 (1987).

Eleven days after the signing of the Declaration of Independence, a revolutionary committee convened in Pennsylvania to craft a constitution for the commonwealth. Ken Gormley, *et al.*, *The Pennsylvania Constitution* at 877 (2004). The people of the commonwealth did not get to approve Pennsylvania's first constitution. Yet, it contained a preamble and a declaration of rights that, in sections III–V, acknowledged the peoples' inalienable right to "community" self-government in its formulation of the source, scope, and abolition of governmental power:

WHEREAS all government ought to be instituted and supported for the security and protection of the **community** as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness...

A Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania

. . . .

IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

V. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or **community**; and not for the particular emolument or advantage of any single man, family, or set of men, who are only part of that **community**: And that the **community** hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish

government in such manner as shall be by **that community** judged most conducive to the public weal.

Pennsylvania Constitution of 1776, Ch. I, § III–V (emphasis added) (in Ken Gormley, *The Pennsylvania Constitution*, at 878 (2004)).

The language here is significant. People are the source of all governmental power - which governments must exercise for the common benefit of people, nations, or communities - and to ensure that this is so, the “community” has “an indubitable, unalienable and inalienable right to reform, alter or abolish government.” It is not the state that holds the right, nor elected officials or governmental bodies, nor corporate interests. Rather, **communities of people** naturally have a right to self-government, and they are powerless only in their inability to alienate that right to anyone.⁹

To understand the significance of the word “community” in this section of Pennsylvania’s first constitution, it is necessary to know the history of Pennsylvania government in the eighteenth century. As told by John L. Gedid in Ken Gormley’s *The Pennsylvania Constitution*, it was a story of disenfranchised communities in the western part of the state fighting to share political power with communities around Philadelphia:

⁹ In his treatise, Gormley writes, “[m]any modern-day lawyers are surprised to learn that Pennsylvania’s Constitution of 1776 was widely viewed as the most radically democratic of all the early state constitutions.” Ken Gormley, *The Pennsylvania Constitution*, at 3 (2004).

By the middle of the [eighteenth century], serious geographic divisions had grown up between persons in the western part of the colony and those in the east. For example, persons living in the western part of the colony after the French and Indian War began to work and campaign for reapportionment of representation, because they believed that the Quaker establishment in Philadelphia had neglected their needs during the hostilities. Indeed, it was clear that the Quakers in Philadelphia, Bucks and Chester counties had total control of the colony by mid-century.

Not only did the eastern Quakers control most political power in Pennsylvania, but they also worked diligently and, at least in most of the eighteenth century, successfully to preserve their monopoly on political power. The Quakers accomplished this domination by restricting the franchise and by refusing to create or admit new counties, especially in the western part of the colony. The voting restrictions prevented large numbers of persons in the east—mostly tradesmen, whose population had grown rapidly—from exercising power; and the county restrictions prevented large numbers of settlers—mostly farmers—on what was then the frontier in the western part of the colony from exercising power. Those in the west also campaigned vigorously for liberalization of naturalization requirements. Against this background of internal strife and division in Pennsylvania in 1776, the Continental Congress recommended to the colonies that they renounce their allegiance to the King and “adopt such government as shall ... best conduce to happiness and safety.”

There had grown up between the end of the French and Indian War and 1776 committees and military associations of dissatisfied citizens who worked for better representation, and these groups began calling for separation from England. The colonists' reaction to the Revenue Acts of 1767 furnishes a good example of how these activist organizations arose. After the Revenue Acts were imposed, there was a strong protest in the colony. The colonists organized an association to oppose those Acts. This association had committees in the capitals of every county, and in most large towns, and these committees were an effective political organization and a valuable means of spreading information. They were very similar to political parties in many ways. Later, the experience with this “association” led to familiarity with how to organize to resist the English Crown. Thereafter, when the First Continental Congress in 1774 recommended the formation of committees throughout the colonies, the people of Pennsylvania were ready and immediately mobilized into committees.

One important reason for the rapid growth of these committees was the lack of representation of large numbers of inhabitants, especially in the western part of the colony. These “revolutionary committees” had no legal legitimacy, but they nevertheless played an important part of the opposition to England. These committees held a provincial convention in 1775. The stated purpose of the convention was to encourage manufacturing, but the real reason was “to familiarize the people with the necessity of subverting the old charter and establishing a new constitution on a more popular basis.” In fact, there is considerable evidence that the provincial conference met in order to draw up plans for a convention to draft a new constitution.

...

On May 15, 1776, the Continental Congress adopted a resolution that called for the colonies to throw off English rule and adopt their own constitutions. The response of the colony to the call of the Continental Congress was an address adopted by the committees of the various counties in a meeting in Philadelphia. The address was circulated to the inhabitants of Pennsylvania and called on them to separate from England, to elect representatives to draft a constitution, and to form a government “under the authority of the people.” After elections were held, the Pennsylvania convention met in Philadelphia on July 15, 1776. It consisted of elected members from nearly all of the counties. Most of the representatives were members of the revolutionary and military committees and associations of correspondence.

...

Who were the members of the Constitutional Convention of 1776?... There were few well known members of the Convention, and many were farmers or artisans who had no constitutional or legal training.¹⁰

¹⁰ It is important to note that even though white farmers and artisans asserted their political power at the time, the majority of people were still absent from the task of constitution-making, i.e., women, slaves, indentured servants, people without property, etc. The right of local self-governance is inherent in all the people of a community in a free society.

John L. Gedid in Ken Gormley, et al, *The Pennsylvania Constitution*, 37–41 (2004).

In light of this history, the use of the word “community” in the first Pennsylvania Constitution is no accident. The drafters knew that without acknowledging the inalienable, superior right of communities to local self-government, the people would not accept a new frame of government that would substitute an oppressive colonial machinery for an oppressive state machinery. To remind the general government that it always would remain inferior to the right of community self-government, the frame of general government crafted by the Constitution “explicitly incorporated the Declaration of Rights into the Constitution with the mandate that it ‘ought never to be violated on any pretence whatever.’” Gormley, *The Pennsylvania Constitution*, at 43–44. In other words, the rights announced in the Declaration of Rights were not showpieces that the legislature could circumvent on a flimsy basis akin to rational basis scrutiny. The rights could never be violated ever, for any reason.

Historian Gordon Wood has shown that an anonymous writer called “Demophilus” influenced the Pennsylvania convention with language such as the following:

The intimate involvement by the ancient Saxons of the common people in politics was what most impressed the Pennsylvania radicals and Jefferson. Men became concerned about government because they participated daily in the affairs of their tithings and towns, not only by paying taxes but by

performing public duties and by personally making laws. When these tasks were taken out of the people's hands and given to superior bodies to perform, men fell into a political stupor, and have never, to this day, thoroughly awakened, to a sense of the necessity there is, to watch over both legislative and executive departments in the state. If they have now and then opened their eyes, it is only to survey, with silent indignation, a state from whence they despair of being able to recover themselves. Fixed establishments on the one hand, rooted habits and prejudices on the other, are not easily got over.

Quoted in Matthew J. Herrington, *Popular Sovereignty in America 1776-1791*, 67 Temp. L. Rev. 575, 585–86 (1994).

Gordon Wood said derisively of this era of constitution making:

The trite theory of popular sovereignty gained a verity in American hands that European radicals with all their talk of all power in the people had scarcely considered imaginable except in those rare times of revolution. “Civil liberty” became for Americans “not ‘a government of laws,’ made agreeable to charters, bills of rights or compacts, but a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure,¹¹ to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead.” American liberty seemed in fact to have made revolution perpetual and civil disorder legitimate.

Gordon S. Wood, *The Creation of the American Republic 1776–1787* at 362 (1972).

That Pennsylvanians intended no abridgement of the right to community self-government as they considered entering into the U.S. Constitution, a social

¹¹ It is striking to note how similar this language is to the language used by then-Senator Jubelirer in support of Act 38 (an Act adopted in 2005 to preempt municipal governments from adopting laws dealing with agribusiness and sludge corporations) and in derision of local control: “At the heart of the local ordinance movement is the notion that there is the right to reject anything, anywhere, for any reason, at any time.” See 2005 Pennsylvania Legislative Journal—Senate 633.

compact not of states, but of “We the People,” was made clear by their concerted defense of the Commonwealth’s constitution when it came under threat of replacement by wealthy and powerful state leaders at the height of revolutionary hostilities that kept common people otherwise occupied. Historian Terry Bouton says this:

the 1776 constitution enjoyed widespread popular support in the state. The surest sign of that support came in early 1779, when a group of state leaders attempted to call a new convention to overturn the constitution because they believed it was too democratic. In response, ordinary people across the state launched a petition drive to support the 1776 charter. Conditions were not favorable for such an effort: many people were more focused on British and Indian enemies than they were on political doings in the state; most of the Pennsylvania line was encamped in northern New Jersey and upstate New York and, therefore, could not defend the constitution under which they were fighting. Nor did the weather cooperate: the winter of 1779 was the coldest of the war. Despite wartime chaos and frigid temperatures, in a little more than a month, over 16,500 Pennsylvanians signed petitions expressing their approval of the 1776 constitution. To put this effort in perspective, consider that eight years later, in 1787, only about 6,800 Pennsylvanians voted in favor of the federal Constitution (and only about 13,000 cast votes in the ratification elections). In sum, more than twice as many Pennsylvanians voiced support for the 1776 state constitution than for the 1787 federal Constitution.¹²

Terry Bouton, *Taming Democracy: “The People,” The Founders, and the Troubled Ending of the American Revolution* at 57 (2007).

¹² For petitions to stop the overturning of the 1776 constitution, see “Memorials Against Calling a Convention, 1779,” *Pennsylvania Archives, Minutes of the Third General Assembly* (Philadelphia, 1778-1779). All of the minutes of the general assembly, as well as much of the other published material from the late eighteenth century, are available on *Early American Imprints, Series I: Evans, 1639-1800*. The assembly minutes and journals can be found under the heading “Pennsylvania. General Assembly Journals.”)

Some jurisprudence has hewn closer to that original intent than others.

Concurring in an early Michigan case on the right of local self-government, Chief Justice Thomas M. Cooley wrote:

The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made....

...

[W]hen the state reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government.

[L]ocal government is a matter of absolute right; and the state cannot take it away. *People v. Hurlbut*, 24 Mich. 44 (1871) (Cooley, J., concurring).

In his treatise on constitutional law, Justice Cooley explained again how in a free society, constitutions are necessarily founded upon fundamental rights retained by the people:

In considering state constitutions we must not commit the mistake of supposing that because individual rights are guarded and protected by them they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause but consequence of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the frame-work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought.

Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* 47 (5th Ed. 1883).¹³

¹³ The struggle between two theories of municipal self-governance pitted Cooley's jurisprudence on the innate right of community self-government against Dillon's theory that municipal governments were completely subservient to the State. As noted by author Nancy Burns,

On the one hand, Judge Thomas Cooley (one of the era's leading scholars of constitutional law) argued that cities received power directly from the people and thus they had a kind of limited autonomy:

The sovereign people had delegated only part of their sovereignty to the states. They preserved the remainder for themselves in written and unwritten constitutional limitations on governmental actions. One important limitation was the people's right to local self-government.

This structure of superior inalienable rights - and inferior powers of state government - bears repeating, because for too long Pennsylvanians have been yoked under a jurisprudence that says local governments are creatures of the state and inferior to the general government.¹⁴ In fact, people are the source of all power, and communities possess an inalienable right to govern themselves.

Emphasizing that structure at the Pennsylvania convention that ratified the federal Constitution, James Wilson said:

“His [Mr. Findley’s] position is, that the supreme power resides in the States, as governments; and mine is, that it resides in the people, as the fountain of government; that the people have not—that the people mean not—and that the people ought not, to part with it to any government whatsoever. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper.”

James Wilson, Remarks to the Pennsylvania Ratifying Convention (Dec. 4, 1787) (reprinted in Philip B. Kurland and Ralph Lerner, *The Founders’ Constitution* 62 (1987)).

On the other hand, John Dillon (the foremost bond lawyer of his day) argued that cities were creatures of the state – nothing more than administrative divisions. As creatures of the states, these governments had no autonomy. Interestingly, Dillon’s argument survived (displacing the very widely read and subscribed-to work of Cooley). Entrepreneurial incentives for creating new cities were now quite high.

Nancy Burns, *The Formation of American Local Governments: Private Values in Public Institutions*, 52-53 (1994).

¹⁴ See *infra* at 28-41.

Because the right is inalienable, it cannot be delegated, limited, or made subservient to any other power.¹⁵

What is certain is that the American Revolution rested its legitimacy on the proposition that it is beyond the delegated power of *any* government to deprive the people of their fundamental right to local self-governance.

For all of the reasons specified in this discussion, and because it is a self-evident truth that people have a right to self-government in the communities where they live, it is the assertion of the people of Blaine Township that the power of community self-government is their inalienable and fundamental right, and that it constituted the central purpose for which independence was wrested from the world's most powerful empire. Community self-government is exempt from, and hence superior to, the general government of the state.¹⁶

¹⁵ Hence the Supreme Court of Pennsylvania was partially correct when it opined that the police power is one of the most important of government powers; the Court erred when it located that power as inherent in the state rather than in the people: "But, the state possesses inherently a broad police power, which transcends all other powers of government. There is therefore no unqualified right to acquire, possess, and enjoy property if the exercise of the right is inimical to the fundamental precepts underlying the police power. As declared by the Court in *Commonwealth v. Widovich*, 295 Pa. 311, 145 A. 295, 298 (1929): 'The police power is the greatest and most powerful attribute of government; on it the very existence of the state depends. * * * If the exercise of the police power should be in irreconcilable opposition to a constitutional provision or right, the police power would prevail.' It needs no constitutional reservation or declaration to support it." See *Commonwealth v. Stofchek*, 322 Pa. 513, 519, 185 A. 840, 844 (1936).

¹⁶ As one writer has said, "The people, who are sovereigns of the state, possess a power to alter when and in what way they please. To say [otherwise] ... is to make

the thing created, greater than the power that created it.” Fed. Gazette, 18 Mar. 1789 (reprinted in Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776–1791*, 67 TEMP. L. REV. 575 (1994)). Also see the current Pennsylvania Constitution, Art. I, § 25, “Reservation of Powers in People,” which declares: “To guard against the transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.” This, in tandem with Art. I, § 2 is unassailable in constitutionally establishing the superior claim of the people over the state. Art. I, §2 reads: “All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.”