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At the Intersection of Sovereignty and Contract: Traffic Cameras and the Privatization of Law Enforcement Power

WILLIAM D. MERCER*

Abstract

Many municipalities are making critical errors in their attempts to alleviate current financial burdens by contracting with private entities to perform many of their essential functions, most

* Lecturer, University of Tennessee, Knoxville, Department of History and College of Law. I would like to thank my fellow participants in the 2011–2012 Constitutional History Webinar created and moderated by Elizabeth Dale and everyone at the 2012 summer faculty forum at the University of Tennessee College of Law for their very helpful comments on earlier drafts of this Article. Select portions of sections two and three of this Article also appear in my dissertation. *See* William D. Mercer, *Locating Liberties:* Barron v. Baltimore *and the Role of Rights in the Early American Republic* (2011) (unpublished Ph.D. dissertation, University of Florida), *available at* http://gradworks.umi.com/34/96/3496918.html.

notably those agreements with companies to install traffic cameras and, in many cases, to monitor and cite offenders. By subcontracting part of their exclusive power to enforce law, these municipalities essentially bargain away sovereignty by parting with portions of their inherent police power.

As these cameras fill a role played by the state's law enforcement personnel, municipalities impermissibly infringe on the actual sovereignty of the state as well as the conceptual sovereignty of the people. Because sovereignty is envisioned as residing with a people at large but is practically exercised by the state, these contracts may represent a new model of sovereignty. This model does not follow the traditional view of sovereignty as a binary or a tension between the state and the people. Rather than returning sovereignty to the conceptual rulers, these contracts represent a new delegation of sovereign powers to private entities.

I. INTRODUCTION

> "You know, I'm not a big government guy. But government should be in charge of the custody, care and control of inmates. That's government's responsibility."
>
> – State Senator Steve Oelrich (R – Florida)[1]

During its 2011 session, the Tennessee General Assembly took up a measure designed to place significant restrictions on the growing use of traffic cameras by municipalities across the state.[2] The General Assembly amended the state motor vehicle code to make the prosecution of traffic violations documented by cameras significantly more difficult, if not impossible.[3] For example, the new laws invalidated all citations for improper right turns on a red signal when the only evidence of the infraction was a photograph

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1. Steve Bousquet, *Prison Privatization Dies in Senate 21-19*, TAMPA BAY TIMES (Feb. 15, 2012), http://www.tampabay.com/news/publicsafety/crime/prison-privatization-dies-in-senate-21-19/1215438.

2. Act of July 1, 2011, ch. 425, 2011 Tenn. Pub. Acts (codified at TENN. CODE ANN. §§ 55-8-101, -110, -198 (2012)).

3. *Id.*

taken by a traffic camera.[4] While municipalities that installed traffic cameras would certainly seem to be the aggrieved parties to such a law, private entities have instead challenged the new laws. A number of Tennessee municipalities contracted with private companies to install, enforce, and collect fines for red light violations; these contracts gave these entities standing to contest the law.[5] On November 14, 2011, Redflex Traffic Systems, Inc. ("Redflex") brought one such suit, nominally against the town of Farragut, Tennessee, and petitioned the court to rule their contract exempt from the new law or alternatively, to hold the act as a violation of the state's constitutional ban on retrospective laws and laws that impair contracts.[6]

A few months before Redflex filed suit, on May 6, 2011, fellow traffic camera company American Traffic Solutions, Inc. (ATS), finalized an agreement with the city of Bellingham, Washington to install cameras at six different locations across the city.[7] Anticipating the arrangement, four separate citizens' committees began a ballot initiative in January of 2011 that sought to amend the city code to prohibit the cameras.[8] The initiative garnered the requisite number of signatures to appear on the ballot, and on July 7, 2011, roughly one month after the contract was finalized, the Bellingham City Council voted unanimously to take no action to stop the measure.[9] While the city council essentially demurred to the initiative, ATS turned to the courts to protect its contractual arrangement, lest the voters approve the initiative. Whereas Redflex asked the court to clarify or even strike down a state law, ATS took one step further and petitioned the court to hold a citizen's ballot initiative unenforceable.[10]

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4. *Id.*

5. *See* Complaint at 4, Redflex Traffic Sys., Inc. v. Farragut, Tenn., No. 181694-1 (Ch. Knox Cnty., Tenn. 2011) [hereinafter Redflex Complaint].

6. Redflex Complaint, *supra* note 5, at 12 (citing TENN. CONST. art. I, § 20).

7. Complaint, Am. Traffic Solutions, Inc. v. Bellingham, No. 11-2-01991-4 (Super. Ct. Whatcom Cnty., Wash. 2011) [hereinafter Am. Traffic Solutions Complaint].

8. *Id.* at 3.

9. *Id.*

10. *Id.*

The foregoing are only two examples of a continuing nationwide conversation over the place of private corporations and camera technology in the largely public arena of traffic monitoring, enforcement, ticketing, and collections. Certainly, there are many good arguments for using traffic cameras. Studies have estimated that traffic intersections witness over 100,000 crashes and over 1,000 deaths per year.[11] Installing automated traffic cameras is not an unreasonable measure to reduce these rates. In addition to safety concerns, traffic cameras also generate revenue for states and municipalities and free up law enforcement resources.

Conversely, the use of the same cameras triggers a number of negative responses. These cameras shift the burden of proof to the violator to disprove the offense, as a photograph acts as prima facie evidence, replacing the duty of law enforcement to appear and give in-court testimony before an accused offender is obligated to even present a defense. They can also give the impression that the municipality is more interested in making money than punishing traffic offenses. Indeed, many local officials have made statements that fuel such speculation. For example, the city of Tampa recently began to fret when its picturesque Bayshore Boulevard was criticized as too rough and unsightly for the incoming delegates attending the 2012 Republican National Convention.[12] To solve the issue, a Tampa city council member suggested that the city "us[e] fines from Tampa's new red-light cameras, which are currently on a pace to generate almost triple the originally projected revenue, to pay for improvements."[13] The state of Texas was more explicit in the fundraising nature of its red light camera program. Texas state law allows municipalities to contract with private companies to install and enforce red light violations.[14] While the law prohibited municipalities from splitting the collected fines with the red light camera operator, the law mandated that half of

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11. *Summary Report*, U.S. DEPARTMENT OF TRANSP., http://www.fhwa.dot.gov/publications/research/safety/05049/ (last visited Nov. 21, 2012).

12. Richard Danielson, *Tampa's Bayshore Boulevard Criticized as Too Shabby for Republican National Convention*, TAMPA BAY TIMES (Jan. 7, 2012), http://www.tampabay.com/news/localgovernment/even-after-roadwork-tampas-bayshore-boulevard-criticized-as-too-shabby-for/1209582.

13. *Id.*

14. TEX. TRANSP. CODE ANN. § 707.003(a) (West 2011).

the fines be sent annually to the state comptroller.[15] While these fines were meant to go to a laudable source—emergency trauma centers across Texas—the state diverted these monies to cover an economic shortfall and to comply with the balanced budget mandate in the state constitution.[16]

This Article does not seek to engage in this debate over whether traffic camera contracts make sense as a matter of financial savings or law enforcement efficiency. Rather, this Article argues that these contracts are unwise because they undermine both the actual sovereignty of the state as well as the conceptual sovereignty of the people, the basis upon which state authority rests. This Article is structured as follows. Part II addresses the trend toward privatization of governmental services as well as the scholarship critical of many of these endeavors. Part III discusses the historical evolution of the concept of sovereignty, while Part IV examines the evolution of the doctrine of police power—a prime method by which the state can exercise its sovereignty. Part V argues that the efforts by many municipalities to privatize portions of their law enforcement power compromise the sovereignty of the state, and Part VI views these contracts as also violating the conceptual sovereignty as the people. Finally, Part VII questions what changes may be wrought by altering the location of sovereignty in these ways.

II. PRIVATIZATION OF GOVERNMENTAL SERVICES

The larger idea of privatizing governmental services is popular, even in good economic times, due to a number of largely ideological, neo-liberal factors.[17] The idea of cutting or privatizing

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15. *Id.* §§ 707.003(b), 707.008(a).

16. *See* TEX. CONST. art. III, § 49 (a); Beth Francesco Currie & Amy Burgess, *Texas Lawmakers Sit on Red-Light Revenue Dedicated to Trauma Centers*, DALLAS MORNING NEWS (Jan. 7, 2012), http://www.dallasnews.com/news/state/headlines/20120107-texas-lawmakers-sit-on-red-light-revenue-dedicated-to-trauma-centers.ece; *Texas Red-light Camera Cash Not Reaching Trauma Rooms*, CALLER.COM (Jan. 9, 2012), http://www.caller.com/news/2012/jan/09/texas-red-light-camera-cash-not-reaching-trauma-ro/.

17. For a good overview of the rise of neoliberal economic policy since the early 1980s, see generally DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

essential functions of government becomes even more attractive when trying to do the same with less, as the recent economic downturn has necessitated, and traffic cameras have played a part in the recovery plans of many municipalities. However, it is important to note that the move to utilize traffic cameras did not begin with the 2008 recession.[18] According to the Insurance Institute of Highway Safety, as of May 2012, red light cameras were in use in roughly 552 communities, while speed cameras were operational in over 111 others.[19]

Though the use of traffic cameras is a somewhat recent development, these traffic camera contracts do not represent the only time that the state has delegated its sovereign law enforcement powers under the guise of efficiency or monetary savings. For example, there is an extensive historiography on the privatization of the state's power to incarcerate criminal offenders.[20] This research shows that many southern state legislatures in the late nineteenth century turned over the punishment of state prisoners to private companies, primarily through the convict leasing system.[21] One of the most egregious examples of the abuses inherent in the convict leasing system occurred in Florida. The state, concerned with the costs of maintaining prisons, sanctioned the leasing of prisoners to private companies.[22] The state officially authorized

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18. For example, a 1998 report identified roughly thirty-seven traffic camera programs, active and discontinued test programs, in the U.S (including cameras for red-light, speed detection, railroad crossing, and HOV/Bus Lane violations), as well as programs in use in eleven countries or municipalities outside of the U.S. *See* Shawn Turner & Amy Ellen Polk, *Overview of Automated Enforcement in Transportation*, 68 INST. TRANSP. ENGINEERS J., 20, 28 (1998), *available at* http://www.ite.org/membersonly/itejournal/pdf/Jfa98a20.pdf.

19. *Communities Using Red Light and/or Speed Cameras as of November 2012*, INS. INST. FOR HIGHWAY SAFETY: HIGHWAY LOSS DATA INST., http://www.iihs.org/laws/auto_enforce_cities.aspx (last visited Nov. 21, 2012).

20. *See generally* ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996); MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928 (1996); DAVID OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996); Vivien M. L. Miller, *Reinventing the Penitentiary: Punishment in Florida, 1868–1923*, 1 AM. NINETEENTH CENTURY HIST. 82 (2000).

21. *See* sources cited *supra* note 20.

22. Miller, *supra* note 20, at 88–89.

this practice in 1868, the same year and in the same law that the state created its first prison.[23] It was not long thereafter—and very soon after the end of Reconstruction—that the state legislature decided to abolish the state prison entirely and lease the prisoners to private railroad, turpentine, and, later, phosphate companies.[24]

The convict leasing system gradually declined in the twentieth century, when the infamous 1923 Martin Tabert case officially brought an end to the practice in Florida; the state, however, has not lost its zeal in seeking to punish criminals in the most cost-effective way possible.[25] The 2012 state legislature recently debat-

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23. *Id.* at 82.

24. *Id.* at 88; *see also* MANCINI, *supra* note 20, at 185, 188.

25. Martin Tabert was a young man from North Dakota who, in a zeal for adventure and likely also looking for seasonal work, set out across the United States. MANCINI, *supra note* 20, at 115. Unfortunately, on December 15, 1921, after catching a westbound train out of Jacksonville, Florida, Tabert was ensnared by the Sheriff of Leon County, Florida, who had concocted a money-making scheme to prey on persons who hopped freight trains for free passage. *See id.*; Vivien E. Miller, *The Icelandic Man Cometh: North Dakota State Attorney Gudmunder Grimson and a Reassessment of the Martin Tabert Case,* 81 FLA. HIST. Q. 279, 282 (2003). The scheme worked as follows: railroad employees would wire ahead the number of men entering Tallahassee so the Sheriff could wait and arrest them. Miller, *supra* note 25, at 283. After the arrests, they would be convicted of vagrancy and sentenced a fine of $25.00. *Id.* at 282. Not only was this a hefty sum for persons traveling by boxcar, but, more importantly, the money had to be paid within two days of sentencing. *Id.* As most could not do so, the men would then be forced to serve their alternative sentence: ninety days at the Putnam Lumber Company Turpentine Camp, a private entity. Jerrell H. Shofner, *Postscript to the Martin Tabert Case: Peonage as Usual in the Florida Turpentine Camps*, 60 FLA. HIST. Q. 161 (1981). Putnam Lumber paid the Sheriff $20.00 per man, which he split up with the spotters from the railroad company. MANCINI, *supra note* 20, at 197. After being scooped up in this scheme, Tabert was shipped off to the lumber camp where he was brutally flogged to death. *Id.* After Tabet's parents were cryptically notified of his death by fever in a prison work camp in far-away Florida, public outrage and the actions of his parents, the North Dakota Attorney General, the New York *World*, and the North Dakota and Florida Legislatures finally put an end to the practice of leasing prisoners to private entities. *Id.* As was noted by Jerrell Shofner, while the Florida Legislature formally ended the practice, in reality, the existence of debt peonage laws, and sometimes just the simple exercise of force and white community pressure, allowed the practice to continue in pockets of north Florida until after World War II, when turpentine was no longer a major industry in the state. Shofner, *supra* note 25, at 172–73.

ed a proposal to privatize twenty-seven of its prisons and work camps in south Florida.[26] What is most interesting about the proposal was not what was argued, but what was absent from argument altogether. Proponents of the bill believed that private contractors would operate the prisons more efficiently, while opponents argued that the expected savings were too speculative.[27] As one journalist described the debate, "Privatization has polarized the Legislature into two camps: One sees outsourcing as a proven way to cut costs; the other views it as a risky undertaking riddled with hidden costs."[28] The debate largely did not include arguments regarding whether privatizing the state's obligation to incarcerate prisoners was even proper. It boiled down to an argument over whether the promised savings would come to pass.[29]

Other scholars have highlighted the problems in the trend toward privatization of governmental operations. Christopher Serkin raises the concern that these contracts will tie the hands of future public officials.[30] Serkin carefully notes that local governments have long constrained the actions of their successors through methods such as signing contracts, alienating property, or incurring debt—what he refers to as "entrenchment."[31] Historically, however, there was largely a balance between allowing municipalities the

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26. Steve Bousquet, *Savings Tough to Calculate in Florida Prison Privatization Plan*, TAMPA BAY TIMES, Feb. 7, 2012, http://www.tampabay.com/news/publicsafety/crime/article1214245.ece.

27. *Id.*

28. *Id.*

29. *Id.* On February 14, 2012, the Florida Senate voted down the proposal 21-19. Bousquet, *supra* note 1. Florida Senator Steve Oelrich (R-Gainesville, District 14), a former Alachua County, Florida Sheriff, was critical in the vote. *Id.* Oelrich did raise non-fiscal concerns in voting against the measure, arguing that "You know, I'm not a big government guy. But government should be in charge of the custody, care and control of inmates. That's government's responsibility." *Id.*

30. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881–82 (2011) ("This Article argues that entrenchment through private law and private rights is actually commonplace, that it is subject to certain structural protections that preserve flexibility for future governments, but that recent changes—like limits on eminent domain—threaten to tip the scales of an often hidden but otherwise carefully balanced equilibrium between stability and flexibility.").

31. *Id.* at 885–86.

necessary "flexibility" to govern and the "stability" to honor its policy commitments.[32] Serkin argues that in recent years this balance has been upset as local governments found new, creative methods to entrench their decisions and limit the options of future decision makers.[33] For example, Serkin argues that the power of eminent domain has traditionally acted as a powerful anti-entrenchment tool, calling it "the ultimate de-entrenching safety valve."[34] This power, however, has been significantly restricted by more recent limits on its use beginning with the Supreme Court's decision in *Kelo v. City of New London*.[35]

Julie Roin argues that the move toward privatization is not a money-saving endeavor or an attempt at efficiency as many of its proponents claim, but is in actuality a way to covertly borrow money.[36] For example, Roin cites the 2008 decision by the city of Chicago to sell the right to collect monies from the city's parking meters for seventy-five years for a lump sum payment of $1.156 billion.[37] Roin argues that by foregoing future revenue for immediate payment, Chicago surreptitiously received a loan in exchange for future debt.[38] This, Roin notes, will leave future city residents worse off because the monies granted by the parking meter con-

32. *Id.* at 881–82.

33. *Id.*

34. *Id.* at 917 ("Eminent domain is the ultimate de-entrenching safety valve because it creates flexibility across a wide swath of entrenching devices.").

35. *Id.* at 919 ("Reforms following *Kelo v. City of New London* have restricted the power of eminent domain in many states, removing one of the core de-entrenching mechanisms from local governments' toolkits." (footnote omitted)). *See generally* Kelo v. City of New London, 545 U.S. 469 (2005). Other pre-*Kelo* scholars recognized that the Supreme Court, in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), suggested that eminent domain could be used to overcome onerous contracts, as the power of eminent domain cannot be contracted away. *See* Michael L. Zigler, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 STAN. L. REV. 1447, 1463–64 (1984) ("The state also has the option of condemning the contract or a portion of the contract in an eminent domain proceeding, an alternative suggested in *United States Trust*. If the state desired to renounce the contract wholly, eminent domain would be appropriate.").

36. Julie A. Roin, *Privatization and the Sale of Tax Revenues*, 95 MINN. L. REV. 1965, 1967–68 (2011).

37. *Id.* at 1993–95.

38. *Id.* at 1997.

tract will have long since been depleted.[39] Further, with the city unable to take in this revenue, future residents are not only required to pay to maintain the meters, but also to find new sources of revenue to fund essential services.[40]

Of course, criticism of these actions is not limited to the privatization of government services in the wake of the 2008 subprime market crash. In 1990, Janice Griffith noted the pitfalls inherent in privatization attempts by municipalities to cope with shrinking budgets.[41] Griffith explained that public contracts with private entities are bound by a number of unique constraints, which are mostly commonsense: the municipality is subject to a range of laws not always applicable to private entities; the municipality must have the legal power to execute these contracts; and the particular municipal officials must have the power to consent on behalf of the municipality.[42] For Griffith, however, the fourth, and most important constraint on public/private contracts is the rule that the municipality shall not contract away its police power or impermissibly bind future legislative activity—what has alternatively been referred to as the "reserved powers doctrine" or the "inalienable power doctrine."[43] In order to remedy what Griffith

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39. *Id.* at 1997–98.

40. *Id.*

41. Interestingly, Griffith opens her 1990 article with a description that could have been written in 2012:

> During the past decade federalism has undergone a dramatic change. The nation's physical infrastructure is aging and inadequate. The federal government, however, has made massive reductions in aid programs that in the past provided financial support to state and local governments. These cutbacks, accompanied by greater resistance to taxation at the local level, have forced municipalities to diminish spending in many areas.

Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277, 280 (1990).

42. *Id.* at 281.

43. *Id.* at 281–83, 291. Griffith notes a slight distinction between these two terms. For example, the reserved powers doctrine is a rule of construction where every public/private contract contains an implied reservation of the police power, whereas the inalienable power doctrine prohibits a governmental entity from contracting away this power. *Id.* at 282–83. In *United States. v. Winstar Corp.*, 518 U.S. 839 (1996), which post-dates Griffith's article, the Supreme

feels was an unruly array of tests to determine whether a public/private contract violates these doctrines, Griffith proposed a five-part test that could provide more uniformity.[44]

Unlike these critiques, this Article does not propose a balancing test or set of guidelines to help courts or municipal officials strike a proper balance for public/private contracts. It also does not comment on the wisdom of traffic cameras as a method of law enforcement. Finally, this Article does not argue that municipalities can execute contracts with impunity or without regard for honoring their legitimate obligations that do not affect core governmental operations.[45] Rather, this Article makes a more fundamental

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Court continues to refer to this doctrine as the reserved power doctrine. *Id.* at 874.

44. Griffith, *supra* note 41, at 285–86. Griffith found that courts were generally using three tests: a "governmental/proprietary test," which distinguished between a governmental function (which could not be delegated) and a proprietary activity (where the government was acting similar to a private party and which could be contracted to a third party); a "function test," which exempted certain sovereign powers (like those inherent to the police power, the power of eminent domain, and the power to tax); and, finally, a more nebulous test where courts would measure the contract against larger public policy concerns. *Id.* at 284–85. In response to these tests, Griffith proposed a uniform five-part test. *Id.* at 285–86. According to Griffith,

> [t]he standards provide that courts should uphold contracts made by a governmental body if (1) the formation of the contract is not the result of fraud, corruption, or bad faith; (2) the contract does not modify the legal structure under which the governmental body is organized and operates; (3) the contract advances a governmental interest that outweighs the loss of governmental control; (4) the contract restrains the operation of governmental functions no further than necessary and for no longer than necessary to accomplish governmental objectives; and (5) circumstances have not so changed as to cause the contract's continued performance to result in substantial harm to the public.

Id.

45. There is extensive jurisprudence on the topic of when public contracts can be abridged by a later enactment. The Supreme Court, for example, in *United States v. Winstar*, 518 U.S. 839 (1996) and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), recognized that the state and federal governments must honor their obligations when entering into contracts that are largely financial and do not implicate core governmental functions. *U.S. Trust Co.*, 431 U.S. at 24–26; *Winstar*, 518 U.S. at 880.

claim: certain governmental functions, like law enforcement, must simply remain just that—governmental functions. Privatizing law enforcement causes ideological ruptures in our appreciation of the concept of sovereignty.

This is not an abstract concern. The role of ideology is of paramount importance in sustaining the legitimacy of governmental institutions. For example, despite the popular conception of a rule by "We the People," in reality sovereignty resides with the state while "the people" exercise supervisory functions, primarily through the ballot.[46] This arrangement is the product of a historical struggle over the actual role non-state actors should play in American government: should the state exercise sovereignty subject to oversight by the people through formal methods like voting (state sovereignty), or should the people remain as the true sovereigns who act through methods like voting if they choose to, but who can also act on their own if desired (popular sovereignty)?[47] As one of the main attributes of sovereignty, the power of law enforcement forms a critical object of this struggle. Over time, the state has become the exclusive location of sovereignty and with it, has eventually gained a monopoly over law enforcement. Despite this evolution, as long as the state is viewed as simply exercising the sovereign powers lent them by the citizenry, the ideology of popular sovereignty can remain intact. The problem, however, is that many municipalities have unwittingly exposed sovereignty as residing with the state by contracting their law enforcement power to private corporations, effectively cordoning off these powers from

46. There is a rich historiography on this tension over the role of the people in a government predicated on the concept of popular sovereignty. *See generally* JASON FRANK, CONSTITUENT MOMENTS: ENACTING THE PEOPLE IN POST-REVOLUTIONARY AMERICA (2009) (arguing that people exist as an effect of successful claims to speak on their behalf); CHRISTIAN FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2007) (exploring how Americans struggled to understand how a collective sovereign could play the role of the ruler and be ruled by a government); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (analyzing the understanding of "popular sovereignty" and "the people" by the colonists); EDMUND MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1989) (exploring the notion of popular sovereignty and how it remains a political force today).

47. *See* sources cited *supra* note 46.

popular review. Furthermore, many of these contracts have also given private traffic camera companies the standing to challenge the sovereignty of the state itself. Thus, in an effort to promote efficiency and safety and to generate revenue, many municipalities have taken actions that threaten to challenge both the conceptual sovereignty of the people as well as the actual sovereignty of the state.

This is additionally problematic. In the above-described model, sovereignty is positioned as part of a struggle between state and non-state actors over the powers of making and enforcing law. However, in the traffic camera scenario, the sovereign power of law enforcement is relinquished by the state, yet it is not returned to the people, its conceptual owners. Rather, it is vested in a select group of individuals. In this model, sovereign powers are no longer a binary or a tension between the people and the state. Instead, these contracts create a new model entirely, where sovereign powers of law enforcement are granted to the state, but where the state, seeking to remedy fiscal difficulties, alienates that power through contract by giving control to private corporations. If these corporations are considered aggregates of individuals—namely officers, directors, employees, and shareholders—does the delegation of these powers represent a relocation of sovereignty?

III. FORMS OF SOVEREIGNTY

The concept of sovereignty defies simple description.[48] Indeed, many scholars find fault in the existing definitions of sovereignty, not to mention the failure to envision reasonable alternatives.[49] Nonetheless, at a fundamental level, there must be the evo-

48. *See* JOHN HOFFMAN, SOVEREIGNTY 9–11 (1997).

49. Stephen Krasner explains that the concept of sovereignty is muddled because the term is often used without reference to its many variations, both internationally and domestically. Specifically, Krasner argues that there are four ways that sovereignty has been described: "international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty." STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3 (1999). For this Article, I am envisioning domestic sovereignty, the power of an entity or group within a particular society to possess final authority to make and enforce law. *See id.*; *see also* James R. Martel, *Can There Be Politics Without Sovereignty? Arendt, Derrida and the Question of Sovereign Inevitability*, 6 LAW, CULTURE AND THE HUMAN. 153, 154 n.2 (2010).

lution of an impersonal state, as opposed to rule by a person, family, or dynasty, which the ruler is obligated to maintain.[50] In turn, the state must be recognized as possessing absolute political authority.[51] While a classical version of sovereignty was present in ancient Greece, this society did not develop the attributes that are consistent with its modern form.[52]

A. History of Sovereignty

Many scholars attribute the true genesis of the concept to sixteenth-century political theorist Jean Bodin who first articulated modern notions of sovereignty in the aftermath of the Protestant Reformation and the battles between Catholics and French Huguenots that ravaged his homeland.[53] Bodin formulated his ideas as an attempt to bridge the conceptual divide between the Catholic French monarchy, who relied upon a mixture of Roman law and their divine right of rule, and dissident Huguenots, who argued for a right of resistance.[54] Others, most notably Michel Foucault, dated sovereignty somewhat earlier to the Middle Ages and more critically argued that it was created and used to impose—and later resist—the power of monarchies.[55] By the eighteenth century, this same notion of sovereignty was co-opted and employed not just to limit the monarch, but to justify alternative forms of government such as the rise of parliamentary democracies like those following the French Revolution.[56] Similarly, James Martel places the modern notion of sovereignty as arising out of the same forces that

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50. F. H. HINSLEY, SOVEREIGNTY 16–17 (Cambridge Univ. Press, 2d ed. 1986) (1966); RAIA PROKHOVNIK, SOVEREIGNTY: HISTORY AND THEORY 19 (2008).

51. HINSLEY, *supra* note 50, at 17.

52. *Id.* at 16–17.

53. *Id.* at 71, 120–21; PROKHOVNIK, *supra* note 50, at 41.

54. HINSLEY, *supra* note 50, at 120. According to Bodin, sovereignty is equated with absolute and perpetual power. Broadly speaking, Bodin listed the following as the requisite attributes of sovereignty: the power to make law; the power to make war or peace; the power to appoint high state officials; and the power to act at the final source of appeal from all courts. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 25, 43–46 (M.J. Tooley trans., Oxford Univ. Press, 1955) (1576).

55. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 34–35 (1997).

56. *Id.* at 35.

brought about the notions of modern liberalism.[57] Indeed, Martel notes that the modern liberal emphasis on the individual and free access to markets is only obtainable through modern notions of sovereignty.[58]

B. Sovereignty in the United States

By the time of the founding era of the United States, the Constitutional framers likewise had to address the question of sovereignty. While a well-known struggle between the federal and state governments took place, a larger question remained unanswered: was sovereignty to lie truly with the people or with the peoples' representatives, the state?[59] As set forth in the Preamble to the U.S. Constitution, "We the people" are the stated rulers. Like much of the new U.S. constitutional system, however, implementation of the contours of popular sovereignty was left for later generations.[60] Indeed, the Constitution left scores of unanswered questions for succeeding generations to define. The early republic wrestled with how far Congress could go in making laws that were "necessary and proper" to carry out its duties (Article I,

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57. Martel, *supra* note 49, at 154.

58. *Id.* at 155.

59. As was noted by James Martel, Donald Lutz has classified four different models of popular sovereignty occurring in western political thought: the Leviathan Model (proposed by Hobbes where sovereignty only resides with the people temporarily before it is permanently transferred to the ruler); the Traditionalistic Model (proposed by Bodin, Philippe du Plessis-Mornay, and others where the people create the ruler); the Constitutional Republic Model (set forth by Locke, William Penn, and others where the people create a popular government but only act through their representatives); and the Constitutional Democracy Model (described by Rousseau and Roger Williams where the people create a popular government and retain active and direct participation in that government). DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 76 (2006); Martel, *supra* note 49, at 153, 154 n.2. It appears that the tension over defining popular sovereignty as one between the people and the state as the representatives of the people could also be described as a battle between the Constitutional Republic Model (the state) and the Constitutional Democracy Model (the people) if we use Lutz's categories.

60. Of course, ideas of popular sovereignty well pre-dated the American example. *See* MORGAN, *supra* note 46, at 38–39. This Article refers to the unique popular sovereignty begun in the United States and not the mixed constitution model present in England, for example.

Section 8),[61] what documents could be considered contracts that could not be impaired by the state (Article I, Section 10),[62] or whether the judiciary had the power to review legislation (Article III).[63] Likewise, the idea of popular sovereignty also required structure and definition by future generations. Unlike these questions, which were addressed through formal law adjudication and resulted in short-hand reference markers (such as *McCulloch*, *Dartmouth College*, *Marbury*), the concept of popular sovereignty was much more difficult to define.

Following independence, the new nation espoused that it was ruled by the sovereign people, but in reality, the two different models of sovereignty competed for primacy. The popular sovereignty model conceptualized power as remaining with the people.[64] Under the state sovereignty model, while the people are conceptually sovereign, the state ultimately exercises sovereign power; the people delegate their sovereign power to the state. This model envisions the people as exercising their sovereignty through formal methods like voting, petitioning government, and, eventually, by exercising rights in courts of law.[65] For much of American history, there existed a tension between these two sovereignty models—state and popular.[66]

Christian Fritz has explained that in the United States, from the founding era until the Civil War, the idea of the people as sovereign meant that they could conceptually operate in three different

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61. *See* McCulloch v. Maryland, 17 U.S. 316, 411–25 (1819).

62. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 627–50 (1819).

63. *See* Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

64. We can refine the state sovereignty argument so that our analysis is not quite so starkly defined. Raia Prokhovnik, for example, notes that the promoters of a sovereignty where the people remained largely on the sidelines, or what we would recognize as state-based sovereignty in the modern American system, appreciated that the checks on sovereignty would be accomplished by dividing sovereign power among the branches of government. PROKHOVNIK, *supra* note 50, at 122. Sovereign power could conceptually remain with the people as long as state power was diffused. *Id.*

65. *See supra* note 59.

66. Many scholars have addressed this tension in the early republic over what form popular sovereignty would actually take. *See, e.g.*, sources cited *supra* note 46.

capacities.[67] First, the people could exercise sovereignty as the creators of the new constitutions that set up government.[68] Second, the people could also act as "the ruler" to oversee their elected representatives, much in the same way that a king—also a sovereign—would pick his aids.[69] In this capacity, the people could express displeasure by voting.[70] Finally, the people could operate as "the ruled" who had rights guaranteed to them by constitutions.[71] These rights allowed persons or groups access to politics. Under this view, the people did not necessarily act as the sovereign but played a more realistic role as one group or individual among many.[72] Fritz argues that in the period before the Civil War, these three roles existed simultaneously and competed for primacy.[73] Ultimately, the role of the people as the "ruled," to use Fritz's categories, won pre-eminence. In this capacity, the people are conceptually sovereign, but the state exercises true sovereign power.

The evolution of the modern conception of sovereignty does not, however, necessarily represent an ominous turn of events. Under this model where the state exercises sovereignty, the citizenry has theoretically delegated this power to the state and, in return, possesses rights that serve as a check on state sovereign power. Indeed, rights are the vehicle through which the citizenry exercises its sovereignty. Instead of considering such rights as largely inconsequential checks granted to the people in return for relinquishing their sovereignty to the state, rights can play an important role in the model of state sovereignty. Under this view, the reality of sovereignty residing with the state is more defensible. The state is perceived as a guarantor of universal liberties and freedoms, and these rights are primarily vindicated through state institutions like the courts. Rights in this capacity are possessed by all, and the state ensures their existence.

Our current model of state sovereignty and its emphasis on universal rights, which evolved post-World War II, views the judiciary as responsible for enunciating and bringing to life the grand

67. FRITZ, *supra* note 46, at 6.
68. *Id.* at 6–7.
69. *Id.* at 7.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 6–8.

principles contained in constitutional provisions.[74] As noted by Lorraine Weinrib, in the United States, this system was particularly exemplified by the jurisprudence of the Warren Court through decisions like *Brown v. Board of Education*[75] and *Loving v. Virginia*.[76] In both of these cases, the Court rejected arguments that predicated a segregated system of education (*Brown*) or laws banning interracial marriage (*Loving*) on custom, tradition, or social hierarchy.[77] Arguments of this sort rely implicitly on a recognition of community norms for their basis. In the post-World War II rights model, however, the courts bear the responsibility of cutting through local normative-based arguments to protect basic rights possessed by all.

For example, in *Brown*, the Court was not swayed by popular arguments that schools in Clarendon County, South Carolina had always been segregated, were segregated because it was the will of the community, and natural (racial) difference sanctioned this method.[78] The school system in Clarendon County was segregated because the majority of the white community desired it. Nonetheless, the judiciary in this model protected the children of Clarendon County, acting, as Weinrib describes it,

> as a safe haven from both popular sovereignty, history and tradition, on the one hand, and judicial subjectivity, on the other. In this paradigm, the abstract ideas of equal citizenship and respect for human dignity—ideas based on human *personhood*—give structure to a legal frame that is regulative of all exercises of state authority.[79]

The emphasis on the rule of law and an independent judiciary to enforce the law undergirded the human rights movement that exploded globally after World War II. Indeed, the penultimate defi-

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74. *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 84–85 (Sujit Choudhry ed., 2006).

75. 347 U.S. 483 (1954).

76. 388 U.S. 1 (1967).

77. Weinrib, *supra* note 74, at 99–102.

78. 347 U.S. 483 (1954).

79. Weinrib, *supra* note 74, at 88.

ciency with the human-rights-based conception of adjudication is the lack of enforceability where viable states and independent judiciaries do not exist; this deficiency evidences the importance of the state to this model.

The rights-based system provides a means by which the people can exercise their sovereignty, while ensuring the rights of people who do not conform to social norms of the popular majority. Under this model, rights act as a more sophisticated way for people to exercise their sovereignty. While it is tempting to take a nostalgic view of the popular sovereignty tradition as a system of law that was more closely rooted in popular will than law mediated through the apparatus of an impersonal state, this system came with a terrible price for those deemed outside prevailing social norms. Those who conformed to different notions of work, sex, or thought often paid dearly for their differences. Others, like N.W. Barber, have realistically reconfigured the nature of the state by reminding us that it is socially created.[80] Accordingly, a view that the state simply must be opposed to maintain liberties for its people fails to recognize the human agency in creating the state.[81] Finally, if, in a system of state sovereignty, the proper exercise of popular will is defined by actions such as voting, petitioning the government, and using the courts, these actions are legitimate because they appreciate the nuanced view that a state also exists to protect the people from each other.

Of course, this Article conceptualizes the phenomenon of state sovereignty broadly and recognizes that there are many examples, especially on the state and local level, where popular participation is expanded to a greater degree. For example, John Dinan has noted that many states permitted the amendment of their constitutions by direct citizen initiative.[82] Certainly, in many states the local electorate can directly alter the constitution; yet, this rec-

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80. N.W. Barber, THE CONSTITUTIONAL STATE 25 (2010).

81. *See id.*

82. JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 59–62 (2006). While procedures vary, this initiative power generally allows the people of these states to bring forth or ratify amendments to their state constitutions directly, without having to resort to normal legislative channels. *Id.* at 59. Dinan notes that eighteen states permitted citizen initiatives to amend their constitutions by the end of the twentieth century, with Oregon acting as the first state to adopt this procedure in 1902. *Id.* at 62.

ognizes the popular use of formal legal channels to create change. Similarly, in Tennessee, local citizens retain law enforcement power, as they possess the right to make citizen's arrests.[83] At first glance, these examples seem to evidence a more complicated view of who has the power to make and enforce law. On a fundamental level, however, they still recognize the preeminent sovereignty of the state because each example requires some form of state interaction, however minimal. Thus, while persons in Tennessee retain the sovereign right to enforce law through a citizen's arrest, they must deliver their prisoner to a state magistrate or officer "without unnecessary delay."[84]

Ultimately, under a state sovereignty model, the people exercise rights by means other than mere popular will. For example, legislative officials who perform their duties unfavorably are voted out of office and replaced. In judicial matters, while the people may disagree with a ruling of the Supreme Court, in the United States, the consensus is that the Court holds the final word. Attempts to contest the decisions of the Court as promoting or opposing judicial nominees all implicitly admit the Court's absolute supremacy. The people vote for their representatives, voice opinions for or against court decisions, yet at all times behave within a set of assumptions that true power has been delegated to governmental entities and actors. The peoples' remedies are voting, using the courts, and peaceful protest.

IV. THE POLICE POWER AS AN ATTRIBUTE OF STATE SOVEREIGNTY

Having established that the state ultimately became the practical sovereign, this Article next assesses the method by which the state exercises its sovereign power, specifically the inherent police power to control and guarantee the health, safety, and welfare of the community. Much of the relevant scholarship notes a transformation of the police power in ways that largely track the changes in sovereignty previously discussed. Markus Dirk Dubber finds that the concept of police power formed when the governance of the household was superimposed on the government of the state itself—with the sovereign of the state acting as the theoretical head

83. *See* TENN. CODE ANN. §§ 40-7-101, -109 (2012).

84. *See id.* § 40-7-113.

of the state household.[85] As the head of the state household, the sovereign is thus charged with ensuring its wellbeing by using the police power, which Dubber finds as the public equivalent of a father's use of discipline to ensure order in a private family setting.[86]

Other scholars like Harry Scheiber specifically traced the origin of the term "police power" to Blackstone who classified certain offenses as being against the "public police and []economy."[87] Blackstone likened the individuals who made up a polity to members of a family who were "bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners."[88] As a result of the "very miscellaneous" nature of this category, the offenses covered a broad range of prohibitions, including most notably the power to abate common nuisances, as opposed to private nuisances.[89] Blackstone cited a long list of what constitutes common nuisances, which included: "annoyances" in common highways like public rivers, roads, or bridges; "offensive trades" like ale houses, gambling dens, unlicensed theaters, and inns that promoted disorderly conduct; unregulated lotteries; fireworks; the presence of idlers, gypsies, and vagrants; and night poaching, to name a few.[90] Scheiber argues that both the common law and civil law traditions long granted the sovereign these types of broad powers to ensure the public good.[91] In the case law of the early American republic, Scheiber finds this power was also envi-

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85. MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 81–82 (2005) [hereinafter THE POLICE POWER]. In addition, Dubber has written a number of other works that address the evolution of the this concept, including: MARCUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS (2002), and Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001).

86. THE POLICE POWER, *supra* note 85, at 58.

87. Harry N. Scheiber, *Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America*, 107 YALE L.J. 823, 824 n.6 (1997); *see* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE FOURTH: OF PUBLIC WRONGS 162 (Dawsons of Pall Mall, 1966).

88. BLACKSTONE, *supra* note 87, at 162.

89. *See id.*

90. *Id.* at 167–69.

91. Scheiber, *supra* note 87, at 833.

sioned as an essential and indispensable attribute of sovereignty or, alternatively, arose from a common-law-based theory emphasizing the common welfare of the community.[92]

Christopher Tomlins argues that the idea of police as a term largely synonymous with the common good pre-dated the early republic and existed as far back as the early modern Europe.[93] Like Scheiber, Tomlins dates an important milestone in the concept to Blackstone.[94] Unlike Scheiber, however, Tomlins argues that by the time of Blackstone's *Commentaries*, the police power was being reassessed from an insurer of community harmony and order to a function of state power concerned more with security than larger issues of public welfare.[95] Similar to William Novak's well-regulated society, Tomlins argues that the Constitution succeeded in elevating law over popular politics as the primary discourse, "separat[ing] power from participation in pursuit of an earlier and more familiar pattern of elite rule in the American polity."[96] While the discourse of police and its focus on common good or happiness had a brief period of expression, it became a power of the state when it met the discourse of law.[97] By the nineteenth century, the idea of police had become one "stripped of the language of democratic participation that had been so essential a component of the ideal of police-as-happiness current in the revolutionary era."[98] Tomlins's observations regarding the evolution of the police power are compelling. Like popular sovereignty, the police power was redefined as a power belonging to the state, instead of a tool retained by a community to ensure harmonious living. The police power expanded to provide for a method of control and reg-

92. *Id.* at 824 n.6.

93. CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 45 (1993).

94. *Id.* at 78–79.

95. *Id.*

96. *Id.* at 90–91, 94; *see* WILLIAM NOVAK, THE PEOPLES' WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA (1996). Novak argues that the idea that nineteenth century America was characterized by small government, private enterprise, and absolute respect for private property is a myth. NOVAK, *supra* note 96, at ix–x, 1. Rather, in what he refers to as the "well-regulated society," Novak states that the U.S. in this era readily deployed governmental power to address economic and social concerns. *Id.* at 1.

97. TOMLINS, *supra* note 93, at 94.

98. *Id.*

ulation by the state to punish offenders, abate nuisance, or regulate a trade or a business, as opposed to a popular power that existed to provide communal order.

When the police power was reconfigured to fit within the state sovereignty model, it covered a whole host of abilities, with law enforcement as a prime responsibility. Similarly, other scholars like Elizabeth Dale recognize the struggles regarding who had the exclusive right to enforce the law.[99] Dale notes that the issue of who had the right to enforce the law, which we appreciate as now residing exclusively with the state, was also the product of an evolution.[100] From the founding until the 1930s, Dale finds that popular forces routinely claimed the right to enforce law.[101] In making this conclusion, Dale compartmentalizes this evolution into six eras. From 1789 to 1839, Dale argues that in the absence of formal police departments, criminal justice was decentralized and was enforced mainly for the violation of local norms.[102] From 1840 through the end of the Civil War, competing forces of municipal and state governments attempted to gain control of criminal justice from popular action through the creation of police forces and state prisons.[103] Dale finds that in this era, both the state and local communities exercised law enforcement powers simultaneously.[104] From the close of the Civil War through 1900, Dale argues that while the state and occasionally the federal government stepped up their efforts to bring extra-legal justice under control, they could not stamp out the competing popular traditions that survived the end of the Civil War, Reconstruction, its collapse, and the establishment of the Jim Crow order in the South in the late

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99. *See generally* ELIZABETH DALE, CRIMINAL JUSTICE IN THE UNITED STATES 1789–1939 (2011).

100. *Id.* at 2.

101. *Id.* at 2–5.

102. *Id.* at 3.

103. *Id.* Laura Edwards recognizes a similar dynamic in her study of rural North and South Carolina beginning in the late 1820s and early 1830s as both states codified criminal laws and built scores of new courthouses, pushing each state's authority farther into the Carolina backcountry. LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 205–19 (2009).

104. DALE, *supra* note 99, at 3.

1880s.[105] Between the turn of the century and 1936, the reformation of police departments, the creation of numerous specialty courts and the deployment of a campaign to curb public support for extra-legal violence like lynching largely brought much of the extreme violence to a conclusion.[106] Although lynching was nearly eradicated, other types of extra-legal justice persisted—from unions that destroyed property during strikes while "law and order" groups formed private armies to eliminate the threat, to mobs attacking Germans during WWI, to the violence of the Chicago Race Riot that stemmed from white outrage over a perceived violation of racial swimming norms.[107] Alarmed by the national labor unrest exemplified by events like the Memorial Day Massacre of 1937, from 1937 to 1939 Congress and the Supreme Court actively implemented measures to place the right to enforce law or community norms squarely with the state.[108]

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105. *Id.* at 4; Michael Pfeiffer has also studied the prevalence of extra-legal activities during this era, or what he refers to as "rough justice." MICHAEL PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY 1874–1947, at 3 (2004).

106. DALE, *supra* note 99, at 4.

107. *Id.* at 4, 105, 114–15.

108. Dale argues that the Supreme Court emphasized its view that extra-legal justice would no longer be tolerated in the following opinions: NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 256–57, 261 (1939) (holding that sit-down strikes were not protected by the Wagner Act); United States v. Carolene Prods. Co., 304 U.S. 144, 145–55 (1938) (expanding the Court's rationale in *Palko* by upholding the Federal Filled Milk Act as proper under the Commerce Clause, despite objections that the Act was actually a police power measure reserved exclusively to the states and, more famously, that laws that restricted the political process, targeted a minority group, or implicated a fundamental right would be subject to strict scrutiny); Palko v. Connecticut, 302 U.S. 319, 323–26 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969) (holding that the double jeopardy clause of the Fifth Amendment was not incorporated against the states through the Fourteenth Amendment, but the Court nonetheless ruled that those rights that were essential to "a scheme of ordered liberty" would be applicable); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 49 (1937) (declaring the Wagner Act constitutional); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 390–99 (1937) (upholding a state law that set a minimum wage for women and rejected the *Lochner*-era assumption that employers and employees negotiated employment terms from equal bargaining positions). For Dale, this evidenced the Court's transition toward viewing rights as universal and protected by the courts, as opposed to its past interpretations

Thus, the state's exclusive power to enforce law is the end result of a 150-year contest over who could completely claim that power. Traffic camera contracts compromise that legacy. Our acceptance of the state as the institution with the exclusive duty of law enforcement obscures the long conflict regarding who could lay exclusive claim to this right. By parting with portions of its essential police power in the name of cost-cutting and efficiency, the state contracts away portions of its sovereignty that took generations to monopolize. Examples of this trend will be discussed in the following section.

V. DELEGATION OF THE POLICE POWER COMPROMISES THE NOTION OF STATE SOVEREIGNTY

This section will first examine the ways that traffic camera contracts affect the actual sovereignty of the state. Traffic camera contracts that delegate the state's exclusive power to detect and punish traffic law violations impede on state-based sovereignty in two ways. The first concerns the sovereignty of the municipality itself and makes for a fairly obvious point: if a municipality signs a contract with a private entity, it is largely responsible under the law of contract to fulfill its promise. After entering into these contracts, many municipalities find ending the relationship much more difficult than expected. The municipality cannot simply unilaterally terminate the contract, as would be expected of contractually obligated parties. The concern is that by subcontracting the power to enforce traffic laws, part of its police power, the municipality contracts away part of its sovereignty.

Certainly, these agreements dovetail neatly with a currently ascendant neoliberal ideology that emphasizes the primacy of the free market. Under this logic, everyone wins: the task of traffic enforcement is done more efficiently (as the private sector always ensures, according to the argument); it frees up law enforcement for other more serious tasks; municipalities generate sorely needed revenue for their budgets; and the citizenry is generally safer as the traffic laws are quickly and more easily enforced. By stepping back and analyzing this trend, however, it becomes apparent that

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where rights were used to create hierarchies of citizens. DALE, *supra* note 99, at 4–5, 122–35.

there are significant costs to this model. Thus, in this first instance, many municipalities bind themselves to contracts that they, or their successors, may wish to rescind at a later date. Many find that a change of heart on traffic cameras is not enough, as the contracting municipalities have not only contracted away their part of their police power, but also their sovereign right to determine the best method of enforcing the laws.[109] For example, as seen in the dispute between the city of Houston and ATS, shortly after a citizen petition forced the city's hand to discontinue the traffic camera program, ATS reminded the city of its contractual remedies to seek $25 million in damages for early termination of their contract, which extends through May 2014.[110]

The second situation in which these contracts impede on state sovereignty occurs when the municipality seeks to continue with the contract, but the existence of the agreement then ties the hands of the state government—the entity from which the municipality largely draws its powers. *Redflex Traffic Systems, Inc. v. Town of Farragut, Tennessee*,[111] discussed in Part I, provides a good example of this scenario. In this case, Redflex executed a traffic camera contract with the town of Farragut, Tennessee on November 9, 2009.[112] In addition to the Farragut contract, Redflex

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109. While municipalities have long entered into contracts with private entities to perform certain public functions, scholars like Christopher Serkin and Julia Roin have noted that, in light of the economic downturn, many municipalities have improperly moved much more aggressively toward tying the hands of their successors in order to cover present shortfalls. *See* Roin, *supra* note 36, at 2001; Serkin, *supra* note 30, at 943.

110. Chris Moran, *Houston Red-Light Cameras: All Over But the Litigation*, HOUSTON CHRON., Aug. 24, 2011, http://www.chron.com/news/houston-texas/article/Houston-red-light-cameras-All-over-but-the-2139922.php.

111. Redflex Complaint, *supra* note 5.

112. Redflex Complaint, *supra* note 5. While Redflex is a separate entity formally incorporated under the laws of the state of Delaware and based in Phoenix, Arizona, it is owned by Redflex Holdings Ltd., based in South Melbourne, Victoria, Australia. *See* Christopher Palmeri & Simone Baribeau, *Drivers Stopping Means Red-Light Cameras Don't Yield Cash Goals*, BLOOMBERG NEWS (July 5, 2011, 11:01 PM), http://www.bloomberg.com/news/2011-07-06/drivers-stopping-means-miami-red-light-cameras-fail-to-yield-promised-cash.html; REDFLEX HOLDINGS: INVESTOR RELATIONS, http://www.redflex.com/index.php/en/2012-02-24-01-10-24 (last visited Dec. 18, 2012); REDFLEX TRAFFIC SYSTEMS NORTH AMERICA, http://www.redflex.com/index.php/en/

signed contracts with eight other Tennessee municipalities to install traffic cameras across the state.[113] Subsequently, Tennessee placed significant restrictions on the use of traffic cameras within the state.[114] Although the subsequent law affected their interests across the state, Redflex chose Farragut as the venue to set forth its challenge. A wealthy community operating effectively as a western suburb of Knoxville, Farragut proudly touts it designation as the "[m]ost Business Friendly City in Tennessee," an award it has won twice since the honor began in 2006.[115]

On November 14, 2011, Redflex sued the town of Farragut, seeking a declaratory judgment that the state law did not apply to their contract.[116] Specifically, the Complaint asked the court to declare that the law was only intended to apply prospectively, which would leave the Redflex contract untouched.[117] Alternatively, Redflex requested that the court hold the law itself unconstitutional as violating the Tennessee Constitutional prohibition on retrospective laws or laws which impair contracts.[118] On December 14, 2011, Redflex filed an amended complaint to name the state of Tennessee and the state attorney general, Robert Cooper, Jr. as defendants.[119] Thomas Hale, attorney for Farragut, emphasized the

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2012-03-14-00-50-01 (last visited Dec. 18, 2012). American Traffic Solutions, Inc. is incorporated as a Kansas corporation but also has its principal place of business in nearby Scottsdale, Arizona. *See* Am. Traffic Solutions Complaint, *supra* note 7.

113. Bill Brewer & Don Jacobs, *Redflex Sues Farragut over New Traffic Camera Law*, KNOXVILLE SENTINEL (Nov. 17, 2011, 4:00 AM), http://www.knoxnews.com/news/2011/nov/17/redflex-sues-farragut-over-new-traffic-camera/; *see* Redflex Complaint, *supra* note 5.

114. Act of 2011, ch. 425, 2011 Tenn. Pub. Acts 425, § 6 (codified at TENN. CODE ANN. §§ 55-8-101, -110, -198 (2012)).

115. *Farragut Named State's Most Business-Friendly City*, KNOXVILLE NEWS SENTINEL (Nov. 15, 2011, 8:42 PM), http://www.knoxnews.com/news/2011/nov/15/farragut-named-states-most-business-friendly/; TOWN OF FARRAGUT, TENN., http://www.townoffarragut.org/index.aspx?NID=35 (last visited Dec. 18, 2012).

116. Redflex Complaint, *supra* note 5.

117. *Id.*

118. *Id.*; *see also* TENN. CONST. art. I, § 20.

119. Heather Mays Beck, *Redflex Amends Suit to Include State, Moves to Join Knoxville Suit*, FARRAGUT PRESS (Jan. 5, 2012), http://www.farragutpress.com/articles/2012/01/14966.html.

town's commitment to the Redflex contract when he stated that he encouraged Redflex to add the state as a party.[120] Hale also made a critical point when he commented on the constitutionality of the state law that curbed the use of the traffic cameras, arguing that, unlike a procedural law that could apply retroactively, substantive laws are "'not supposed to be applied retroactively because they would adversely affect people's contract rights or other rights they may have.'"[121] Here, Hale tacitly recognized the real tension in this case—the sovereign power of the state legislature to prescribe traffic laws versus the ability of municipalities to limit that power by delegating law enforcement duties to private entities that can claim competing contract rights.

Hale also noted that Redflex had also filed a motion to consolidate its case against Farragut with a similar case filed by competitor ATS against nearby Knoxville, Tennessee.[122] On November 8, 2011, roughly one week before Redflex brought suit against Farragut, its competitor ATS filed suit nominally against its customer the City of Knoxville, also seeking a declaratory judgment exempting it from the state law.[123] While ATS was similarly aggrieved by the Tennessee state law restricting the use of traffic cameras, their suit against Knoxville relied on slightly different reasoning than Redflex. For example, both complaints relied heavily on the common precept that laws usually only have prospective applications.[124] ATS, however, went further and argued that the city of Knoxville, under its designation as a home-rule municipality, had "inherent authority and police power to act as sovereign to make laws and ordinances necessary to secure the safety, health, peace, comfort, and convenience of Knoxville without impermissible interference from the Tennessee General Assembly."[125] As the basis for its argument, ATS relied on Article XI, Section 9 of the Tennessee Constitution, which provides for the election of home

120. *Id.*

121. *Id.*

122. *Id.*; Am. Traffic Solutions Complaint, *supra* note 7.

123. Am. Traffic Solutions Complaint, *supra* note 7.

124. *Id.*; Redflex Complaint, *supra* note 5.

125. Am. Traffic Solutions Complaint, *supra* note 7. Certainly, a good reason why Redflex chose not to rely on a similar line of argument is that while Knoxville is a home rule city, Farragut is not.

rule;[126] however, as it largely prohibits the state from passing special laws that affect home rule cities or removing home rule officers, a blanket statement that a home-rule city has exclusive police power to the exclusion of the state legislature is an overly expansive constitutional interpretation.[127] While ATS made an argument that the city of Knoxville has police power that trumps that of the state of Tennessee, state Attorney General Robert Cooper, Jr. fashioned largely the opposite argument.

In his August 8, 2011 Attorney General Opinion, Cooper addressed the question of whether the state law curbing the use of the cameras unconstitutionally violates the contracts entered into by the Tennessee municipalities, as the state constitution prohibits the impairment of contracts.[128] Cooper held that it would not.[129] In so doing, Cooper set forth a view of the state's police power as one that cannot be restrained by a private contract, as it is well-recognized that all contracts are subject to modification in light of the police power.[130] In this case, because the police power in ques-

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126. The Tennessee Constitution provides, in pertinent part:

> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

TENN. CONST. art. XI, § 9.

127. *See id.*

128. Constitutionality of Restrictions on Use of Unmanned Traffic Enforcement Cameras, Op. Tenn. Att'y Gen. 11-61 (2011) [hereinafter Constitutionality of Restrictions]; *see* TENN. CONST. art. I, § 20.

129. Constitutionality of Restrictions, *supra* note 128.

130. *Id.* Cooper also argues that the law in question does not violate the state constitution as it was remedial in nature and not retrospective. *Id.* Further, as noted previously, Christopher Serkin has aptly described the long standing balance required of the government between honoring contractual obligations and exercising its sovereign powers. *See supra* notes 30–35 and accompanying text.

tion comes in the form of a state law, the *ATS v. Knoxville* litigation sets up a showdown between the primacy of a municipality's police power versus the state's police power. Thus, at its base, these traffic camera contracts create a conflict between the contractual obligations of municipal governments and the power of state legislatures to accede to the larger demands of the citizenry that the practice be discontinued.

VI. DELEGATION OF THE POLICE POWER COMPROMISES OUR APPRECIATION OF POPULAR SOVEREIGNTY

While traffic camera contracts can contest the sovereignty of the state by determining how public safety violations are monitored and punished, these agreements can also limit sovereignty in more fundamental ways. Specifically, these contracts, signed by municipalities as the representatives of the local electorate, can also infringe on the conceptual sovereignty of the citizenry at large. While the state is the entity that exercises sovereignty, the ideology that the state operates at the pleasure and direction of the citizenry is essential to the continued legitimacy of this arrangement. As noted by Patricia Ewick, ideology can operate as a process by which people make sense of their personal lives, as well as structure their views of their larger society.[131] One of the most common functions of ideology is its role in providing legitimacy for the many unequal relationships in society by depicting them as historically innate or routine.[132]

One such relationship that ideology legitimizes is that between the state and the citizenry regarding the location of actual sovereignty. The ideology that the people have the ultimate power allows governance to continue in its current form. By parting with the sovereign power to enforce and punish certain laws thought the vehicle of contract, many municipalities are testing the conceptual structure that supports this ideology by placing the sovereign power given them by the electorate off limits. These agreements essentially transform the sovereign responsibility of law enforcement

131. Patricia Ewick, *Consciousness and Ideology*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 80, 80–81 (Austin Sarat, ed., 2004).

132. *Id.* at 86; *see also* JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE: CRITICAL SOCIAL THEORY IN THE ERA OF MASS COMMUNICATION 6–10 (1990).

into questions of ordinary contract rights, which then become the domain of courts and the rules of contract. Alienating these sovereign powers exposes popular sovereignty as an ideology, in its negative connotation, as well.

For example, in the Bellingham, Washington traffic camera case discussed in Part I, ATS brought suit against the city of Bellingham, the county, the county auditor and the four sponsors of a citizen initiative, which sought to add a traffic camera prohibition to the city code.[133] ATS sought two avenues of relief: first, it sought a declaratory judgment holding the initiative illegitimate because it violated the powers of the city council granted under state law; and second, it petitioned the court to enjoin the initiative from appearing on the November ballot.[134] Initially, the petition sponsors fared well. On August 17, 2011, the trial court ruled against ATS and directed it to pay the petition sponsors' attorneys' fees and costs, as well as a statutory fine of $10,000.00.[135] ATS sought an expedited appeal the same day and, on September 6, 2011, the day before the November ballots were to be printed, the Washington Court of Appeals entered its ruling.[136] The appeals court overturned the trial court and held the initiative invalid because it infringed on the power of the municipality.[137] The court held that the Washington State Legislature specifically authorized local municipalities to install traffic cameras through municipal ordinances.[138] Thus, the state legislature had specifically granted authority to the officers of the municipalities, thereby preempting acts by local residents.[139]

Seventy miles south of Bellingham, a similar scenario occurred in Mukilteo, Washington, an affluent northern suburb of Seattle. In response to the same 2005 state law that allowed Bellingham the authority to sign private traffic camera contracts, the Mukilteo city council passed an ordinance in May of 2010 that

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133. Am. Traffic Solutions, Inc. v. City of Bellingham, 260 P.3d 245, 247 (Wash. Ct. App. 2011).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 249.

138. *Id.* at 248 (noting that this authority was granted pursuant to section 46.63.170 of the Revised Code of Washington).

139. *Id.*

granted the mayor authority to contract with ATS to place cameras in the city.[140] One month later, a citizen petition drive began that sought to prohibit the installation of the cameras unless approved by at least two-thirds of the electorate, to limit the amount of fines for violations evidenced only by the cameras, to revoke the existing ordinance, and to prohibit future cameras ordinances without a citizen vote.[141] Shortly thereafter, the city council appeared to experience a change of heart and passed a resolution withdrawing its consent to allow the mayor to sign the camera contract and ordering the petition initiative placed on the November ballot.[142] In response, the "Mukilteo Citizens for Simple Government" brought suit in state court against the city and a number of city officials, asking the court to declare the petition initiative illegal and to enjoin its appearance on the ballot.[143] The trial court ruled against the Mukilteo Citizens' challenge as premature, and the local electorate approved the initiative restricting the cameras in the subsequent November election.[144] While its opponents accused the Mukilteo Citizens for Simple Government of being nothing more than a concocted front for the traffic camera lobby, the group prevailed on its appeal when the Washington Supreme Court held that it did have standing to bring the challenge.[145] In a 5-4 decision, the court held that the citizen initiative was invalid as a violation of the state law that governed the use of traffic camera contracts.[146] The court characterized the law as giving exclusive discretion over the use of this technology to the municipalities, and this discretion was not subject to citizen review.[147]

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140. Mukilteo Citizens for Simple Gov't v. City of Mukilteo, 272 P.3d 227, 229–30 (Wash. 2012).

141. *Id.* at 230.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 230–31; Oscar Halpert, *Mukilteo Group Fighting Eyman Initiative Remains a Mystery*, EVERETT HERALD, July 28, 2010, http://www.heraldnet.com/article/20100728/NEWS01/707289800; Scott North & Rikki King, *Traffic Camera Company Sought Mukilteo Officials' Help in Filing Lawsuit*, EVERETT HERALD, Aug. 7, 2011, http://heraldnet.com/article/20110807/NEWS01/708079940.

146. *Mukilteo Citizens*, 272 P.3d at 233–34 (referencing WASH. REV. CODE § 46.63.170 (2012)).

147. *Id.*

Both courts in the *Bellingham* and *Mukilteo* cases relied heavily upon a 2006 Washington Supreme Court case, *City of Sequim v. Malkasian*[148] for their decision.[149] Though the case concerned a citizen initiative to place additional restraints on the city's issuance of revenue bonds and was not a traffic camera case, the decision is nonetheless instructional. In *Malkasian*, its namesake, Paul Malkasian, sponsored a ballot initiative that sought to make it more difficult for the Sequim City Council to issue revenue bonds, primarily through the requirement that final approval of most revenue bonds be obtained through citizen referendum.[150] Prior to the placement of the initiative on the ballot, the city brought suit seeking a declaratory judgment that the initiative exceeded its bounds because the power to issue bonds was specifically granted to the city council as a political body by state law and not to the city itself.[151] The case had a tortuous history in which the trial court ruled against the city, only to have the case bounce back and forth between the appeals court and the trial court; the initiative question finally arrived in the Washington Supreme Court, which handed down its decision in 2006—approximately ten years after the saga began.[152] After untying the "procedural tangle," the court ruled in favor of the city.[153] The court relied on three major concepts for its ruling. First, it premised its decision on a strict textual reading of the state law that granted power to issue revenue bonds to the "legislative body" of a municipality.[154] Second, it implicitly viewed the law as a delegated police power to the city.[155] As such, the court gave wide latitude to the city to issue revenue bonds to provide for the general welfare or best interests of the community.[156] Finally, the court commented on the nature of sovereignty. Firmly placing sovereignty with the state, the court held, "[w]hen the legislature grants authority to the governing body of a city, that au-

148. 138 P.3d 943 (Wash. 2006).

149. *See Mukilteo Citizens*, 272 P.3d at 233; Am. Traffic Solutions, Inc. v. City of Bellingham, 260 P.3d 245, 247–48 (Wash. Ct. App. 2011).

150. *Malkasian*, 138 P.3d at 946.

151. *Id.*

152. *Id.* at 946–47.

153. *Id.* at 945.

154. *Id.* at 949–50.

155. *Id.* at 950–51.

156. *Id.* at 949–50.

thority is not subject to repeal, amendment, or modification by the people through the initiative or referendum process."[157]

A similar dynamic occurred in Houston where the city also contracted with ATS for the installation of red light cameras.[158] There, in 2004, the city council passed an ordinance allowing for the installation of the cameras.[159] Two years later, the city hired ATS to finally install seventy traffic cameras across Houston.[160] In addition to installing the cameras, ATS would issue the notices of violation as well as collect all fines.[161] After four years of the program, however, many in Houston resented the cameras, organizing to amend the city charter to specifically disallow their use.[162] In November of 2010, 53% percent of voters agreed with the camera ban amendment.[163] In response, the city took three steps. First, it amended the charter as directed by the election.[164] Second, it notified ATS that it would cancel the traffic camera contract.[165] Finally, the city filed suit in federal court seeking a declaratory judgment to advise the city of its obligations, as it was caught between a citizen mandate and an executed contract.[166] Shortly thereafter, ATS filed a counterclaim against the city, arguing that the citizen initiative and the resulting charter amendments were invalid and unconstitutional.[167]

On June 17, 2011, the U.S. District Court for the Southern District of Texas resolved the city's dilemma. In its order on a motion for summary judgment, the court ruled that the city charter amendment was invalid.[168] In making its decision, the court set

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157. *Id.* at 951.

158. City of Hous. v. Am. Traffic Solutions, Inc., No. H-10-4545, 2011 WL 2462670, at *1 (S.D. Tex. June 17, 2011).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*; Complaint for Declaratory Judgment, City of Hous. v. Am. Traffic Solutions, Inc., 2011 WL 2462670 (S.D. Tex. June 17, 2011) (No. H-10-45452010), 2010 WL 4780022.

167. City of Hous. v. Am. Traffic Solutions, Inc., 668 F.3d 291, 293 (5th Cir. 2012).

168. *Am. Traffic Solutions, Inc.*, 2011 WL 2462670, at *3.

forth its view of the role of the sovereign, relying heavily on the terminology and procedures inherent to the municipal governance of Houston. For example, the court recognized that there was a dispute concerning what to label the citizen initiative: was it a charter amendment (as thought by the citizen initiative planners), or was it actually a referendum designed to overturn an unpopular city ordinance (as argued by ATS)?[169] For the court, this distinction was critical. If the initiative was considered a referendum to repeal an ordinance, the city charter mandated that any petition to overturn the ordinance be filed within thirty days of passage.[170] Clearly, as the action to ban the traffic cameras was brought four years after the ordinance, classifying the initiative as a referendum would provide a procedural method to dispose of the case. The court reasoned:

> On December 21, 2004, the city adopted the ordinance to use red-light cameras. The citizens had 30 days—until January 20—to gather the signatures for a referendum to repeal it. No one did.
>
> Almost six years after its adoption, people started a petition drive for a referendum to stop the city's use of red-light cameras. The petitioners did not call it a referendum—a proposition to repeal an offending ordinance. To evade the deadline on referendums, they called it an amendment to the charter. Presented with this mis-labeling, the council supinely ignored—over the voices of some of its members—their responsibility and put the proposition to the voters as an amendment to the charter.
>
> The court's inquiry is limited to the character and effect of the election as ascertained from an obdurate reality—not from labels and press releases.[171]

Here, the court used a procedural requirement—the thirty day deadline to repeal ordinances—to invalidate the amendment,

169. *Id.* at *2–3.
170. *Id.* at *1.
171. *Id.* at *2.

as it provided the only method by which the residents of Houston could object to the delegation of powers they, in theory, delegated to the state.[172] In so doing, the court envisioned sovereignty as firmly placed with the state. Under this view, the citizens can vote for elected officials to make appropriate decisions, with the court noting:

> The deadline is short, but the people have an alternative, recurring way to repeal an offending ordinance. Since the referendum deadline passed, the city has held three general elections for the mayor and council. The same energy and organization that went into the effort to repeal the ordinance may be applied in future elections as an alternative to a referendum.[173]

Similar to the *Bellingham* and *Mukilteo* cases, the U.S. District Court in Houston envisioned an even more restrictive version of state sovereignty, one where the only practical remedy is voting, not petitioning the government (as the thirty day deadline makes that virtually impossible) and not bringing suit (as the motion to intervene was also denied).[174]

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172. *See id.* at *3.

173. *Id.*

174. The ruling by the District Court is not the end of this matter, however. The District Court also denied a motion to intervene in the case by parties involved with the original citizen's initiative drive. On January 24, 2012, the United States Court of Appeals for the Fifth Circuit reversed the District Court, holding that the intervenors had standing as their interests were not properly represented by their ostensible representatives, the city government. City of Hous. v. Am. Traffic Solutions, Inc., 668 F.3d 291, 294 (5th Cir. 2012). The Court of Appeals, in an opinion written by Judge Edith Jones, held that

> [t]his is no matter of simply defending City policy of one sort or another: it involves millions of dollars of revenue to City coffers during a period of considerable economic uncertainty. The district court erred in declaring that the Kuboshes [the intervenors] had to prove a "meaningful probability [of inadequate representation] derived from actual facts." Under the totality of circumstances here, including the haste of the litigation, the City's pecuniary motives, the extended opposition to the charter amendment, the agreed order to leave the cameras in place, and the attempt to reinstate them before the suit had

VII. CONCLUSION

The foregoing are but a few examples of municipalities seeking to trim expenses by privatizing governmental services. While many such services may make financial sense, they do not take into account other more significant hidden costs. Others have noted the societal and moral consequences behind privatizing governmental services that do not necessarily implicate core functions like law enforcement. As noted in the Introduction, for example, the state of Florida recently attempted to privatize the vast majority of its prisons in south Florida.[175] While this move ultimately failed, the state legislature successfully privatized the health care services provided to Florida's inmate population.[176] Although this is being challenged by health care workers affected by the new mandate, the end result of this transition for these health care workers could likely be the standard story: they will perform the same job, only now they will work for a private company for less money, inferior benefits, and minimal job security.

This Article does not seek to repeat the critiques of this now familiar story. Rather, this Article seeks to show that these privatization efforts, at some point, challenge not only the actual sovereignty of the state, but undermine the conceptual sovereignty of the people as well. A unifying thread among these cases is that traffic camera contracts can not only bind the state legislatures and future officials elected to city government, but also constrain the will of the electorate. For example, the Tennessee litigation shows that a city council decision in a western suburb of Knoxville was given standing to challenge the sovereignty of the state of Tennes-

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> concluded (although this act occurred after the denial of the intervention motion), it is sufficient to conclude that the intervenors' interests "may be" inadequately represented.

Id.

175. *See* Bousquet , *supra* note 26.

176. Steve Bousquet, *Unions Sue over Plan To Privatize Prison Health Care System*, TAMPA BAY TIMES, Feb. 16, 2012, http://www.tampabay.com/news/health/unions-sue-over-plan-to-privatize-prison-health-care-system/1215638. The privatization of health care services was successful in part due to its inclusion in a proviso to the state budget, and it did not go through the normal legislative process on its own, which the *Tampa Bay Times* reports is one of the main legal arguments underlying the suit. *Id.*

see itself. While the Redflex and ATS challenges to the Tennessee state law were struck down by the trial court, this is very likely not the final chapter for this specific litigation in Knox County, nor the rest of the country.[177] ATS has maintained a view that a contract is a proper vehicle through which a municipality can both part with its power of law enforcement and restrain the actions of a state legislature seeking to respond to the demands of their constituents. In commenting on the court's decision, a representative for ATS insisted on framing the dispute as one that "'has implications for all businesses, large or small, operating in the state. Ultimately, what's really at stake is whether or not a contract in Tennessee is worth [the] paper it's written on.'"[178] This view myopically considers that a public municipality is indistinguishable from a private business and fails to recognize that some governmental functions simply cannot be delegated through contract without infringing on sovereignty.

Further, as evidenced by the Houston litigation, municipalities that willingly part with their police power can even affect citizens' right to influence their representatives. By delegating their responsibilities to perform law enforcement to private entities through legally enforceable contracts, they alienate one of their fundamental rights of sovereignty, that of the police power. Once the police power is made part of a private bargain, that power transforms from a broad sword wielded by the state into just another limited subject of a contract.

This leads to a final question. If the power of sovereignty rests with the state, subject to oversight by the citizenry, what happens to sovereignty when the state parts with portions of its sovereign power? In the traffic camera situation, the sovereign power of law enforcement does not return to its conceptual owner. Instead, it is contracted to third party corporations that are themselves comprised of select individuals serving as employees, officers, directors, and, if applicable, shareholders of these entities. Does this

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177. Memorandum Opinion and Order, *available at* http://www.thenewspaper.com/rlc/docs/2012/tn-rightturn.pdf.

178. Don Jacobs, *Knox Chancellor Nixes Attempt to Overturn Red Light Camera Law*, KNOXVILLE NEWS SENTINEL (June 8, 2012, 4:00 AM), http://www.knoxnews.com/news/2012/jun/08/knox-chancellor-nixes-attempt-to-overturn-red/.

trend signal the emergence of a new type of sovereignty other than popular sovereignty or state sovereignty?