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John Marshall and We the People

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I. INTRODUCTION

My remarks focus on a portion of *McCulloch v. Maryland*[1] that is not logically necessary to any part of the decision, but which nonetheless addresses perhaps the most basic question of constitutional law.

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states.[2]

For his part, Marshall appears to have no doubt about the answer:

> It would be difficult to sustain this proposition.
>
> From these conventions [held in the states], the constitution derives its whole authority. The government proceeds directly from the people; it "ordained and established," in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negative, by the state governments.

* I would like to give thanks to Mike, Dave, Melody, and the Organizers. Just a few caveats: Work not just in progress, but just underway; fear less enlightening to you than useful to me.

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1 17 U.S. 316 (1819).

2 *Id.* at 402.

The constitution, when it was adopted, was of complete obligation, and bound the state sovereignties.[3]

Since I went to graduate school before law school, I came upon this case after discovering the writings of Gordon Wood, Edmund Morgan, and Jack Rakove. But when I did I thought it was a brilliantly concise summary of their work on the nationalist origins of American popular sovereignty. Recently, and especially at the Supreme Court, this understanding of popular sovereignty has come under challenge. Indeed, associating John Marshall himself with that account has also come under challenge. What I want to do today is consider the problem that *McCulloch* raised concerning just who were the popular sovereign that ordained the constitution.

First, I want to talk about why this issue is suddenly almost as important as it was when *McCulloch* was decided. Then I want to consider the answer Marshall gave. Finally, I would like to at least sketch out whether Marshall himself was representative of the Founding.

II. THE STAKES, NOW AS THEN

While the practical effect of it all may be an open question, arguably never has the Court struck down so many acts of Congress in so short a time in the name of "states' rights."[4] This "counterrevolution" arguably began with the little noted *Gregory v. Ashcroft*,[5] then accelerated through *United States v. Lopez*,[6] *New York v. United States*,[7] *Printz v. United States*,[8] *Alden v.*

[3] *Id.* at 403-04.

[4] This deliberately provocative claim in large part depends on how the relevant terms are applied. If invalidation based on "states' rights" broadly means any decision that considers the allocation of power among the federal and state governments, then clearly the New Deal and even the Progressive Era present rival claims.

For now, I note only that I employ the terms "states' rights" more for its popular currency than for its theoretical accuracy. Martin S. Flaherty, *Are We to Be a Nation? Federal Power v. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1089 (1999). Charles Black correctly pointed out that "rights" are more appropriately attributed to individuals rather than governmental units. *See* CHARLES BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED 41-85 (1997); *see also* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1911 (1983) (focusing on state sovereign immunity from federal jurisdiction).

[5] 501 U.S. 452 (1991).

[6] 514 U.S. 549 (1995).

[7] 505 U.S. 144 (1992).

[8] 521 U.S. 898 (1997).

Maine,[9] and last year's *United States v. Morrison*.[10] These cases have in turn fueled much academic commentary.[11] The states' victories appear so complete that many in court and academia herald a "restoration" of American federalism.[12]

As different as these cases may be in specifics, one larger proposition tends to unite them. Over and over the Court and its defenders have thought it critical to argue that the nation[13] "and certainly the Constitution" was created by "We the States." Once popular as the "compact theory"[14] of our government, this particular story remains alive and well at the Supreme Court. In a current, typical version, "[t]he States *entered the Federal union* with their sovereignty intact;"[15] indeed, "*they adopted the Constitution*."[16]

Conversely, those Justices on the nationalist side advance the contrary thesis that the original popular sovereign was not the States but "We the People" of the United States. Here, one idiosyncratic example is Justice Kennedy, who has on occasion rejected both the state-oriented story and the results that follow.[17] No sooner does he do that, however, then he hops back

9 527 U.S. 706 (1999).

10 529 U.S. 598 (2000). Against these cases stand a small number of exceptions, most notably U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985).

11 *See* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1327 (1997) (analyzing Garcia); *see also* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1494 (1994); Martha A. Field, *The Supreme Court, 1984 Term: Comment: Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 89 (1985).

12 *See* Yoo, *supra* note 11, 1403-04; *see also* Martin S. Flaherty, *Symposium Papers: Federalism in the 21st Century: Historical Perspective: More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 U. KAN. L. REV. 993, 993 (1997); Richard E. Levy & Stephen R. McAllister, *Symposium Papers: Federalism in the 21st Century: Defining the Roles of the National and State Governments in the American Federal System: A Symposium*, 45 U. KAN. L. REV. 971, 971 (1997) (pointing out reemergence of federalism debate in Congress).

13 The questions of which came first, the nation or the states, is a longstanding debate. *See* RICHARD MORRIS, THE FORGING OF THE UNION 55 (Harper & Row 1987).

14 The term refers to the idea that the federal government results from an original compact among the states. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161-202 (Alfred A. Knoph ed.) (1996); *see also* Michael J. Klarman, *How Great were the "Great" Marshall Court Decisions?*, 87 VA. L. REV., 1111, 1129 (2001) (discussing how Marshall rejected state compact theory and its implications).

15 Blatchford v. Native Vill. Of Noatak and Circle Vill., 501 U.S. 775, 779 (1991) (emphasis added).

16 *Id.* at 781 (emphasis added).

17 *Thornton*, 514 U.S. at 798 (Kennedy, J., concurring).

on the "We the States" bandwagon in both senses.[18]

In between these theoretic possibilities is the proposition that the peoples of the several states as opposed to their governments created the United States. Writing for four justices usually in the majority, Justice Thomas argued just this in *U.S. Term Limits v. Thornton*.[19] Yet either way, as his opinion makes clear, "the notion of popular sovereignty that under girds the Constitution does not erase state boundaries, but tracks them."[20]

In one sense, which of the three theories should not matter. Yet in another sense we all tend to act as if the choice is vital. As Larry Kramer has pointed out,[21] determining the nature of the popular sovereign that created this new constitutional order is not the same thing as determining the nature of the order itself. "We the People" of the United States could easily have decided that national power should be minute, state sovereign immunity broad, and an authority to "commandeer" state executive officials non-existent. "We the States" could just have easily have ordained a government that came out differently on any or all of these issues.

Almost no one, however, views these perfectly logical possibilities as likely. At least as far back as *McCulloch v. Maryland*, litigants and judges alike "have deemed it of some importance, in the construction of the constitution, to consider that instrument as emanating not from the people, but as an act of sovereign and independent states."[22] They have done so even when, as in *McCulloch*, the choice between these competing stories does not directly resolve any issue under consideration.[23] This ongoing attraction to a logically irrelevant debate must in large part rest on the sensible intuition that groups, nor more than individuals, like to grant power to rivals. This insight prevailed over strict logic during ratification, as state-oriented Anti-federalists like Patrick Henry scoffed at the idea of a national popular sovereign, while Federalists such as James

18 *Alden*, 527 U.S. at 718-20.

19 *Thornton*, 514 U.S. at 846 (Thomas, J., dissenting).

20 *Id.*, at 849.

21 As per conversation author had with Larry Kramer.

22 *McCulloch*, 17 U.S. at 404-05.

23 *See* Larry D. Kramer, *Putting the Politics Back Into The Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 233 (2000).

Wilson embraced it.[24] As the Supreme Court's recent opinions show, it still prevails.[25]

So much does this thought prevail, in fact, that the usual understandings of Marshall on this issue have been contested in much the same way as the issue itself. So to Marshall I turn.

III. MARSHALL

The usual scholarly understanding of Marshall on this point paralleled my own initial encounter as a graduate student. To cite one example, Professor Hobson has written that

"Marshall premised constitutional nationalism on a theory of the Constitution as a constituent act of the people of the United States, not a compact among the several states."[26] Members of the

Court at times have echoed this understanding. In *Term Limits*, for example, Justice Kennedy stated:

It might be objected that because the States ratified the Constitution, the people can delegate power only through the States or by acting in their capacities as citizens of particular States. But in *McCulloch v. Maryland*, the Court set forth its authoritative rejection of this idea:

The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument . . . was submitted to the people. . . . It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people

[24] *See infra* test accompanying n. 53-55.

[25] *See* New York v. U.S., 505 U.S. 144, 149 (resurrecting Tenth Amendment by invalidating Low-Level Radioactive Waste Policy Amendment as unconstitutional infringement of state sovereignty); *see also* Bd. of Trustees v. Garrett, 531 U.S. 356, 364 (2001) (holding that state sovereignty prohibited application of section of Americans With Disabilities Act to allow suits against states by private citizens); U.S. v. Morrison, 521 U.S. 548, 648-51 (discussing historical debate and case law debate over state immunity).

[26] *See* Charles Hobson, *Editing Marshall*, 33 J. MARSHALL L. REV. 823, 850-53 (2000) (discussing Marshall's judicial philosophy and his legal correspondence with other justices); Edward White, *The Working Life of the Marshall Court 1815-1835*, 70 VA. L. REV. 1, 44 (1996) (noting theme of Marshall's tenure was nationalism and state sovereignty).

themselves, or become the measures of the State governments.[27]

In the same case, however, Justice Thomas tried to turn use of Marshall on its head by arguing, first, that Marshall actually advocated a "We the Peoples" model, and second, that this intermediate model ultimately cut in favor of state's rights.

At the same time, however, the people of each State retained their separate political identities. As Chief Justice Marshall put it, "no political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."[28]

The concurring opinion appears to draw precisely the opposite conclusion from the passage in *McCulloch* that contains this sentence. But while the concurring opinion seizes on Marshall's references to "the people," Marshall was merely using that phrase in contradistinction to "the State governments."[29]

Marshall's opinion accepted this premise, even borrowing some of counsel's language.[30] What Marshall rejected was counsel's conclusion that the Constitution therefore was merely "a compact between the States."[31] As Marshall explained, the acts of "the people themselves" in the various ratifying conventions should not be confused with "the measures of the State governments."[32]

It would, however, be difficult to sustain Justice Thomas's proposition. Granted, the passage was ambiguous, nor was Thomas's view untenable, but a close reading indicates that Marshall was talking about logistics and not theory.

But, of course, the larger context would appear to resolve the question. Looking before, consider Marshall's own account of his early nationalism in his autobiographical sketch:

I had grown up at a time when a love of union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom; "when patriotism and a strong fellow feeling

[27] *Thornton*, 514 U.S. at 840-41 (citing *McCulloch v. Maryland*); *see also* Printz v. U.S., 521 U.S. 898, 920 (1997) (reiterating conclusion that federal government has power to regulate individuals and not states).

[28] *See Thornton*, 514 U.S. at 849 (discussing Marshall's reasoning in *McCulloch* and disagreeing with it); *McCulloch*, 17 U.S. at 363 (argument of counsel).

[29] *See Thornton*, 514 U.S. at 849 n. 2.

[30] *See McCulloch*, 17 U.S. at 363 (argument of counsel).

[31] *See McCulloch*, 17 U.S. at 403; *see also* Christopher L. Eisgruber, *The Fourteenth Amendments Constitution*, 69 S. CAL. L. REV. 47, 66 (1995) (noting Marshall jurisprudence rejected notion that Constitution was compact with states).

[32] *See McCulloch, 17 U.S. at* 403-04.

with our suffering fellow citizens of Boston were identical;" when the maxim "united we stand, divided we fall" was the maxim of every orthodox American; and I had imbibed these sentiments so thoroughly that they constituted [interesting word choice there] a part of my being.[33]

For him, the American people predated the Constitution. Unlike Lance Banning's Madison,[34] America came first. But as Professor Hobson pointed out, there appears to be evidence that resolves the matter, and it is in the pamphlets Marshall unusually wrote to defend *McCulloch* in particular.

There is, then, no agreement formed between the government of the United States and those of the states. Our constitution is not a compact. It is the act of a single party. It is the act of the people of the United States, assembling in their respective states, and adopting a government for the whole nation. Their motives for this act are assigned by themselves. The have specified the objects they intended to accomplish, and have enumerated the powers with which those objects were to be accomplished.[35]

Marshall it seems, meant "We the People" of the nation.[36]

IV. FOUNDING

A more important, and tougher, question is how representative was Marshall during the ratification process of which he speaks?

[33] JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH 9 (Adams ed.) (1937).

[34] *See* Lance Banning, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC (1995) (arguing that Madison was less consistently nationalist than usually thought).

[35] *See* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, 203 (Gerald Gunther ed. 1969) (quoting Marshall's eighth essay, "A Friend of the Constitution," displaying Marshall's argument that his decision was correct and that federal government is compact between federal government and people); Charles F. Hobson, *The Bill of Rights at 200 Years: Bicentennial Perspective James Madison, The Bill of Rights and the Problem of The States*, 31 WM. AND MARY L. REV. 267, 273 (1990) (discussing Marshall's view of framers' intent and its relationship to his judicial philosophy). *See generally* R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States Rights Tradition*, 33 J. MARSHALL L. REV. 875, 883-86 (2000) (discussing critique of Marshall's theory and Marshall's response to that critique).

[36] Or so I thought. Subsequent research, however, has reluctantly but firmly led me to the conclusion that Marshall indeed understood his treatment of the Founding in *McCulloch* as navigating a middle course between We the States and We the People, effectively adopting the We the Peoples approach as Justice Thomas surmised. I nonetheless further conclude that, in stark contrast to Justice Thomas, Marshall saw this starting point as leading to nationalist results rather than to state-oriented doctrine. *See* Martin S. Flaherty, *John Marshall, McCulloch v. Maryland, and "We the People": Revisions in Need of Revising*, _ WM. & MARY L. REV. _ (forthcoming 2002).

The persistence of the We The People/We The States debate suggests that further inquiry may not yield an answer. That would not be the worst result. In that case, the Supreme Court, among others ideally would then refrain from offering a particular account as the clear winner and move beyond history to consider political science, comparative law, structure, or evolving tradition to reach sound doctrinal conclusions. Then again, the dispute over the popular sovereign's first incarnation might also have endured because even after 200 years we have not been conducting the historical inquiry the right way.

This possibility might seem a non-starter given the work of modern historians. Those scholars, who over the last generation have reconstructed original constitutional understandings, almost all side with the nationalist story. Edmund S. Morgan, for example, writes "Madison was inventing a sovereign American people to overcome the sovereign states,"[37] continuing "[t]he Anti-federalists were not prepared to challenge Madison's crucial invention: they did not deny that there could be an American people as opposed to the peoples of the several states."[38] Likewise, Jack Rakove, notes with apparent approval that James Wilson believed that "the right of a sovereign people to replace a defective compact with a more perfect union."[39] In similar fashion, Gordon Wood has written, "[T]he more the Federalists stress the foundation of the new Constitution in the people, the more excited they became with the spectacular significance of the constitution-making process."[40] All this said, much in this line of scholarship tends to adopt the nationalist position, and even then not always clearly, without squarely considering alternatives other than ratification of the states by sovereign state governments.

For better or worse, the same cannot be said of scholarship from the law side of the aisle. Precisely because of its doctrinal implications, legal scholars have more directly considered whether the popular sovereign was understood as the people of

[37] EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 267 (1988).

[38] *Id.*, at 282.

[39] *See* RAKOVE, *supra* note 14, at 163 (1996).

[40] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 535 (1969).

the nation, the state governments, or some possibility in between. Much of this work on either side of the question has been hack advocacy.[41] But some has not. One study worth mention in this regard is Henry Monaghan's *We The Peoples, Original Understanding, and Constitutional Amendment*.[42] In a nuanced account, Monaghan considers the structural and historical evidence indicating that both the government and the popular sovereign that ordained it cannot be easily dismissed as either, in Madison's phrase, "wholly national or wholly federal."[43] Monaghan's conclusion not only better accords with history's usual complexity than the conclusions of the historians, it suggests that legally-motivated historical inquiry can advance historical inquiry in general.

Exactly for that reason, however, Monaghan should not necessarily be considered the final word. Instead, a further look from a slightly different angle suggests an alternative "though at this stage, merely working" hypothesis. A sketch of the thesis begins with Preamble, the text that ostensibly settles the matter, which famously proclaims, "We the People of the United States . . . do ordain and establish this Constitution for the United States of America."[44] Nationalists typically pounce on these words with the plain meaning argument that people of the nation meant people of the nation.[45] To this opponents advance a number of points to show that the plain meaning is not so plain after all.[46] One counter argument notes that the original preamble read, "We the People of the States of New Hampshire,

41 Citations deliberately omitted.

42 Henry Monaghan, *We The People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 124 (1996)

43 *Id.*, at 126 (quoting James Madison, FEDERALIST NO. 39).

44 U.S. CONST., Pmbl; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 177, 590 (Max Farrand ed., 1987) (comparing August draft stating "We the people of the States. . ." with Report of Committee of Style, "We the People of the United States. . .").

45 *See* Martin v. Hunter's Lessee, 14 U.S. 304, 324-25 (1816) (stating "[t]he Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States."); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 365-67 (1851) (declaring Union formed upon decision of entire populace rather than individual state citizenry); *cf.* Alexander Hanebeck, *Democracy Within Federalism: An Attempt to Reestablish Middle Ground*, 37 SAN DIEGO L. REV. 347, 360 (2000) (noting "difference between preamble of Articles of Confederation and Constitution is striking").

46 *See* Raoul Berger, *Federalism: The Founders' Design – A Response to Michael McConnell*, 57 GEO. WASH. L. REV. 51, 56 (1988) (emphasizing ratification process' structural basis being individual states).

Massachusetts, Rhode-Island and Providence Plantations . . .", but was changed by the Committee of Style on the ground that since ratifications by nine state conventions were all that was required to establish the new government, it was impossible to tell which would be the first nine or whether all thirteen would approve.[47] One further rejoinder points out that the text of the Constitution refers to the term "United States" as plural.[48]

These lawyerly counters, however, run into counters of their own. "United States," to be sure, was seldom referred to in the singular during the eighteenth century. Yet British usage, then and now, commonly employed the plural for collective entities that were nonetheless understood to be a single unit. Today, think the ways in which Ireland are going to defeat England in the World Cup, (even though the United States do not have a chance against Brazil in the same competition). Then, consider that how the Constitution also refers to the House and Senate "unitary institutional bodies rather than some sort of confederation or alliance" in the plural.[49] Likewise true, as far as it goes, is the original purpose for the Preamble's switch to people "of the United States." The somewhat less lawyerly, and far less trivial, rejoinder to this objection is that on almost any theoretic account, the understanding of the few dozen individuals at the Federal Convention should bow before the more general understanding of the public that had the authority to vote the Constitution up or down.[50] This point seems especially compelling when the issue is the public's self-understanding of who and what they are. Reconstructing this self-understanding (or, as Jack Rakove would caution, possible understandings[51]) is no small task.

The early projections nonetheless indicate that research confirms what both the untutored perspective and scholarly account suspects: "We the People of the United States," which appears to speak of a national populace, was generally

47 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 44, at 177.

48 *See Thornton*, 514 U.S. at 846, n.1 (Thomas, J., dissenting) (stating Constitution "consistently" uses plural form).

49 *See, e.g.*, U.S. CONST. art. I, §2, cl. 5 & §3, cl. 2.

50 *See* Charles A. Lofgren, *The Original Understanding of Original Intent*, 5 CONST. COMMENT. 77, 83-84 (1988).

51 *See* RAKOVE, *supra* note 14, at 3-22.

understood in just this way.[52] Beyond simply confirming what previous historians have largely projected, a fresh look at the matter also suggests an important reason why: once divorced from its original purpose and placed in public discourse, the rhetorical power of the Preamble took on a life of its own, polarized thinking about the possibilities of popular sovereignty, and became its own nationalist, self-fulfilling prophecy.

For now, consider some of the more famous exchanges on the issue. Perhaps chief among these came from Anti-federalist Patrick Henry, which came late in the ratification process but at the outset of the Virginia Convention. The better to defeat the Constitution, Henry dramatically identified the nationalist stakes, arguing that the Preamble spoke directly to the identity of the popular sovereign aspiring to establish the new government and implying a stark choice between a national populace and sovereign states:

[B]ut, Sir, give me leave to demand, what right had they to say, *We, the People.* My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of, *We, the People*, instead of *We, the States?* States are the characteristics, and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government of the people of all the States.[53]

Federalists did not always pick up this gauntlet, yet neither did they take the easy way out. Faced with challenges such as Henry's, the Constitution's supporters could have responded precisely that the Preamble's grandiose opening was merely a device to get around the problem of late ratifications. This does not appear to have happened. Instead, some Federalists famously stated that the Preamble conveyed exactly the meaning that Henry feared. Most notable here was James Wilson's remarks at the earlier Pennsylvania Convention:

His [William Findlay's] position is:

that the supreme power resides in the States, as governments; and mine is, that it *resides* in the People, as the fountain of

[52] *Id.* at 18.

[53] *See* 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES 930 (Patrick Henry, Jun. 4, 1788) (John P. Kaminski & Gaspare J. Saladino, eds., 1990) (emphasis in the original) [hereinafter, DOCUMENTARY HISTORY].

government; that the people have not – and that the people mean not - and that the people ought not, to part with it to any government whatsoever. . . I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number, and magnitude of their objects. . . I view the States as made *for* the People as well as *by* them, and not the People as made for the States. The People, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all.[54]

Wilson, Findlay, and Henry all agreed about the either/or choice for the popular sovereign. The leader of Pennsylvania's Federalists simply declared the opposite choice.

More often, though, Federalists simply did not respond. Back in Virginia, for example, no one countered Henry in any way remotely like Wilson's reply to Findlay. Though negative inferences are always dangerous, even this reaction is telling. As Jack Rakove cogently noted, a common structural feature of the ratification debates witnessed Anti-federalists overstating the Constitution's departures from the status quo, in an effort to make the proposal seem dangerously radical, and Federalists poor mouthing the document's innovations to make it appear more cautious.[55] In this way, anyone in search of statements equating the Constitution with consolidated, national government had best consult its state-oriented opponents. The framework's nationalist champions, conversely, remain the best source for quotations predicting the states' ongoing vitality in the future regime. Just this phenomenon gives the work of certain younger originalists a certain prima facie plausibility insofar as they argue that Federalists leaders had to ratchet down the goals they initially had upon leaving the Federal Convention to get the document approved by a less adventurous public.[56] But this is

[54] 3 DOCUMENTARY HISTORY, at 472-73 (James Wilson, Dec. 4, 1787) (emphasis in the original).

[55] RAKOVE, *supra* note 14, at 94-130.

[56] *Compare* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-*

what did not appear to happen with regard to the popular sovereign. Explanations for the moment must remain speculative. The foregoing exchanges, however, suggest that the Federalists had little room to retreat with regard to the nature of popular sovereignty in part because the Preamble gave them little room for retreat, especially given the binary choice—state governments vs. national people—that various Founders believed they faced.

Then again, there is Madison. No one, including Wilson, so thoroughly explored or advanced the Constitution's conceptual breakthroughs. Madison's analysis was especially nuanced in examining the ways the framework's unique unprecedented approach to federalism overcame such traditional objections as the contradiction of *imperium in imperio*.[57] In Federalist No. 39, Madison summarized his multi-layered views:

The proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.[58]

Easy to miss in this tightly packed passage is the first specific assertion that the Constitution rests on a federal foundation. Earlier in the essay, Madison had sought to make clear that the authority to create the new government depends, "on the assent of the people of America . . . [but] . . . not as individuals composing one entire nation."[59] Rather, "[i]t is to be the assent of the and ratification of the several States, derived from the

Execution, and the Original Understanding, 99 COLUM. L. REV. (1999) (arguing that against an internationalist understanding of the Treaty Power as in England), *with* Martin Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as the "Supreme Law of the Land*, 99 COLUM. L. REV. 2095 (1999) (arguing treaties are self-executing and domestically binding upon passage).

57 *See* FORREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, at viii (2000) (stating proposition "translates roughly as supreme power within supreme power. . . within a single jurisdiction").

58 THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed. 1982).

59 *Id.* at 243.

supreme authority in each State the authority of the People themselves."[60] In other words, America's popular sovereign was neither "We the People of the United States," understood as the national people, nor "We the States," but "We the Peoples of the United States." As Monaghan points out, this middle position not only has the historical weight of Madison behind it, it appears to comport with the document's own "partly national, partly federal" stance in general.[61]

The only problem with the Madisonian solution is that no one appeared to listen. As the other passages suggest, people within "the people" more commonly divided into two opposing camps, assigning constitution-making authority to either the national public or the sovereign state governments. If so, it wouldn't be the only time the Constitution's most subtle expositor proved too subtle for his contemporaries. Larry Kramer has convincingly argued that almost no one during the ratification debates noted, remarked upon, opposed or extolled Madison's theory of faction in *Federalist* No. 10, what today is perhaps is his most celebrated hypothesis.[62] In this light, it should appear less shocking to conclude that the subtleties of No. 39 likewise evaded Madison's peers. The theory of factions, moreover, logically had an easier time of it. Both ideas ran into older understandings. Montesquieu clouded any quick appreciation for the notion that the larger the republic, the more moderate the effects of faction. Eighteenth-century conventions about sovereignty, similarly, could not help but overshadow the conceit that at least nine sovereign peoples could be the sovereign creator of that republic. Only the latter idea, however, had the further, textual, problem of having to counter the first seven words of the proposal to create a new constitutional order.

CONCLUSION

Much labor remains before this thesis moves beyond the borders of history "lite." Some work that even a working thesis can do, however, is suggest consequences. Historiographically, the Founding generation's approach to "We the People" suggests

[60] *Id.*
[61] *See* Monaghan, *supra,* note 42.
[62] *See* Larry Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 656 (1999).

that mainstream historians have been right for the wrong, or at least incomplete, reasons. Doctrinally, the experience indicates that the Supreme Court has built its neo-states' rights jurisprudence on a foundation of sand, doubly so since the "original intent" generally provides the main building materials for that jurisprudence. Of more immediate relevance, the story further suggests both the power of a rhetorical trope such as "We the People" in creating a reality that in turn can create a regime. Then again, the slow dripping of the Supreme Court's state-oriented rhetoric "together with similar tropes outside that the Court merely echoes" also indicates how such a creation can also erode without care.