

NOTE

WE THE PEOPLE: THE ORIGINAL MEANING OF POPULAR SOVEREIGNTY

*Andrew G. I. Kilberg**

INTRODUCTION

WE the People of the United States . . . do ordain and establish this Constitution for the United States of America.”¹ Thus, the Preamble to the United States Constitution tells us—upfront, without reservation—that the creators of fundamental law are the People.² The American system of government rests on a theory of popular sovereignty. But what does popular sovereignty mean? Who is the sovereign People?³

The answer at first may seem to be self-evident. The United States is a nation. The People of the United States is the American people. As the original pledge of allegiance written by Francis Bellamy says, “I pledge allegiance to my flag and the republic for which it stands—one nation indivisible—with liberty and justice for all.”⁴ There are fifty states, but as Justice Black remarked, it is a simple “fact that the States of the Un-

* J.D. 2014, University of Virginia School of Law; M.Phil. 2011, University of Cambridge; A.B. 2010, Princeton University. I would like to thank Professor John Harrison for his guidance in the drafting of this Note, and Professors Sai Prakash and Caleb Nelson for their helpful comments. The Editorial Board of the *Virginia Law Review* caught many errors, for which I am grateful; Nick Reaves deserves special recognition. Finally, this would never have been written if not for the constant support provided by Julia Osellame Kilberg, Bill and Bobbie Kilberg, and Professor A. E. Dick Howard.

¹ U.S. Const. pmb.

² James Wilson of Pennsylvania was the most eloquent articulator of this fact. See, e.g., 2 *The Documentary History of the Ratification of the Constitution* 448 (John P. Kaminski et al. eds., 1976) [hereinafter *DHRC*] (noting that the Constitution’s “existence depends upon the supreme authority of the people alone”).

³ I will often refer to “the People” or “a People” as a singular noun, because I am using the term to refer to a body politic—a singular thing. Sometimes this may sound strange to the ear, but I think it is the correct way to go about it. All errors in the use of the singular instead of the plural or vice-versa are my own.

⁴ Jeffrey Owen Jones & Peter Meyer, *The Pledge: A History of the Pledge of Allegiance* 10 (2010).

ion constitute a nation.”⁵ If we are one nation, are we not also one people?

The question is not so open-and-closed, and the ultimate answer is not so simple. Indeed, the debate over the identity of the People still rages. Often, the disagreement over the identity of the People is obscured by an emphasis on the expressions of popular sovereignty, by a focus on the split in the on-the-ground powers of governing between the federal government and the state governments. Commentators, thus, often talk about “sovereignty” when they in fact mean the parameters or boundaries of governmental *power*.⁶ As Part II will demonstrate however, the concept of popular sovereignty distinguishes between the exercise of power through the branches of government and the fundamental, arbitrary power held by the sovereign people.

Nevertheless, other scholars have tackled the question of *whose* popular sovereignty head on. We can split academics into two broad camps: nationalists and state-populists. Adherents of the former insist that the People—and the only existing people—is a national people. Those in the latter camp maintain that the several state peoples not only existed before the Constitution, but also survived ratification.

Although united in their belief that the People is a singular national people, nationalists are divided by differing theories of how and when that singular people came to be. Professor Beer has articulated a strict nationalist narrative. Simply put, the national people as a body politic existed before the Constitution and it was this people that created the Constitution.⁷ The national people hold fundamental sovereignty and have “divided the attributes of sovereignty, that is, the various powers of

⁵ *Testa v. Katt*, 330 U.S. 386, 389 (1947).

⁶ William P. Murphy discussed the relative powers of the federal and state governments under the Constitution as indicative of the “sovereignty” of the national government. William P. Murphy, *The Triumph of Nationalism: State Sovereignty, the Founding Fathers, and the Making of the Constitution* 400–17 (1967). Raoul Berger claimed to address the question posed by this Note: “Did [the Constitution] ‘consolidate’ the States into one sovereign, or did it erect a system which came to be known as ‘dual federalism?’” Raoul Berger, *Federalism: The Founders’ Design* 47 (1987). But he answered that question by looking at “what may seem a concatenation of unrelated matters” in the Constitution, *id.* at 20, that revealed “the Founders’ emphasis, again and again, upon ‘limited’ federal powers, upon preservation of the States’ jurisdiction over ‘internal,’ ‘local’ matters that operate only within a State’s borders.” *Id.* at 76.

⁷ Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* 322 (1993).

governing, between the federal and the state governments.”⁸ This division does nothing to shake the fact that the “American people . . . were unitary.”⁹ Federalism is functional.

Unlike Beer, Professor Amar concedes that America before the Constitution was composed of “united states, not a unitary state; they were thirteen Peoples, not (yet) one People.”¹⁰ It was the several state peoples who created the Constitution.¹¹ Yet through ratifying the Constitution, the “separate state Peoples agreed to ‘consolidate’ themselves into a single continental People.”¹² A popular body politic rarely acts in any practical sense. For Amar, however, ratification was one of “those rare meta-legal moments” where the state peoples reconstituted themselves as the American People.¹³

State-populists contend that the Constitution did not destroy the state peoples as bodies politic, but these scholars are divided by differing theories of how the federal government obtained its power. According to one theory, the Constitution is “a compact among political societies.”¹⁴ As Professor McDonald has explained, “national or local governments, being the creatures of the states, could exercise only those powers explicitly or implicitly given them by the states; each state government could exercise all powers unless it was forbidden from doing so by the people of the state.”¹⁵ The state peoples delegated power to both the state and federal governments; this is a theory of *dual delegation* from a single class of sovereigns.

On the other hand, a theory of *dual sovereignty* holds that the state peoples coexist with a national people. “To my eyes,” Professor Monaghan has written, “neither completely state-centered nor completely nationalist views of the founding capture the original understanding.”¹⁶ He stresses, “the understanding was not that ‘consolidation’ had occurred and that any parallel conception of ‘We the People of New Hampshire,

⁸ Id. at 339.

⁹ Id.

¹⁰ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1446 (1987).

¹¹ Id. at 1459–60.

¹² Id. at 1460.

¹³ Id. at 1431. But see Beer, *supra* note 7, at 321.

¹⁴ Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 281 (1985).

¹⁵ Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic 1776–1790*, at 312 (2d ed. 1979).

¹⁶ Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121, 138 (1996).

etc.’ had been eliminated.”¹⁷ Yet that does not mean that there is no room for a sovereign national people. “The reality was considerable confusion, not a first theorem,” he maintains.¹⁸

This Note jumps into the fray, closely examining the Constitution itself and the history surrounding its adoption in order to reverse-engineer a coherent theory of American popular sovereignty as it was understood at the time of ratification and the adoption of the Bill of Rights.¹⁹ The result of this effort is a nuanced theory of dual popular sovereignty that alleviates the confusion Monaghan emphasized.²⁰ In short, there is a national people, but it coexists with the sovereign state peoples. Furthermore, the national people must be interpreted through a lens of state peoples—the People is national in scope and importance, but it is defined in reference to the state peoples. The reservoir of reserved powers—those uses of governmental authority that are not expressly mentioned in the text of the Constitution—defaults to the state level. This balance of peoples means that the American system is one of limited sovereignty. Neither the federal nor the state governments can eliminate or alter the other; they reinforce each other in a structure that presupposes its perpetuity. Dual popular sovereignty is the essence of federalism, and it has broad implications for the fundamental distribution of power between the federal government and the states.

Part I will consider the U.S. Supreme Court case *U.S. Term Limits, Inc. v. Thornton*²¹ in order to examine the Tenth Amendment and the importance of the identity of the People. Part II will then delve into the history of the idea of popular sovereignty in order to provide the theoretical foundations for the search for the People. Part III will argue that the state peoples existed before the Constitution and survived ratification as sovereigns. Part IV will complement that analysis by positing that a national people must exist by the terms of the Constitution and by implica-

¹⁷ Id. at 139.

¹⁸ Id.

¹⁹ A premise of my analysis is that the original meaning is highly important, if not dispositive. Furthermore, I do not consider the Reconstruction Amendments nor the Seventeenth (direct election of senators), Nineteenth (women’s suffrage), Twenty-Third (electoral college representation for Washington, D.C.), or Twenty-Sixth (eighteen-year-old vote) Amendments. Whether those Amendments modified the original meaning is beyond the scope of this Note.

²⁰ Monaghan reached substantially the same conclusion as this Note, but he did not attempt to fill out a theory to support the conclusion, nor did he examine the full implications of his conclusion. See Monaghan, *supra* note 16.

²¹ 514 U.S. 779 (1995).

tion. Finally, Part V will weave these strands into a theory of dual popular sovereignty.

I. THE IMPORTANCE OF THE PEOPLE: *U.S. TERM LIMITS, INC. v. THORNTON*

The Tenth Amendment is the critical constitutional expression of vertical federalism, of the relationship between the national and state levels. The Amendment tells us that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²² It combines two elements: governmental power and sovereignty. The Amendment announces where the powers not mentioned in the Constitution reside: with the states or with “the people.” That the people may retain power is an implicit reference to popular sovereignty. Yet the Amendment does not tell us who the People are.

The identity of the People necessarily influences interpretation of constitutional provisions that are vague or ambiguous as to their scope or exclusivity, such as the Necessary and Proper Clause and the Commerce Clause. If the locus of authority is at the state level—if the People are the state peoples—then one will be reluctant to give a broad gloss to a provision granting authority to the national government out of fear of encroaching on state power.²³ For example, if the federal government establishes regulations under the authority of the Commerce Clause that approximate an exercise of the police power, something is almost certainly amiss.²⁴ But if that locus is at the national level—if the People is a national people—then the inclination is reversed. How you read the Constitution depends significantly on your view of the Constitution’s distribution of powers between the national government and the states, on how you define, in Justice Thomas’s words, the “default rules.”²⁵

U.S. Term Limits, Inc. v. Thornton brought the importance of the People into sharp focus. In that case, the Supreme Court considered whether the Constitution permitted the people of Arkansas to establish term lim-

²² U.S. Const. amend. X.

²³ See, e.g., Berger, *supra* note 6, at 76.

²⁴ See *Gonzales v. Raich*, 545 U.S. 1, 49–50 (2005) (O’Connor, J., dissenting) (maintaining that the Commerce Clause cannot be stretched so that it allows for the exercise of police powers); *id.* at 64–66 (Thomas, J., dissenting) (same); *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (same); *id.* at 627 (Thomas, J., concurring) (same); *United States v. Lopez*, 514 U.S. 549, 564–65 (1995) (same); *id.* at 584–85 (Thomas, J., concurring) (same).

²⁵ *Term Limits*, 514 U.S. at 848 (Thomas, J., dissenting).

its for their representatives and senators in Congress. More specifically, the question was twofold: whether the Qualifications Clauses are exclusive and, if other qualifications can be added, who has the power to do so.²⁶ Although these two inquiries seem sequential—if the Qualifications Clauses are exclusive, then there would seem to be no reason to ask who might have had the power to add qualifications—they are interrelated, because deciding whether the Clauses are exclusive hinges on whether the repository of undelegated authority lies at the state level or at the national level. The Court’s holding required analysis of the Tenth Amendment and a determination, even if implicit, of the identity of the People.

Justice Stevens, writing for the majority, maintained that the Tenth “Amendment could only ‘reserve’ that which existed before” the Constitution was created.²⁷ Justice Story explained this position concisely in his treatise on the Constitution: “[T]he States can exercise no powers whatsoever which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. . . . No State can say that it has reserved what it never possessed.”²⁸ Justice Stevens’s reasoning went as follows: Congressmen and Senators did not exist before the Constitution; thus, qualifications for those legislators did not exist; thus, the power to set those qualifications did not exist; thus, the states did not reserve the power to set qualifications.²⁹ A Congressman, Senator, or President, Justice Story wrote, “is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States. It is no original prerogative of State power to appoint a representative, a senator, or President for the Union.”³⁰

The Stevens and Story understanding of reserved powers includes an implicit assumption: The People is a national body.³¹ Whether a state held a power before the ratification of the Constitution only matters if the People is a national people. If that is the case, a power not held by a state before the Constitution’s inception belongs to the national people,

²⁶ Id. at 782–87 (majority opinion).

²⁷ Id. at 802.

²⁸ 1 Joseph Story, *Commentaries on the Constitution of the United States* § 627 (Melville M. Bigelow ed., William S. Hein & Co., Inc. 5th ed. 1994) (1851).

²⁹ *Term Limits*, 514 U.S. at 803–04.

³⁰ 1 Story, *supra* note 28.

³¹ See Benjamin S. Walton, Note, *U.S. Term Limits, Inc. v. Thornton*: Who are the People and Why Does It Matter?, 4 *Liberty U. L. Rev.* 173, 187–90 (2009).

and the state cannot exercise it. But if the People are the state peoples—as far as federal courts are concerned—it does not matter whether the state held the power before the Constitution or even if the power existed, since it defaults to the state level.

This assertion requires unpacking. If the power in question is not delegated to the national government and is not reserved by the states—as is the case with the Qualifications Clauses—then, by the terms of the Tenth Amendment, it defaults to “the people.” If the People of the Constitution are state peoples, then the “States” and “the people,” as the Tenth Amendment understands them, are not synonymous—the undelegated power may lie with either of the two bodies. But if a power is reserved to the state peoples, each state people can delegate to their state government the authority to exercise the reserved power. Furthermore, the question of whether the state people in fact have delegated that authority to their state government is, as Justice Wilson noted in *Chisholm v. Georgia*, one to which a federal judge “can neither know nor suggest the proper answer[].”³² It is not the business of a federal court to decide whether the state people have delegated the power to its state government. Therefore, insofar as a federal court is concerned, once it determines that the power is not delegated to the national government, nor prohibited to the states, it leaves it to the state-level actors to sort out. That is, if the People are the state peoples, federal courts should not be concerned at all with whether a state government reserved a particular power; its only inquiry should be whether the power is one delegated to the federal government. But Justice Stevens engaged in the reservation analysis, thereby revealing his assumption that the People is national in scope.

Moreover, Justice Stevens refused to recognize any difference between state legislatures and state peoples, which is the reverse of the state-peoples-based understanding of the Tenth Amendment. Responding to one of Justice Thomas’s arguments in dissent, Justice Stevens argued that the “distinction between state legislation passed by the state legislature and legislation passed by state constitutional amendment is untenable. The qualifications in the Constitution are fixed, and may not be altered by either States or their legislatures.”³³ The people of Arkan-

³² 2 U.S. (2 Dall.) 419, 457 (1793).

³³ *Term Limits*, 514 U.S. at 809 n.19. Justice Stevens’s broader point that federal courts do not take cognizance of whether a state law was passed by the legislature or by popular vote

sas approved the state constitutional amendment by referendum; thus, Stevens equated the states with the state peoples. If the state peoples *are* the states mentioned in the Tenth Amendment, then the only option left for the identity of the People is the national people.

Justice Thomas's dissenting opinion went to great lengths to rebut Justice Stevens's assumption that the People is a national body. "To be sure, when the Tenth Amendment uses the phrase 'the people,' it does not specify whether it is referring to the people of each State or the people of the Nation as a whole," Justice Thomas wrote. He continued:

But the latter interpretation would make the Amendment pointless: There would have been no reason to provide that where the Constitution is silent about whether a particular power resides at the state level, it might or might not do so. In addition, it would make no sense to speak of powers as being reserved to the undifferentiated people of the Nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.³⁴

Justice Thomas conceded that "the United States obviously is a Nation, and . . . it obviously has citizens."³⁵ But that does not change the fact, in his view, that the "ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."³⁶ It is unclear, however, whether Justice Thomas subscribes to the dual delegation or dual sovereignty theories. While his interpretation of the Tenth Amendment certainly tracks the dual delegation theory, it is also consistent with a theory of dual sovereignty, as Section V.B will show.

The debate in *Term Limits* demonstrated that identifying the People can have serious practical effects. What may seem to be an abstract inquiry into an amorphous concept has real implications for the application of governmental power. The remaining Parts of this Note will aim to identify the People and build a coherent theoretical foundation for that identification.

does not help his argument because if the People are the state peoples, federal courts should leave determinations of exactly where reserved powers lie to the state-level actors.

³⁴ Id. at 848.

³⁵ Id. at 859.

³⁶ Id. at 846.

II. SOVEREIGNTY AND SECESSION

Before attempting to answer who the People are, it is necessary to comprehend both sovereignty and its popular nature. Section A will trace the history of sovereignty from its roots in England to America during the drafting of the Constitution. Section B will investigate the concept of representation. Finally, Section C will consider the (il)legality of secession within the framework of popular sovereignty in order to foreshadow the argument in Part IV that a national people exists.

*A. Total Sovereignty: The Power to Make and to Destroy Governments**1. The English Roots of American Popular Sovereignty*

“That the power to tax involves the power to destroy,” Chief Justice Marshall famously reasoned in *McCulloch v. Maryland*,

[T]hat the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.³⁷

The states cannot interfere with the powers of the national government such that they “control” those facets of government that are assigned to the national sphere. The national government, likewise, cannot interfere with state powers, unless sanctioned by a delegated national power.³⁸ When scholars discuss the reach and boundaries of “state sovereignty,” they often are engaging in the same conversation as Marshall in *McCulloch*. Namely, the question for them is: What may the states permissibly do and what may the national government permissibly do?

But to distinguish between “state sovereignty” and “federal sovereignty” is misleading. American popular sovereignty is premised on the idea that sovereignty lies with the people, not with any government. Governments exercise powers that have been delegated by the people. It is essential to separate the concepts of sovereignty and powers. The sovereign people granted to instrumentalities—governments and depart-

³⁷ 17 U.S. (4 Wheat.) 316, 431 (1819).

³⁸ See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997).

ments of governments—the power to act in certain ways. Powers are functions, but not reflections, of sovereignty. “Sovereignty, in its eighteenth-century signification,” McDonald wrote, “was absolute: sovereignty comprehended the power to command anything and everything that was naturally possible.”³⁹ Indeed, Dr. Johnson defined sovereignty as “Supremacy; highest place; supreme power; highest degree of excellence.”⁴⁰ As Johnson noted, “To give laws unto a people, to institute magistrates and officers over them; to punish and pardon malefactors; to have the sole authority of making war and peace, are the true *marks* of sovereignty.”⁴¹ The powers of governing were trappings—parts, expressions, uses, effects—of sovereignty.

Sovereignty is not just absolute. It is also *arbitrary*.⁴² The sovereign can do anything; the sovereign’s authority is not limited by conceptions of “judgment, righteousness, and truth.”⁴³ A sovereign, such as Parliament, has “power and jurisdiction . . . so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.”⁴⁴

This *total* sovereignty went along with the English conception of *popular* sovereignty. Initially, monarchs ruled by divine right.⁴⁵ Starting with Magna Carta, however, the monarch’s power was tempered by the requirement that he gain the consent of the people in order to do certain things, such as tax.⁴⁶ Still, the English endeavored not to disrupt the fiction of absolute power, which divine right entailed. They claimed that Parliament was not government itself,⁴⁷ since it was the monarch who summoned Parliament, as representatives of the whole people, to gain their consent.⁴⁸ Over time, Parliament increasingly asserted itself, taking

³⁹ McDonald, *supra* note 14, at 278–79.

⁴⁰ 2 Samuel Johnson, *Dictionary of the English Language* (4th ed., Dublin, 1775); see also Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed., London, 1789) (defining sovereignty as “Supremacy; highest place; highest degree of excellence”).

⁴¹ Johnson, *supra* note 40 (emphasis altered).

⁴² Bernard Bailyn, *The Ideological Origins of the American Revolution* 205–09 (enlarged ed. 1992).

⁴³ *Id.* at 205 (quoting James Otis, *The Rights of the British Colonies Asserted and Proved* (1764), *reprinted in* 2 *Pamphlets of the American Revolution, 1750–1776*, at 456 (B. Bailyn ed. 1965)).

⁴⁴ 1 William Blackstone, *Commentaries on the Laws of England* 156 (London, Clarendon Press 1765).

⁴⁵ Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 17 (1988).

⁴⁶ *Id.* at 24.

⁴⁷ *Id.* at 46.

⁴⁸ *Id.* at 39, 47, 49.

the “short step from representing the whole people to deriving authority from them.”⁴⁹ Parliament came to be seen *as the people*.⁵⁰ Since the people were the fount of governmental authority, this meant that Parliament was “its own creator.”⁵¹ This idea had the important implication “of endowing Parliament not simply with a part of the powers of government, but with the people’s inherent power to begin, change, and end governments,”⁵² which is known as the “constituent power.”⁵³ Thus, England never “achieve[d] . . . a formulation and establishment of its constitution by a popular sanction or authority separate from its government. Popular sovereignty in England was to be exercised, as from its inception, by Parliament, or more particularly by the House of Commons.”⁵⁴

It was this notion of a powerful, fully sovereign, and ostensibly eternal Parliament with which the pre-revolutionary American colonists dealt. As part of their pushback against the taxes imposed on the colonists by Parliament, the Americans claimed that there were some things that Parliament could do—such as tax external operations like trade—and some things that only the local governments could do—such as tax internally.⁵⁵ The colonists, thus, argued that there were limits on Parliament’s power, and “any effort to restrict Parliament’s power assumed that sovereignty”—as the English conceived of sovereignty—“was in some sense divisible.”⁵⁶

But this was contrary to the English fiction of parliamentary sovereignty. The royal governor of Massachusetts, Thomas Hutchinson, clearly summarized the English position in a 1773 debate with the colonial legislature.⁵⁷ The colonists, he noted, claimed that “a *subordinate* Power in Government which, whilst it keeps within its Limits, is not subject to the Controul of the *supreme* Power.”⁵⁸ The Americans assert-

⁴⁹ Id. at 49; see also id. at 56–57 (describing how theorists simultaneously elevated the people over the monarch).

⁵⁰ See id. at 49, 64; Bailyn, supra note 42, at 163.

⁵¹ Morgan, supra note 45, at 59.

⁵² Id.

⁵³ Id. at 81.

⁵⁴ Id. at 120.

⁵⁵ Bailyn, supra note 42, at 209–21; see also John Dickinson, Letters from a Farmer in Pennsylvania [sic] 22–24 (Boston, Edes & Gill 1768) (arguing that “parliament [cannot] legally impose duties to be paid by the people of these colonies only”).

⁵⁶ Bailyn, supra note 42, at 209.

⁵⁷ See id. at 219–23.

⁵⁸ The Speeches of His Excellency Governor Hutchinson to the General Assembly 115 (Boston, Edes & Gill 1773).

ed that they held the sole power to tax internally, while maintaining that Parliament remained supreme. Yet, Hutchinson said, that did not make sense. “Is there no Inconsistency in supporting a *subordinate* Power without a Power *superior* to it?” he asked. “Must it not so far as it is without Controul be, itself, Supreme?”⁵⁹ The nature of sovereignty was such “that a Power should always exist which no other Power within such Government can have Right to withstand or controul: Therefore, when the word *Power* relates to the Supreme Authority of Government it must be understood *absolute* and *unlimited*.”⁶⁰ Parliament’s sovereignty was not just absolute, but also arbitrary. By arguing that Parliament could not do something, Americans challenged the foundations of parliamentary sovereignty.

In the end, the solution was almost irresistible: The Americans repositioned fundamental sovereignty in the people themselves as an entity separate from Parliament—separate from any government. The American desire and demand for a division of absolute and arbitrary power led to “the assumption that the ultimate sovereignty—ultimate yet still real and effective—rested with the people.”⁶¹ The American colonies became states by taking the leap that the English never could get themselves to take—they lifted the people out of and above government itself.

2. *The Constituent Power in America*

The American intelligentsia of the revolutionary era—Patriot and Tory both—accepted that the constituent power lay with the people.⁶² John Adams, for example, encouraged the Continental Congress in the summer of 1775 to recommend that conventions of the people be called to establish governments for the colonies independent of their English charters. Congress, Adams exhorted, “must reallize [sic] the Theories of the Wisest Writers and invite the People, to erect the whole Building [of government] with their own hands upon the broadest foundation.”⁶³ This was proper “for the People were the Source of all Authority and Original

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Bailyn, *supra* note 42, at 228.

⁶² Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 329–31 (2d ed. 1998).

⁶³ *Autobiography of John Adams, in 3 Diary and Autobiography of John Adams* 253, 352 (L.H. Butterfield et al. eds., 1961).

of all Power.”⁶⁴ Thomas Paine agreed, arguing that “the body of the people . . . undoubtedly had, and still have, both the right and the power to place even the whole authority of the Assembly in any body of men they please.”⁶⁵ Regardless of whether they truly agreed or felt backed into a corner, Tories conceded that “the collective body of the people . . . have an inherent right to change their form of government.”⁶⁶ The Continental Congress explicitly relied on this power in the Declaration of Independence, in which Jefferson proclaimed that, when government becomes tyrannical, “it is the right of the people to alter or to abolish it, and to institute a new government, . . . and to provide new guards for their future security.”⁶⁷

The Constitution, too, depends on the total sovereignty of the people and the concomitant constituent power. Delegates to the Constitutional Convention did not proclaim a new national constitution. Instead, they sent the document to the states for submission to the people.⁶⁸ As Madison freely admitted, the framers themselves held no fundamental power. Rather, whether to accept the Constitution was the people’s choice; the document “was to be submitted to *the people themselves*,” Madison wrote.⁶⁹ That decision was the people’s alone, because, as James Wilson proclaimed to the Pennsylvania ratifying convention, “the truth is, that the supreme, absolute, and uncontrollable authority *remains* with the people.”⁷⁰ The people, Wilson said, are “the fountain of government”; as such, “They can delegate [power] in such proportions, to such bodies, on such terms, and under such limitations as they think proper.”⁷¹ This belief in the total sovereignty of the people was not one held merely by the most educated. One Connecticut town, for instance, objected to the amendment process detailed in Article V⁷² because it “enable[d] the sev-

⁶⁴ Id.

⁶⁵ Wood, *supra* note 62, at 335.

⁶⁶ Daniel Leonard, *Novanglus and Massachusettensis* 225 (Boston, Hews & Goss 1819).

⁶⁷ The Declaration of Independence para. 2 (U.S. 1776).

⁶⁸ McDonald, *supra* note 14, at 280.

⁶⁹ The Federalist No. 40, at 221 (James Madison) (Clinton Rossiter ed., 1999).

⁷⁰ 2 DHRC, *supra* note 2, at 471–72.

⁷¹ Id. at 472; see also id. at 559 (explaining that Wilson disputed that the states were sovereign, because “the supreme power resides in the people”); Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 109–10 (2010) (noting, further, that Wilson believed sovereignty is “supreme, absolute and uncontrollable authority”).

⁷² Article V states:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two

eral legislators to change the form of government at pleasure without ever consulting the people.”⁷³ The concept of popular sovereignty in America was, truly, popular.

B. Representation and Popular Sovereignty

The Americans’ experience with a recalcitrant Parliament led to the placement of sovereignty with the people themselves, instead of with Parliament. Under the American conception of sovereignty, therefore, the legislature does not exercise sovereignty in its unadulterated form. While the legislature is *representative* of the people, it is not *the* people and, therefore, cannot act *as* the people. That is, the legislature cannot exercise the constituent power.⁷⁴

1. The Constituent Convention

This new conception of popular sovereignty, therefore, required innovation—if the people could establish a new government, but the legislature was not the proper vehicle, then how could the people act? “The basis of our political systems is the right of the people to make and to alter their constitutions of government,” Washington said in his Farewell Address. “But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.”⁷⁵ How could the whole people act explicitly and authentically?

One answer was the “constituent convention.”⁷⁶ Action undertaken directly by the whole people was impractical; proposal and deliberation of changes in fundamental law was impossible.⁷⁷ The people could conceivably vote on a proposal that was put before them, but the people could not assemble as a whole to discuss proposals. Representation was essential. An assembly of representatives called and elected for the spe-

thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof

U.S. Const. art. V.

⁷³ 2 DHRC, *supra* note 2, at 441.

⁷⁴ See Morgan, *supra* note 45, at 81.

⁷⁵ George Washington, Farewell Address (Sept. 19, 1796), in 35 *The Writings of George Washington* 214, 224 (J. Fitzpatrick ed., 1939).

⁷⁶ Wood, *supra* note 62, at 328.

⁷⁷ See 1 James Burgh, *Political Disquisitions* 5 (Da Capo Press 1971) (1774); Morgan, *supra* note 45, at 59, 119.

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cific purpose of employing the constituent power, the reasoning went, was a different institution than the traditional, established legislature. It offered the “opportunity to establish [a] constitution through the kind of original contract” that English theorists had envisioned.⁷⁸

This idea of a constituent convention had its roots in England and gradually developed in America over the course of the 1760s, 1770s, and 1780s in rough parallel to the shifting contours of popular sovereignty. American colonists built off of the idea, creating committees and calling conventions to counter the official colonial governments.⁷⁹ Under the parliamentary system, however, the people themselves only acted as a political body through the process of electing representatives. As one observer noted,

[T]he people have a right to share in the legislature. This right they exercise by choosing *representatives*; and thereby constituting one branch of the legislative authority. But when they have chosen their representatives, that right, which was before diffused through the whole people, centers in their *Representatives alone*; and can legally be exercised by *none but them*.⁸⁰

The Americans, attuned to the problem of legitimacy, struggled with justifying the extra-legislative committees and conventions, which popped in and out of existence in the colonies during the lead-up to the war.

Some, such as Hamilton and Jefferson, were more aggressive in asserting that the people could act directly, while others demurred. According to Hamilton, “Extraordinary emergencies[] require extraordinary expedients.”⁸¹ The English government had broken the contract with the people, and “[w]hen the first principles of civil society are violated, and the rights of a whole people are invaded, the common forms of municipal law are not to be regarded.”⁸² Regardless of “the supposed *illegality*” of these quasi-legislatures, therefore, “There are some events in society, to which human laws cannot extend.”⁸³ Similarly, Jefferson conceded that the legislature normally “alone possess[es] and may exer-

⁷⁸ Morgan, *supra* note 45, at 107.

⁷⁹ Wood, *supra* note 62, at 312–14.

⁸⁰ Samuel Seabury, *An Alarm to the Legislature of the Province of New York* 4 (New York, 1775).

⁸¹ Alexander Hamilton, *The Farmer Refuted*, in 1 *The Papers of Alexander Hamilton* 81, 136 (Harold C. Syrett & Jacob E. Cooke eds., 1961).

⁸² *Id.*

⁸³ *Id.*

cise” legislative power; but in extreme situations, “the power reverts to the people, who may use it to unlimited extent, either assembling together in person, sending deputies, or in any other way they may think proper.”⁸⁴ Others, however, stressed that these representative bodies had “no coercive or legislative Authority,” as John Rutledge told the Continental Congress.⁸⁵ Congress and other assemblies, born as they were by “public necessity,” enacted “Resolves and Recommendations” instead of laws.⁸⁶ This pre-war waffling is understandable, as many of the colonists were trying to come to a rapprochement with the English, and the American conception of popular sovereignty was still highly malleable.

But after the Declaration of Independence, the Americans located sovereignty squarely in the people themselves. This required creation of a means for the people to act separately from the government. “In planning a government by representation, the people ought to provide against their own *annihilation*,” James Burgh wrote in his *Political Disquisitions* in 1774. “They ought to establish a regular and constitutional method of acting by and from *themselves*, without, or even in opposition to their *representatives*, if necessary.”⁸⁷ This ideal hung in the air as the new states rushed to establish new governments after the Declaration. The revolutionaries “groped awkwardly for some institutional representation of the people with which to justify the erection of new governments.”⁸⁸ This was new territory and the states struggled to apply the teachings of English theorists such as Burgh and Locke to their new-found independence.⁸⁹ During the war period, only two of the former colonies “framed constitutions by conventions specially elected for that sole purpose,” and none of the states actually had the people ratify a constitution.⁹⁰ By 1787, only two of the states—Massachusetts and New Hampshire—had followed the combined procedure of convention and ratification.⁹¹

⁸⁴ Thomas Jefferson, A Summary View of the Rights of British America (1774), in 1 The Papers of Thomas Jefferson 121, 132 (Julian P. Boyd et al. eds., 1950).

⁸⁵ Adams, *supra* note 63, at 125.

⁸⁶ Wood, *supra* note 62, at 317.

⁸⁷ Burgh, *supra* note 77, at 6.

⁸⁸ Wood, *supra* note 62, at 330.

⁸⁹ See Morgan, *supra* note 45, at 256–60; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 97–100 (Vintage Books 1st ed. 1997) (1996); Wood, *supra* note 62, at 330–43.

⁹⁰ Rakove, *supra* note 89, at 97.

⁹¹ Morgan, *supra* note 45, at 261.

Yet, the idea of a constituent convention followed by popular ratification was seen, at the very least, as the best legitimate means of constitutional creation or change.⁹² True, “the Massachusetts precedent did not suddenly render the other state constitutions legally defective,” as Professor Rakove has argued.⁹³ But, as Professor Wood has shown, the intellectual leaders of the new states were remarkably self-conscious of the problem of the legitimacy of fundamental law and the need to tie constitution making into the broader conception of popular sovereignty. The revolution had resulted in an explosion of popular political agitation.⁹⁴ Empowered, the numerous committees, conventions, and mobs created a “capricious *retail tyranny*” that threatened to throw the states into chaos.⁹⁵ Fear of overly literal popular action was in tension with the need to legitimize the American governments. The constituent convention was a compromise, which tamed the mob and created a means of changing the fundamental law without revolution, while still maintaining the sovereignty of the people. Even men such as Jefferson, who thought that the “term *constitution* . . . means a statute, law, or ordinance”⁹⁶ and despaired “of the magic supposed to be in the word *constitution*,”⁹⁷ by 1787 saw the need for constituent conventions as a means of settling fundamental law. Otherwise, the question would linger: “On every unauthoritative exercise of power by the legislature, must the people rise in rebellion, or their silence be construed into a surrender of that power to them?”⁹⁸

In 1787, therefore, the procedure of convention and ratification was a sufficient means of constitutional creation or modification.⁹⁹ The ratification of the Constitution followed the procedure, and the people accepted the validity of the process as an explicit and authentic act of the people themselves.¹⁰⁰ Where in Europe, in 1804, Napoleon felt comfort-

⁹² Wood, *supra* note 62, at 342–43.

⁹³ Rakove, *supra* note 89, at 98.

⁹⁴ See Wood, *supra* note 62, at 323–28.

⁹⁵ *Id.* at 327.

⁹⁶ Thomas Jefferson, Notes on the State of Virginia 123 (William Peden ed., 1982) (1787).

⁹⁷ *Id.* at 124.

⁹⁸ *Id.* at 125.

⁹⁹ Other methods may have been sufficient as well. See, e.g., U.S. Const. art. V (expressly allowing for amendment of the Constitution upon the approval of three-fourths of state *legislatures*).

¹⁰⁰ See Maier, *supra* note 71, at xi.

able declaring that “I am the constituent power,”¹⁰¹ in America that power lay solely with the people, who exercised it through the tool of the convention.

2. Legislative Representation

Placing constituent power in the hands of the people and restricting the use of that power leaves legislatures as tools of the people, but not the unrestricted voice of the people themselves. That is, the legislature does not *embody* the people as a whole. This distinction—the raising of the people above the legislature—does not, however, destroy the legislature’s *representation* of the whole people. That the people of Virginia stand above the General Assembly does not mean that the delegate elected by the people of Charlottesville acts on behalf of only that city.

This is a simple idea, but an important one. As the word “assembly” makes plain, a representative legislature brings together delegates elected by different groupings of people.¹⁰² But representatives make laws that, as in England, “bind not only their own communities but the whole realm, the whole nation, the whole society.”¹⁰³ When the delegate from Charlottesville votes in the General Assembly, he in a sense speaks for Charlottesville; he personifies (but does not embody) the people of Charlottesville.¹⁰⁴ But he acts on behalf of and legislates for the whole of Virginia.

Furthermore, according to the federalist view of representation, “Lawmakers should *not* act as their constituents would if they met en masse, for the simple truth was that no substantial gathering of citizens could ever deliberate calmly or prudently.”¹⁰⁵ Contrary to what John Adams claimed before the war, the legislature was not the people in “miniature.”¹⁰⁶ Of course, representatives will be and should be attuned to the sentiments of the constituents who elect them. But, as Madison wrote in

¹⁰¹ 1 R.R. Palmer, *The Age of Democratic Revolution: A Political History of Europe and America, 1760–1800*, at 214 (1959).

¹⁰² Morgan, *supra* note 45, at 44.

¹⁰³ Bailyn, *supra* note 42, at 163–64; Morgan, *supra* note 45, at 47.

¹⁰⁴ There is a subtle distinction between “embody” and “personify.” The delegate from Charlottesville votes *for* Charlottesville’s people, but he does not carry the fiction of *being* the people of Charlottesville, as Parliament claimed to *be* the people of England.

¹⁰⁵ Rakove, *supra* note 89, at 236.

¹⁰⁶ John Adams, *Thoughts on Government: Applicable to the Present State of the American Colonies* 9 (Philadelphia, John Dunlap 1776); see also Rakove, *supra* note 89, at 203 (discussing Adams’s belief that the legislature is the people in “miniature”).

The Federalist No. 10, all of society suffers where government is dominated “by the superior force of an interested and overbearing majority.”¹⁰⁷ As one delegate to the Massachusetts ratifying convention said, the “representation of the people is something more than the people.”¹⁰⁸ For if the legislature were to attempt to act as the people would, to “mirror” the people,¹⁰⁹ the result “would be a government not by laws, but by men.”¹¹⁰ The great hope of representation, Madison wrote, was “that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”¹¹¹

In America, moreover, not just the legislature, but also the other branches of government were representative in the broad sense of the term. In the English government at the time of the revolution, only the House of Commons was representative of the people in any meaningful sense; the crown was hereditary, and the monarch appointed the hereditary lords. The districts that elected members of Parliament, furthermore, were horribly disproportionate, and the colonies, as well as some parts of Britain, enjoyed only “virtual” representation.¹¹² The American conception of popular sovereignty completely remapped the representative structure of government. The people, rather than the legislature, were sovereign. All of government—including the executive, the judiciary, and the upper house in states with a bicameral legislature—exercised powers delegated by the people. In that sense, “the Americans could now argue that the people participated in all branches of the government and not merely in their houses of representatives.”¹¹³ All of government was representative.

C. Secession, Citizenship, and the People

The framers of the Constitution understood that sovereignty was total—that the people could make *and remake* their government. If the People of the Preamble were the several state peoples, then the constituent power remained with each state people. A state people could,

¹⁰⁷ The Federalist No. 10, at 45 (James Madison) (Clinton Rossiter ed., 1999).

¹⁰⁸ 6 DHRC, supra note 2, at 1190.

¹⁰⁹ Rakove, supra note 89, at 203–04.

¹¹⁰ 6 DHRC, supra note 2, at 1190.

¹¹¹ The Federalist No. 10, supra note 107, at 50.

¹¹² Bailyn, supra note 42, at 166.

¹¹³ Wood, supra note 62, at 599.

through a convention or other sufficient means, decide to withdraw its consent to the Constitution. That is, if the People is synonymous with the state peoples, the implication is that secession is legal. Therefore, the constitutionality or unconstitutionality of secession—which Section IV.B will discuss—will be a strong piece of evidence for the absence or existence of a national people.

1. Secession and the Constituent Power

Threatening secession quickly became a political stratagem in America,¹¹⁴ but southern agitators did the most in advancing the theoretical foundations for secession—and in attempting to carry it out. Southern secessionists touted two theories for the right to secede. The first theory held that the national government was but a compact of the states, and, as the states went in, so they could leave.¹¹⁵ If the state peoples were sovereigns, this made sense. Each sovereign agreed to a new national government through the vehicle of the constituent convention; each sovereign could exercise the constituent power in order to change the government of that state; therefore, each sovereign could secede.

The roots of this view lay in international law.¹¹⁶ Federalism was merely a contract or compact among sovereigns.¹¹⁷ Writing in the mid-eighteenth century, the Swiss philosopher Vattel maintained that “independent states may unite themselves together by a perpetual confederacy, without each in particular ceasing to be a perfect state. . . . A person does not cease to be free and independent, when he is obliged to fulfil [sic] the engagements into which he has very willingly entered.”¹¹⁸ But the French philosopher Montesquieu, whose ideas of separation and balance of powers so influenced the framers, wrote that “the confederation

¹¹⁴ See, e.g., Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876*, at 39–40 (2000) (XYZ Affair); Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln 79–80* (2005) (Alien and Sedition Acts); *id.* at 165–66 (War of 1812); *id.* at 374–79 (Nullification Crisis).

¹¹⁵ Wilentz, *supra* note 114, at 772–73.

¹¹⁶ See generally Patrick Riley, *The Origins of Federal Theory in International Relations Ideas*, 6 *Polity* 87 (1973) (discussing how federal theory grew out of conceptions of international relations).

¹¹⁷ *Id.* at 97–98; see also Beer, *supra* note 7, at 222–24 (describing Montesquieu's federal theory as based on ideas of sovereignty and contract).

¹¹⁸ 1 Emmerich de Vattel, *The Law of Nations* bk. I, § 10 (London, J. Newberry et al. 1760).

can be dissolved and the confederates remain sovereign.”¹¹⁹ Under a contractual compact theory, if the agreement was in any way breached—if the freedom of one of the independent states was infringed—then a simple and strong case could be made that the states could leave the compact as a remedy for the breach. It was perhaps inevitable, therefore, that secession would become a serious political option in the new United States.

No one man did more to develop the theoretical justification for secession than John C. Calhoun of South Carolina. During the Nullification Crisis, Calhoun invoked the Virginia and Kentucky Resolutions¹²⁰ in making his argument that South Carolina had the right to nullify the tariff.¹²¹ In the Kentucky Resolutions, Jefferson had contended that the states “alone [are] parties to the compact, & solely authorized to judge in the last resort of the powers exercised under it, Congress being not a party, but merely the creature of the compact.”¹²² If the federal government purported to exercise “powers . . . which have not been delegated, a nullification of the act is the rightful remedy.”¹²³ Calhoun similarly based his argument on the premise that the state peoples were the sovereigns as to both the state governments and the federal government.¹²⁴ As such, each state held “a veto or control within its limits on the action of the

¹¹⁹ Montesquieu, *The Spirit of the Laws* bk. 9, ch. 1 (Anne M. Cohler et al. eds., 1989) (1748).

¹²⁰ The resolutions were a response to the Alien and Sedition Acts. Thomas Jefferson, the principal author, “argued that the alien and sedition acts exceeded the federal government’s delegated authorities.” Wilentz, *supra* note 114, at 79.

¹²¹ The South Carolina Exposition and Protest: Exposition Reported by the Special Committee, *in* 10 *The Papers of John C. Calhoun* 445, 502, 508, 510 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977). These references to the South Carolina Exposition and Protest are drawn from Calhoun’s draft under the theory that his draft reflects his thinking better than the final committee report. See Wilentz, *supra* note 114, at 319–21 (distinguishing between Calhoun’s draft and the final report).

¹²² Thomas Jefferson, Notes and Proceedings on Discontinuing the Establishment of the Church of England, *in* 1 *The Papers of Thomas Jefferson* 525, 547 (Julian P. Boyd et al. eds., 1950).

¹²³ *Id.*

¹²⁴ 10 *The Papers of John C. Calhoun*, *supra* note 121, at 496–98. During the Nullification Crisis, Andrew Jackson issued a proclamation in which he claimed that “before the declaration of independence we were known in our aggregate character as *the United Colonies of America* . . . [w]e declared ourselves a nation by a joint, not by several acts . . .” The purported power of state nullification of federal laws was, therefore, “*incompatible with the existence of the Union.*” 2 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* 1206 (1897).

General Government, on contested points of Authority”¹²⁵—the states could nullify federal laws that the states judged to be outside the grant of delegated federal power. Calhoun recognized that it was the people of the state who had authority to judge the boundary between state and federal power. He noted, therefore, that “[w]hatever doubts may be raised whether their respective legislatures fully representing the sovereignty of the States for this high purpose, there can be none as to the fact that a convention, fully represents them for all purposes whatever.”¹²⁶ Conventions created the federal government; conventions could nullify federal laws as well.

Calhoun’s theory, however, did not stop at nullification. As Calhoun wrote in his later *Discourse on the Constitution and Government of the United States*, if the federal government acts in a way “inconsistent with the character of the constitution and the ends for which it was established”—that is, if the federal government breaches the constitutional contract—then each state “may choose whether it will, or whether it will not secede from the Union.”¹²⁷ Under Calhoun’s reasoning, secession was constitutional; in fact, secession was necessary in order to defend the Constitution’s values. Supporters of this theory strenuously maintained that they were conservatives, not revolutionaries.¹²⁸ For, Calhoun noted, “[t]hat a State, as a party to the constitutional compact, has the right to secede,—acting in the same capacity in which it ratified the constitution,—cannot, with any show of reason, be denied by anyone who regards the constitution as a compact.”¹²⁹

The second theory posited that there was no right to secede implied within the terms of the Constitution itself. Rather, “each State has the right of revolution,” as one southern U.S. senator put it.¹³⁰ These men “draped themselves in the Jeffersonian natural right to revolution.”¹³¹ This “right” to revolt was not *constitutional*—the Constitution explicitly and implicitly forbade rebellion¹³²—but it was *legal*, its proponents ar-

¹²⁵ 10 The Papers of John C. Calhoun, *supra* note 121, at 506.

¹²⁶ *Id.* at 510.

¹²⁷ John C. Calhoun, *Discourse on the Constitution and Government of the United States*, in 1 The Works of John C. Calhoun 111, 300 (New York, D. Appleton & Co. 1853).

¹²⁸ Wilentz, *supra* note 114, at 773.

¹²⁹ 1 The Works of John C. Calhoun, *supra* note 127, at 301.

¹³⁰ Wilentz, *supra* note 114, at 773.

¹³¹ *Id.*

¹³² See U.S. Const. art. I, § 9, cl. 2 (Suspension Clause); *id.* art. III, § 3 (Treason Clause); *id.* art. VI, cl. 3 (Oaths Clause).

gued, in the sense that, by rebelling, the people exercised their constituent power. Like the constitutional theory of withdrawal, the right to revolution “rested upon the basic premise that the citizens of each state comprised a separate sovereign power and retained the natural . . . right to determine the fate of the Union.”¹³³

The purpose here is not to applaud Calhoun or justify secession. Rather, it is merely to demonstrate that if the state peoples were the only sovereigns under the original meaning of the Constitution, then the march of deduction strongly leads to the conclusion that secession was a remedy available under either “constitutional” or “natural” law according to the dictates of popular sovereignty.

2. *Citizenship*

Citizenship is an important facet of popular sovereignty, and one that secession necessarily implicates. “In the view both of the ancients and of modern liberal political theorists,” Professor Bickel summarized, “the relationship between the individual and the state is largely defined by the concept of citizenship.”¹³⁴ Citizenship’s association with sovereignty brings forth two broad questions. First, *who* are citizens? While this is undoubtedly an important question, it is not central to this Note. Of greater salience to the constitutional division of powers is the second question: How does allegiance work in the federal system? Allegiance to the body politic is a crucial component of citizenship.¹³⁵ Is U.S. citizenship supreme over state citizenship or is it secondary?¹³⁶ Does citizenship flow upward from the states to the federal government?

The pre-Reconstruction Constitution was ambiguous on this point.¹³⁷ Yet the “civic issues that divided [Americans] pivoted on whether popular sovereignty and citizenship would be primarily located in the states or the nation.”¹³⁸ As *Dred Scott v. Sandford* demonstrated, the power to answer the *who* question was inextricably tied up in the answer to the al-

¹³³ James H. Kettner, *The Development of American Citizenship, 1608–1870*, at 338 (1978).

¹³⁴ Alexander M. Bickel, *The Morality of Consent* 33 (1975).

¹³⁵ See Kettner, *supra* note 133, at 349–51.

¹³⁶ See, e.g., *id.* at 265–67 (discussing a case on this question from the 1830s).

¹³⁷ See Bickel, *supra* note 134, at 35–36; Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 116–20 (1997).

¹³⁸ Smith, *supra* note 137, at 6.

legiance question.¹³⁹ Thus, both secession and the new Confederate government were premised on citizenship being the province of the states.¹⁴⁰ The war can be conceptualized as “a bloody contest over allegiance.”¹⁴¹ Subsequently, the Citizenship Clause of the Fourteenth Amendment specifically sought to prevent the elevation of state citizenship over national citizenship.¹⁴²

3. *The People and the Constitution*

This analysis of popular sovereignty outlines a two-step inquiry in order to identify who is the People. First, did the state peoples survive the ratification of the Constitution? Second, if the state peoples did survive, is there a national people that exists alongside the class of state peoples? If secession is not allowed under our constitutional scheme, that suggests that there must be something checking the sovereignty of the state peoples. That something would have to be a sovereign national people, the citizens of which are the individuals who make up the state peoples. Only a sovereign that parallels the state sovereigns in this way would be able to chasten the constituent power of the state peoples. But before determining whether such a balance of sovereigns does in fact exist, we must first answer the antecedent question: Did the state peoples survive the popular ratification of the Constitution?

III. THIRTEEN (STATE) PEOPLES

Determining whether the state peoples survived ratification requires answering two questions. Did the state peoples exist as sovereigns *before* the Constitution? If yes, did the Constitution consolidate them into one unitary national people?

¹³⁹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406 (1856); see also Kettner, *supra* note 133, at 325–32 (discussing *Scott* and citizenship); Smith, *supra* note 137, at 263–71 (same).

¹⁴⁰ Kettner, *supra* note 133, at 334–38.

¹⁴¹ *Id.* at 340.

¹⁴² Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 Va. L. Rev. 493, 507, 563–64, 592 (2013).

A. Before the Constitution

Some scholars, such as Beer, contend that a unitary American people predated and created the Constitution.¹⁴³ And, in fact, some members of the Founding generation did subscribe to this idea. The ratification-era champion of the strict nationalist view was James Wilson, a delegate to the Constitutional Convention, who, during the ratification debate in Pennsylvania, claimed that the pre-war Continental Congress understood that the states had been extinguished and that “[w]e are now one nation of brethren.”¹⁴⁴ Wilson was not the only founder who felt this way. Writing as Publius, John Jay claimed that the Americans were “one united people.”¹⁴⁵ Jay worried that without a strong new national government, this unitary people would break down into “three or four nations.”¹⁴⁶

The historical evidence, however, demonstrates that the state peoples were sovereign before the Constitution. By its very terms, the Declaration of Independence proclaimed the sovereignty of the former colonies as “Free and Independent States.”¹⁴⁷ James Wilson claimed that the states were declared “independent, not *Individually* but *Unitedly* and that they were confederated as they were independent, States.”¹⁴⁸ Justice Story, too, read the Declaration as an “act of the whole *people* of the united colonies”—the Declaration was “the achievement of the whole for the benefit of the whole.”¹⁴⁹ The words of the Declaration cannot bear the weight Wilson and Justice Story ascribed to the document. The Declaration consistently refers to the states in the plural as “these United Colonies,” as “they,” and as “them.”¹⁵⁰ The document did invoke the constituent power,¹⁵¹ but that power created thirteen distinct states. The words of the Declaration were chosen carefully to distinguish the sovereign states from their unity of purpose in declaring independence.¹⁵² The colonies acted together under the banner of the Declaration, but the document did not create or acknowledge a unitary national people.

¹⁴³ Beer, *supra* note 7, at 322–30.

¹⁴⁴ 1 The Records of the Federal Convention of 1787, at 166 (Max Farrand ed., 1911).

¹⁴⁵ The Federalist No. 2, at 6 (John Jay) (Clinton Rossiter ed., 1999).

¹⁴⁶ The Federalist No. 5, at 19 (John Jay) (Clinton Rossiter ed., 1999).

¹⁴⁷ The Declaration of Independence para. 32 (U.S. 1776).

¹⁴⁸ 1 The Records of the Federal Convention of 1787, *supra* note 144, at 324.

¹⁴⁹ 1 Story, *supra* note 28, § 211, at 147–48.

¹⁵⁰ The Declaration of Independence para. 32 (U.S. 1776).

¹⁵¹ See *id.* para. 2.

¹⁵² See Berger, *supra* note 6, at 24–26.

But, as Justice Story wrote, the Continental Congress acted as a government for the whole country by preparing for and waging war, regulating trade, and accumulating debts.¹⁵³ These actions alone, however, do not establish the existence of a sovereign national people. The exercise of these powers merely shows that Congress was national in scope. “We have no coercive or legislative Authority,” noted one member of Congress before the war.¹⁵⁴ “[F]ew . . . conceived of the thirteen states’ becoming a single republic, one community with one pervasive public interest.”¹⁵⁵ The Americans were students of Montesquieu and Vattel; they did not conceive of Congress as a true government of the people, but rather as a compact of independent states with independent sovereign peoples.¹⁵⁶ Despite Congress’s exercise of power leading up to and during the war, it was highly dependent on the states.¹⁵⁷

The Articles of Confederation made explicit the underlying premises of the Continental Congress’s authority. The first substantive provision of the Articles states that “[e]ach state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”¹⁵⁸ The Articles thus explicitly reaffirmed the states’ sovereignty; Congress exercised only those powers delegated by the states.¹⁵⁹ It truly was a Confederation in the mold of Vattel. The central government held the powers of foreign policy and war, along with others,¹⁶⁰ but the pact was described as a “league of friendship with each other, for their common defense”;¹⁶¹ each state had one vote;¹⁶² at least nine out of thirteen votes were required for any action;¹⁶³ Congress had no independent taxing authority;¹⁶⁴ and the Articles could be amended only by the assent of all thirteen states.¹⁶⁵ Wood has summarized the compact:

¹⁵³ 1 Story, *supra* note 28, §§ 213–14, at 149–50.

¹⁵⁴ Wood, *supra* note 62, at 317.

¹⁵⁵ *Id.* at 356.

¹⁵⁶ See *id.* at 354–57.

¹⁵⁷ See, e.g., McDonald, *supra* note 15, at 44–50.

¹⁵⁸ Articles of Confederation of 1781, art. II.

¹⁵⁹ Berger, *supra* note 6, at 44–47.

¹⁶⁰ Articles of Confederation of 1781, art. IX.

¹⁶¹ *Id.* art. III.

¹⁶² *Id.* art. V, para. 4.

¹⁶³ *Id.* art. IX, para. 6; *id.* art. X.

¹⁶⁴ *Id.* art. VIII.

¹⁶⁵ *Id.* art. XIII, para. 1.

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And the Articles of Confederation, for all the powers it theoretically gave to Congress, did not in fact alter this independence [of each state]. . . . The states not only jealously guarded their independence and sovereignty by repeated assertions and declarations, but in fact assumed the powers of a sovereign state that Independence had given them, even in violation of the Articles of Confederation, making war, providing for armies, laying embargoes, even in some cases carrying on separate diplomatic correspondence and negotiations abroad. The Confederation was intended to be, and remained, a Confederation of sovereign states.¹⁶⁶

Under the Articles, Congress may have projected a picture of sovereignty to the wider world, but the central government could not claim sovereignty in fact, nor did it operate directly on the people of the United States.

It is important to remember that despite fighting and winning a war, the people of the American states lived in relative isolation from one another. Particularly for those people who lived in the western portions of the states, “it was as unreasonable to suppose that the thirteen states could be well governed by a single national government as it had been to suppose that the thirteen colonies could be well governed from London.”¹⁶⁷ The exhortations of Jay and Wilson notwithstanding, there was no unitary American people before 1787.

The ratification process used to adopt the Constitution further demonstrates the framers’ understanding that the state peoples were sovereign. Article VII contemplated ratification by “Conventions” of the states. That term, as we have seen, was understood to mean a special assemblage of representatives, separate from the legislature, of the people specifically elected to exercise the constituent power. The Constitutional Convention separately recommended that the Constitution should “be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification.”¹⁶⁸ McDonald has argued persuasively that by

¹⁶⁶ Wood, *supra* note 62, at 356–57.

¹⁶⁷ McDonald, *supra* note 15, at 318.

¹⁶⁸ 1 DHRC, *supra* note 2, at 318. The framers, thus, cleverly created a government of the people instead of the states as states, see Wood, *supra* note 62, at 532–33, while still following the procedure for amending the Articles. McDonald, *supra* note 14, at 279; see Articles of Confederation of 1781, art. XIII, para. 1 (requiring the assent of all thirteen states to change the Articles).

submitting the Constitution to ratification by the states, the framers recognized the sovereignty of the state peoples. “The Constitution amended each of the state constitutions in a number of ways,” McDonald reasoned, “and if it were adopted by a majority vote of the whole people, the people in some states would be altering both the political societies and the constitutions of the other states.”¹⁶⁹ Instead, the Constitutional Convention “submitted [it] for ratification by each of the thirteen political societies, which is to say by the people of the several states in their capacities as people of the several states.”¹⁷⁰

B. Consolidation: The Provisions of the Constitution

The several state peoples were sovereign before the ratification of the Constitution, and it was the state peoples who *created* the Constitution. But that does not by itself answer the question of whether the state peoples *survived* ratification. Amar has argued that, in ratifying the Constitution, the “previously separate state Peoples agreed to ‘consolidate’ themselves into a single continental People.”¹⁷¹ In essence, Amar holds that this national body politic emerged *sua sponte* from ratification. In order to determine whether ratification did in fact consolidate the state peoples, this Section will examine the provisions of the Constitution itself to see whether it contemplates the existence of state peoples. Each piece of evidence, viewed individually, does not by itself prove that the state peoples survived ratification. Taken as a whole, however, the case for the continued existence of the state peoples is very strong.

1. Elections

Although members of Congress and the President are federal officers, the Constitution demands that their election be held on the state level. Representatives are “chosen . . . by the People of the several States.”¹⁷² The states determine who is qualified to vote.¹⁷³ Senators were originally “chosen by the Legislature[s]” of each state.¹⁷⁴ The states, not the American people, vote for the President through the electors chosen to repre-

¹⁶⁹ McDonald, *supra* note 14, at 280.

¹⁷⁰ *Id.*

¹⁷¹ Amar, *supra* note 10, at 1460.

¹⁷² U.S. Const. art. I, § 2, cl. 1.

¹⁷³ *Id.*

¹⁷⁴ *Id.* art. I, § 3, cl. 1, amended by U.S. Const. amend. XVII.

sent the states in the Electoral College.¹⁷⁵ If no candidate wins a majority of the Electoral College, then the election is thrown to the House of Representatives; the representatives, however, vote by state delegation, with “each State having one Vote.”¹⁷⁶ Residents of the District of Columbia have representation in the Electoral College because of the Twenty-Third Amendment;¹⁷⁷ they do not have voting representation in Congress precisely because D.C. is not a state. These procedures show that a federal election is “indisputably an act of the people of each State, not some abstract people of the Nation as a whole.”¹⁷⁸

2. *Citizenship*

Article III states that the “judicial power shall extend . . . to Controversies . . . between a State and Citizens of another State;—between Citizens of different States,— . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”¹⁷⁹ The word “Citizen” is used in the same manner to describe those who live in a state and those who live in a foreign state. The states are not the same as foreign states—a citizen of Georgia, when in Virginia, is not an alien.¹⁸⁰ And the Privileges and Immunities Clause of Article IV does provide cross-border protections for citizens of different states.¹⁸¹ Still, states have citizens whose citizenship is distinguishable from the citizens of the other states. That is the basis of the diversity jurisdiction of the federal courts.¹⁸² Allegiance is a central component of citizenship; by its very nature, citizenship suggests that there is a body politic to which the citizen owes his allegiance. Where there are citizens of a state, one would expect to find a state-level sovereign.

3. *The Amendment Process*

The structure of the Constitution’s amendment process demonstrates that some matter of sovereignty remains at the state level. Amendments are ratified by the states, not through some kind of national popular pro-

¹⁷⁵ Id. art. II, § 1, cl. 2; id. art II, § 1 cl. 3, superseded by U.S. Const. amend XII.

¹⁷⁶ Id. art. II, § 1, cl. 3, superseded by U.S. Const. amend. XII.

¹⁷⁷ Id. amend. XXIII.

¹⁷⁸ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 858 (1995) (Thomas, J., dissenting).

¹⁷⁹ U.S. Const. art. III, § 2, cl. 1.

¹⁸⁰ See Kettner, supra note 133, at 255.

¹⁸¹ U.S. Const. art. IV, § 2, cl. 1; Kettner, supra note 133, at 255–56.

¹⁸² See Kettner, supra note 133, at 261–64.

cess.¹⁸³ It is important to note that Article V was not designed to provide safety in numbers regarding a *national* people. The affirmation of three-fourths of the states is required for an amendment to be adopted, but that does not ensure that a majority of individual Americans supports the adopted amendment because state populations are unevenly balanced. Furthermore, the states can force Congress to call a national convention for the purpose of proposing amendments, and state *conventions* are a permissible means of ratifying amendments.¹⁸⁴ The amendment process is focused on the states as bodies politic, not the national population.

4. State Integrity

The Constitution is built around an assumption of state integrity. Article V holds “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” Furthermore, states cannot be carved up without their consent.¹⁸⁵ These two clauses reveal the assumption that the states are bodies politic independent of the federal government. The other states and the federal government cannot infringe upon any state’s territorial or core representational integrity.

5. The Structural Aspect of the Bill of Rights

The original meaning of several of the provisions of the Bill of Rights “reveals structural ideas” that emphasize the use of the states to check the overreaching federal government.¹⁸⁶ It is important to remember that until the adoption of the Fourteenth Amendment, the Bill of Rights did not apply against the states. Rather, the provisions enshrined rights protecting individuals from the *federal* government; the state governments provided the *means* of protecting the people from federal violation of their rights. The separateness of the states from the federal government was crucial to protecting liberty.

The Second Amendment, for example, fit within a “militia system [that] was carefully designed to protect liberty through localism.”¹⁸⁷ The amendment was intended to counter Congress’s delegated powers over

¹⁸³ U.S. Const. art. V.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* art IV, § 3, cl. 1.

¹⁸⁶ Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* xii (1998) [hereinafter Amar, *Bill of Rights*].

¹⁸⁷ *Id.* at 55–56.

the army and the militia itself.¹⁸⁸ The provision, thus, reinforced Madison's assurance during the ratification debates that, if a tyrannical government employed the army to oppress the people, "the State governments with the people on their side would be able to repel the danger."¹⁸⁹ Indeed, the Constitution does not refer to the federal government as a "state" anywhere in the text. The most natural reading of the Second Amendment, therefore, supports the conclusion that the purpose of the amendment was to calm fears about the "security" of the *states*.

The Fourth Amendment, too, evidences the continuing sovereignty of the states as a bulwark against the power of the new federal government. Like the rest of the Bill of Rights, the Fourth Amendment applied against the federal government. And it was enforced through *state* law. Specifically, a victim of a violation of the amendment could sue the federal agent for trespass. When the defendant asserted his agent status as a defense, the plaintiff could invoke the Fourth Amendment to demonstrate that the search or seizure was unauthorized by the law.¹⁹⁰ Trespass was part of *state* common law.¹⁹¹ Thus, the Fourth Amendment, like the Second, projected an "image of federalism"—"localism would protect liberty."¹⁹²

The institution of the jury, moreover, ensured that the peoples of the states could check the power of the federal judiciary. The jury was a convenient way for the people to govern directly, albeit only regarding specific cases or controversies.¹⁹³ Indeed, one commentator in 1788 described the jury as "*the democratic branch of the judiciary power*."¹⁹⁴ The Sixth Amendment, furthermore, guarantees to criminal defendants "an impartial jury of the *state* and district wherein the crime shall have

¹⁸⁸ *Id.* at 50–59; see also U.S. Const. art. I, § 8, cl. 12, 15, 16.

¹⁸⁹ The Federalist No. 46, at 267 (James Madison) (Clinton Rossiter ed., 1999); see also Amar, Bill of Rights, *supra* note 186, at 50 (describing the idea that the states could resist the national government militarily).

¹⁹⁰ See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 774 (1994); see also United States v. Jones, 132 S. Ct. 945, 949–51 (2012) (discussing trespass and the Fourth Amendment's close relationship to property rights); William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791, at 593–96 (2009) (discussing the English origins of using trespass as a vehicle to fight against searches and seizures).

¹⁹¹ Amar, Bill of Rights, *supra* note 186, at 76.

¹⁹² *Id.*

¹⁹³ See Jon P. McClanahan, The "True" Right to Trial by Jury: The Founders' Formulation and Its Demise, 111 W. Va. L. Rev. 791, 806–07 (2009).

¹⁹⁴ 5 The Complete Anti-Federalist 38 (Herbert J. Storing ed., 1981); see also Amar, Bill of Rights, *supra* note 186, at 95 (discussing the jury as a democratic check).

been committed.”¹⁹⁵ The state peoples had a hand even in the administration of federal justice.

C. Consolidation: The Original Understanding at Ratification

The face of the Constitution itself contemplates the continued existence of the state peoples in several different ways. This evidence indicates that the state peoples exist within the constitutional framework. The clear counterargument, however, is that the states were a convenient means of distributing the powers held by the national people—that the localism evident in the Constitution is consistent with the view that the states are merely *arrondissements* of the greater body politic.¹⁹⁶ The framers’ own words, however, contradict that argument. Sources such as *The Federalist* and the state ratification debates “are not authoritative and hence not conclusive,” but they are “permissible second-best source[s] of constitutional meaning.”¹⁹⁷ Those sources provide further evidence that the meaning drawn out above from the text of the Constitution is correct: The state peoples survived ratification.

1. The Federalist

The newspaper articles written mostly by Madison and Hamilton under the pseudonym “Publius” reveal the federalist presumption that the states and the sovereign state peoples would continue to exist under the aegis of the Constitution. One of the main reasons for drafting the Constitution was the capricious and uncontrolled legislating of the states.¹⁹⁸ The federal government certainly was intended to be national in scope and power.¹⁹⁹ Indeed, if “the sovereignty of the States cannot be reconciled to the happiness of the people,” Madison expressed his wish that the states be “sacrificed.”²⁰⁰

But Madison and Hamilton assured those wary of centralization that the states would retain their sovereignty within the new framework. If

¹⁹⁵ U.S. Const. amend. VI (emphasis added); see also Amar, *Bill of Rights*, supra note 186, at 88 (“The jury was not simply a popular body but a local one as well.”).

¹⁹⁶ See Beer, supra note 7, at 339.

¹⁹⁷ Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113, 1149 (2003). Moreover, federalist interpretations carry more weight than anti-federalist interpretations. *Id.* at 1152.

¹⁹⁸ Wood, supra note 62, at 467.

¹⁹⁹ See *The Federalist* No. 39 (James Madison).

²⁰⁰ *The Federalist* No. 45, at 257 (James Madison) (Clinton Rossiter ed., 1999).

the national government held all the powers of sovereignty, Hamilton reasoned, then the Constitution clearly would contemplate an “entire consolidation of the States.”²⁰¹ The new framework, however, “aims only at a partial union or consolidation, [and] the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”²⁰² The national government, Madison wrote, would be “dependen[t]” on the states, whereas the states would be independent of the national government.²⁰³ Although the federal government would exercise some powers that the states were forbidden from concurrently enjoying,²⁰⁴ the states would retain their sovereignty. For the “assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.”²⁰⁵ And, as Hamilton strenuously argued in *The Federalist* No. 85, the states could force through amendments to the Constitution if Congress was intransigent.²⁰⁶ “We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.”²⁰⁷ The state peoples existed before the Constitution, they would continue to exist as sovereigns under the Constitution, and that existence would be to an extent autonomous of the national government.

2. *State Ratification Debates*

The state ratification debates are another “second-best” source for divining constitutional meaning.²⁰⁸ For, as Madison famously told an early Congress, the Constitution was “nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking

²⁰¹ *The Federalist* No. 32, at 166 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²⁰² *Id.*; see also *The Federalist* No. 45, *supra* note 200, at 260 (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”).

²⁰³ *The Federalist* No. 45, *supra* note 200, at 258; see also *The Federalist* No. 44, at 255 (James Madison) (Clinton Rossiter ed., 1999) (noting that “members of the federal government will have no agency in carrying the State constitutions into effect,” but that state-level actors “will have an essential agency in giving effect to the federal Constitution”).

²⁰⁴ See U.S. Const. art. I, § 9.

²⁰⁵ *The Federalist* No. 39, at 211 (James Madison) (Clinton Rossiter ed., 1999).

²⁰⁶ *The Federalist* No. 85, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²⁰⁷ *Id.*

²⁰⁸ Kesavan & Paulsen, *supra* note 197, at 1159–64.

through the several State Conventions.”²⁰⁹ Furthermore, “whether this system proposes a consolidation or a confederation of the states” was “the principal question” in the state conventions.²¹⁰

Many of those who opposed ratification, termed anti-federalists, claimed that the Constitution would destroy the states. “It appears to me,” said a North Carolinian anti-federalist, “that, instead of securing the sovereignty of the states, [the Constitution] is calculated to melt them down into one solid empire.”²¹¹ George Mason of Virginia similarly declared that the national government’s taxing “power is calculated to annihilate totally the State Governments. . . . These two concurrent powers cannot exist long together; the one will destroy the other.”²¹² There could not be an *imperium in imperio*; by agreeing to the Constitution, the states would surrender their sovereignty to the new national government.²¹³

But, the federalists countered, the states themselves were not sovereign to begin with. The people were sovereign. There is nothing nonsensical about two governments that can tax the same body of people, James Wilson told the Pennsylvania convention. The people “can distribute one portion of power to the more contracted circle called state governments; they can also furnish another proportion to the government of the United States.”²¹⁴ Madison, too, explained to the Virginian anti-federalists that “the concurrent collections under the authorities of the General Government and State Governments, all irradiate from the people at large. The people is their common superior.”²¹⁵ This did not satisfy the anti-federalists, however, because they saw no guarantee that the state peoples were the ones delegating power. The evidence was in the Preamble, Patrick Henry said: “that poor little thing—the expression, *We, the people*, instead of the States of America.”²¹⁶ If that were the case, then the Constitution consolidated the state peoples into one sovereign national people.

²⁰⁹ 5 Annals of Cong. 776 (1796).

²¹⁰ Wood, *supra* note 62, at 529.

²¹¹ 4 Debates on the Adoption of the Federal Constitution 202 (Ayer Co. 1987) (Jonathan Elliot ed., 1836) [hereinafter *Elliot’s Debates*] (statement of William Lenoir).

²¹² 9 DHRC, *supra* note 2, at 936.

²¹³ See Wood, *supra* note 62, at 519–28.

²¹⁴ 2 DHRC, *supra* note 2, at 449.

²¹⁵ 10 *id.* at 1225.

²¹⁶ 9 *id.* at 951.

The federalists had one last card to play: The People are, actually, state peoples. “Who are the parties to [the Constitution]?” Madison asked the Virginia convention rhetorically. “The people—but not the people as composing one great body—but the people as composing thirteen sovereignties . . . Sir, no State is bound by [the Constitution], as it is, without its own consent.”²¹⁷ Most of the federalists did not think that the Constitution eliminated the states. In fact, some of the federalists who attended the Constitutional Convention had attempted to do just that and, by their own estimation, failed.²¹⁸

Measures of sovereignty remained at the state level, the federalists believed. The question of state sovereign immunity from suit demonstrated this. Article III provides that Congress may grant the federal courts jurisdiction over “controversies . . . between a state and citizens of another state.”²¹⁹ “Is this State to be brought to the bar of justice like a delinquent individual?” George Mason objected. “Is the sovereignty of the State to be arraigned like a culprit, or private offender? — Will the States undergo this mortification?”²²⁰ But this provision did not change the sovereign immunity of the states, Madison responded. “It is not in the power of individuals to call any State into Court.”²²¹ John Marshall similarly maintained that Article III did not entail “that the sovereign power shall be dragged before a Court.”²²² Article III may have given a federal court subject-matter jurisdiction over the suit, but it did not give the court personal jurisdiction over the state.²²³ The Constitution did not subordinate the states—and, thus, the sovereign state peoples—through the vehicle of the federal courts. After the Supreme Court held in *Chisholm v. Georgia* that Article III precluded state sovereign immunity where the federal court has diversity jurisdiction,²²⁴ the Eleventh Amendment was adopted. It provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citi-

²¹⁷ Id. at 995.

²¹⁸ Wood, *supra* note 62, at 524–26.

²¹⁹ U.S. Const. art. III, § 2, cl. 1.

²²⁰ 10 DHRC, *supra* note 2, at 1406.

²²¹ Id. at 1414.

²²² Id. at 1433.

²²³ See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1580–92 (2002).

²²⁴ 2 U.S. (2 Dall.) 419, 420 (1793).

zens of another State, or by Citizens or Subjects of any Foreign State.”²²⁵ The states retained their sovereign immunity under the unamended Constitution; the Eleventh Amendment tells the courts not to construe Article III differently.²²⁶

The most convincing reading of the text of the Constitution and the debates surrounding its ratification strongly support the conclusion that the state peoples not only were the creators of the Constitution, but also that they survived its adoption. This was a new form of government, one “of a federal nature, consisting of many co-equal sovereignties,” in Madison’s words.²²⁷ But this is not the end of the inquiry. Were there thirteen state sovereigns at the time of ratification, or did the Constitution contemplate one additional “co-equal” sovereign: the national people?

IV. PLUS ONE (NATIONAL) PEOPLE

The mechanics of exercising federal power and extrapolation from the Constitution’s terms reveal the existence of a national American people. This body politic is needed in order to make sense of the federal government’s representational system, its power to act on individuals, and the unconstitutionality of secession.

A. Citizenship and the Reach of the Federal Government

Despite the fact that the state peoples occupy a prominent place within the constitutional framework, there is no circumventing the fact that the federal government is a national government, the reach of which extends past the states to individual Americans.

1. National Representation and Citizenship

The Constitution divides representation in Congress by states and grants the states significant control over the elections of those representatives. Yet, although representatives personify their respective districts, they legislate for—they act on behalf of—the people of the whole governmental unit. As Justice Kennedy noted in his concurrence in *U.S.*

²²⁵ U.S. Const. amend. XI (emphasis added).

²²⁶ *Alden v. Maine*, 527 U.S. 706, 713 (1999). But see Nelson, *supra* note 223, at 1613–15.

²²⁷ 10 DHRC, *supra* note 2, at 1272.

Term Limits, Inc. v. Thornton, “The federal character of congressional elections flows from the political reality that our National Government is republican in form.”²²⁸ Under the Constitution, even though the House of Representatives is divided by state and the Senate is apportioned by state, there is no requirement that a member of Congress vote along with the other members from his state. Moreover, the president personifies the people of all the states much in the way the representative from Charlottesville personifies the constituents of his district. The whole federal government is representative.

The Constitution’s recognition of national citizenship—and, therefore, allegiance to a national body—further indicates the existence of the national people. Article I gives Congress the power “[t]o establish a uniform Rule of Naturalization.”²²⁹ To what extent the states could also regulate naturalization was unclear,²³⁰ but the delegation of this power to the federal government implies that there is a national interest in regulating the induction of new citizens. That there is a national interest suggests that aliens would be naturalized not just into a state body politic, but also into the national body politic.

Two more pieces of evidence supplement the case for national citizenship. First, all legislative, “executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”²³¹ The implication of the Oaths Clause is that an officer owes allegiance not just to his state, but also to a national body politic. Under the American form of republican government, that national body politic is the people—the national people.

Second, the people living in Washington, D.C. and the federal territories were not citizens of states, but were thought to be citizens of the United States.²³² What explains this citizenship? The Constitution did not give the persons living in D.C. and the territories representation in Congress, nor were they given representation in the Electoral College.²³³ How else can citizenship attach? Congress has legislative power over

²²⁸ 514 U.S. 779, 842 (1995) (Kennedy, J., concurring).

²²⁹ U.S. Const. art. I, § 8, cl. 4.

²³⁰ Kettner, *supra* note 133, at 238–39.

²³¹ U.S. Const. art. VI, cl. 3.

²³² Kettner, *supra* note 133, at 263–64.

²³³ The Twenty-Third Amendment gave the District of Columbia Electoral College representation.

D.C.²³⁴ and the federal territories.²³⁵ Federal courts bind the parties to cases with the decisions they issue. That federal law and authority act on these individuals directly is not conclusive evidence of citizenship; aliens, too, are subject to domestic law. Yet, as the next section describes, the constitutional power of the federal government to govern individuals demonstrates that there is a direct relationship between the two parties—a relationship that is best explained by reference to a national people.

2. *Federal Power over Individuals*

In *The Federalist* No. 39, Madison noted that, as to “the operation of the government,” the central government is in part national, because its “powers operate . . . on the individual citizens composing the nation, in their individual capacities.”²³⁶ The federal government, independent of the states, has coercive power over individuals.

Take, for example, the power to tax. Under the Articles of Confederation, Congress could not directly tax the people. Rather, taxes voted by Congress were to “be laid and levied by the authority and direction of the legislatures of the several States.”²³⁷ But under the Constitution, Congress can, without relying on state legislation, “lay and collect Taxes, Duties, Imposts and Excises.”²³⁸ And, as the lead-up to the revolution demonstrated, the taxing power is a highly important exercise of sovereignty.

The Bill of Rights, furthermore, was adopted to protect the people from federal power.²³⁹ While this is evidence of the continued existence of the state peoples, it also presupposes the need for an intermediary. The federal government, anti-federalists feared, would hold too much power. The first ten amendments recognize that Congress can act directly on individuals and call upon the states to act as a shield for the people against the national government’s exercise of power. The existence of the Bill of Rights is an admission that there is a national sovereign that can be checked only by another sovereign—the states.

²³⁴ U.S. Const. art. I, § 8, cl. 17.

²³⁵ Id. art. IV, § 3, cl. 2.

²³⁶ *The Federalist* No. 39, *supra* note 205, at 213.

²³⁷ Articles of Confederation of 1781, art. VIII.

²³⁸ U.S. Const. art. I, § 8, cl. 1.

²³⁹ See Maier, *supra* note 71, at 462–63.

B. The Unconstitutionality of Secession

The most effective use of the states as a shield from federal power was tried once before when eleven of the southern states purported to secede from the United States and form the Confederate States of America. If the state peoples are the only sovereigns in the constitutional framework, then there is a compelling argument that secession must have been legal under the unamended Constitution. And, it must be conceded that much of the analysis above in Section A alternatively can be explained—though this explanation is less compelling—as a delegation of power from all of the state peoples to a central body for the purpose of acting for all the state peoples. But a close reading of the statements of the framers and the Constitution’s provisions demonstrates that secession was unconstitutional at the founding. And if secession is unconstitutional, then there must be something else binding the state peoples together. There must be a national people.

1. The Framers

It is helpful in this instance to begin with the words of the framers. John Jay wanted the states to bind themselves closer together precisely to prevent the union from disintegrating.²⁴⁰ Hamilton, too, prayed for “perpetual peace between the States,” darkly reminding his essay’s readers of the “axiom in politics, that vicinity or nearness of situation, constitutes nations natural enemies.”²⁴¹ The Constitution was needed, Hamilton concluded, to prevent “civil war, a perpetual alienation of the States from each other.”²⁴² This was an ever-present danger under the Articles. It certainly was on Madison’s mind before the Constitutional Convention, when he despaired that,

As far as the Union of the States is to be regarded as a league of sovereign powers, . . . it seems to follow from the doctrine of compacts, that a breach of any of the articles of confederation by any of the parties to it, absolves the other parties from their respective obliga-

²⁴⁰ The Federalist No. 5 (John Jay).

²⁴¹ The Federalist No. 6, at 24, 27 (Alexander Hamilton) (Clinton Rossiter ed., 1999); see also The Federalist No. 9, at 239 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“A firm Union will be of the utmost moment to the peace and liberty of the States, as a barrier against domestic faction and insurrection.”).

²⁴² The Federalist No. 85, supra note 206, at 495 (Alexander Hamilton).

tions, and gives them a right if they chuse [sic] to exert it, of dissolving the Union altogether.²⁴³

The intention of the framers was to build a framework for longstanding unity and peace among the states. The question is whether the framers accomplished their goal of creating a constitutional framework that forbids secession.

2. *The Implications of Amendments and New States*

In the letter to Congress accompanying the final draft of the Constitution, the Convention reflected, “It is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all—Individuals entering into society, must give up a share of liberty to preserve the rest.”²⁴⁴ The amendment process of Article V exhibits the purposively chastened sovereignty of the states, demonstrating that the share of sovereignty given up by the states was, in fact, irrevocably sacrificed to a national people.

Under Article V, a state may be bound by an amendment without that state having ratified it. It is true that an amendment may be adopted into the Constitution without garnering the support of a majority of the national populace—the amendment process is not a power held purely by the national people. Yet there is no allowance for a state not to abide by an amendment. Once ratified by three-fourths of the states, an amendment becomes “[p]art of this Constitution.”²⁴⁵ A convention may propose amendments, but Congress has to call it. Furthermore, Congress itself may propose amendments and specify whether the states must ratify through their legislatures or through conventions called for that purpose.²⁴⁶

The Constitution is higher law; because it regulates the exercise of powers delegated by the sovereign, it sits above normal lawmaking. A modification of fundamental law is an exercise of the constituent power; and, where the people are sovereign, it is the people who must sanction

²⁴³ James Madison, Vices of the Political System of the United States, *in* 9 *The Papers of James Madison* 352–53 (Robert A. Rutland ed., 1975).

²⁴⁴ 2 *The Records of the Federal Convention of 1787*, supra note 144, at 666.

²⁴⁵ U.S. Const. art. V.

²⁴⁶ *Id.* Prohibition is an interesting example of Congress’s use of this power. See David E. Kyvig, *Repealing National Prohibition* 171–72 (1979).

the use of the constituent power. By including an amendment procedure in the Constitution, the framers tamed the radicalism of the constituent power—they “had in fact institutionalized and legitimized revolution.”²⁴⁷ The Constitution can be declared null and void, and the union destroyed; but to do so requires the concurrence of two-thirds of both houses of Congress and three-fourths of the states.²⁴⁸ By the terms of Article V, therefore, the states gave up not just a measure of lawmaking authority, but sovereignty as well.

An exception to the amendment power confirms that conclusion. Article V provides “that no state, without its Consent, shall be deprived of its equal suffrage in the Senate.”²⁴⁹ Virginia is entitled to have the same number of senators as every other state, unless Virginia consents and three-fourths of all the states agree that it should have a lesser number.²⁵⁰ Virginia cannot unilaterally reduce its representation in the Senate. Virginia can flex its sovereign muscles to protect itself from being forced to have fewer than two senators. But it cannot by itself announce that it will henceforth only have one senator or none at all. Considering this limitation on the states, it would be odd if a state could withdraw its representation in Congress entirely by seceding.

Similar logic applies to Article IV’s rules for the admission of new states. Section 3 of Article IV provides:

New states may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.²⁵¹

Congress is the final decider when it comes to the creation of new states. The amendment process of Article V does not have to be followed; the federal Congress alone decides whether to incorporate another body politic into the country. If the new state of Northern California is carved out of California, or North Dakota and South Dakota combine to become Dakota, California and North Dakota and South Dakota must consent.

²⁴⁷ Wood, *supra* note 62, at 614.

²⁴⁸ See U.S. Const. art. V.

²⁴⁹ *Id.*

²⁵⁰ If the proposal were to give Virginia *more* senators than the other states, *all* of the states would have to consent.

²⁵¹ U.S. Const. art. IV, § 3, cl. 1.

State territorial sovereignty is guaranteed from federal fiat. But those states cannot unilaterally divide or combine without Congress's approval.²⁵² Sovereignty is protected, but limited. It would be strange if North Dakota and South Dakota could secede from the union, but could not combine into one state.

This discussion leads to the conclusion that the Constitution itself regulates what it is to be a state. The states are not extinguished—on the contrary, the Constitution protects the integrity and sovereignty of the states. But once the Constitution was ratified, the states became defined *in relation* to the other states and the federal government. Secession under either the constitutional theory or the natural right theory is incompatible with that understanding.

3. *The Supremacy Clause*

Conspicuously absent so far has been any treatment of, or reference to, the Supremacy Clause. It speaks for itself: “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land”²⁵³ If the implications of the amendment process are not convincing enough, the Supremacy Clause closes the case. By ratifying the Constitution—or joining the union as a new state—the states agreed to be bound by the Constitution and federal law. Secession flies in the face of this principle.

If only the state peoples existed, secession would be legal because the state peoples' constituent power would be unencumbered. The Constitution, however, forbids secession. Something must counterbalance the sovereign state peoples. Since the Constitution is premised on popular sovereignty, only a popular body politic can check the state peoples, and the only candidate that fits that description is a national people. A close reading corroborates that the Constitution contemplates a national people. What we have then is a system of dual popular sovereignty—both the state peoples and the national people are sovereign.

²⁵² California presumably could split into two “states” for intrastate purposes.

²⁵³ U.S. Const. art. VI, cl. 2.

V. DUAL POPULAR SOVEREIGNTY

What are the implications of dual popular sovereignty? What does this theory mean for the relative powers of the state and national governments, for federalism, and for sovereignty itself?

A. Total Sovereignty Reconsidered

Is the American constitutional framework an *imperium in imperio*? Not exactly. The thirteen original states predated the Constitution and entered into the new framework without destroying themselves. All new states, furthermore, enter the union as equals with the preexisting states.²⁵⁴ To an extent, the states—being derived from state peoples—are *extra-constitutional*. They have an existence that is independent of the national government. “There are within the territorial limits of each State two governments,” Justice Field wrote in an opinion for the Court in 1872, “restricted in their spheres of action, but independent of each other, and supreme within their respective spheres.”²⁵⁵ The Constitution does not delegate powers to the states. Rather, it recognizes a grant of powers by the People to the national government and retention of all other powers by the states or the people.²⁵⁶ Through the Constitution, the People cut off a slice of state sovereignty—perpetually and irrevocably, unless returned through amendment—but that state sovereignty was not created by the Constitution. Still, the Constitution regulates what it is to be a state. The states and their peoples have an independent existence, but that existence is coordinated and defined in relation to the federal government and the other states.

The case of *Luther v. Borden* highlights this indistinctness.²⁵⁷ Two competing legislatures and governors claimed to govern Rhode Island under two different constitutional documents. In order to decide the case at hand, the Supreme Court needed to determine which was the lawful government of Rhode Island.²⁵⁸ Chief Justice Taney’s opinion wandered in two directions. First, he declared that “the power of determining that a State government has been lawfully established, which the courts of the

²⁵⁴ *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

²⁵⁵ *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 406 (1872).

²⁵⁶ U.S. Const. amend. X.

²⁵⁷ 48 U.S. (7 How.) 1 (1849).

²⁵⁸ Arthur May Mowry, *The Dorr War, or the Constitutional Struggle in Rhode Island* 232 (1901).

State disown and repudiate, is not” a power given to the federal government.²⁵⁹ Soon thereafter, however, he considered the Republican Guarantee Clause, which provides that the “United States shall guarantee to every State in this Union a Republican Form of Government, . . . and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”²⁶⁰ From this, Taney concluded that “Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.”²⁶¹ Similarly, Congress would have to decide which representatives and senators to accept—a decision that requires determining which state government is lawful.²⁶² This conundrum demonstrates the dual nature of our constitutional system. Although the federal government has no power to alter state constitutions—that power is reserved to the sovereign state peoples—it must recognize a state government as legitimate.

The result of this balance is that neither the national people nor the state peoples enjoy *total* sovereignty. The states are constituent parts of the United States insofar as they are subordinate to the national government’s exercise of delegated powers. But in the area of reserved powers, the states stand outside the scope of the national government’s reach. As Taney indicated in *Luther*, the state peoples can replace or change their state constitutions without federal interference—it is their constituent power to use as they see fit, as long as the state constitutions do not violate the federal Constitution.²⁶³ Yet the national government must decide which state constitution is legitimate for federal purposes.

Similarly, no state unilaterally can prevent amendment of the federal Constitution, but a supermajority of states must agree in order to amend. With the states balanced against the national government, the Constitution itself presupposes its perpetuity. Within the constitutional framework, no single entity enjoys total sovereignty. Only if three-fourths of the states and two-thirds of each house of Congress agree can the Constitution be declared void and the union be dismantled. The one cannot destroy the other. The framers absorbed Enlightenment principles and

²⁵⁹ *Luther*, 48 U.S. (7 How.) at 40.

²⁶⁰ U.S. Const. art. IV, § 4.

²⁶¹ *Luther*, 48 U.S. (7 How.) at 42.

²⁶² *Id.*

²⁶³ See U.S. Const. art. VI, cl. 2 (Supremacy Clause); see also Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* 80–111 (1987) (describing the democratic action in the states between the Revolutionary and Civil Wars).

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fashioned a wholly innovative governmental system. They tamed total sovereignty through a combination of radicalism and conservatism; they located sovereignty in the people and balanced the peoples against each other.

B. The Default Rule

One loose end requires tying: How exactly do we define the People mentioned in the Preamble? And which default rule does the Tenth Amendment contemplate: Justice Stevens's or Justice Thomas's?

1. Defining "the People"

The simple answer is that the national people is sovereign on the national level and the several state peoples are the sovereigns on the state level. The national people is to the federal Constitution as the state peoples are to the state constitutions. But that does nothing to tell us what the balance is between the two classes of sovereigns.

One solution could be that the state peoples are component parts of the national whole; the state peoples are part of the national people just like the states are physically part of the United States. American citizenship encompasses Virginian citizenship. Congress, the President, and the Supreme Court act on behalf of the whole nation. The federal government's coercive power affects individuals directly. The national government as a whole personifies the nation. It would make sense if "the People" of the Constitution is a *pure* national people with the state peoples as subsets.

But to read "the People" as a national mass, in which the state peoples are component parts, would destroy the state peoples. We would have an *imperium in imperio*. One salient feature of the Constitution makes this plain: the amendment process. If the state peoples are a subset of the national people, then the national people is supreme. The exclusivity of Article V, therefore, "would violate the inalienable right of a majority of the People to alter or abolish their government."²⁶⁴ If the national people is the People of the Preamble, as Amar believes, then Article V cannot be exclusive; the people must be able to amend the Constitution through

²⁶⁴ Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1056 (1988) [hereinafter Amar, *Philadelphia Revisited*].

direct participatory means.²⁶⁵ And, as Amar concedes, state sovereignty would be at the mercy of this extra-Article V amendment power:

Under this reading, the Senate [exception in Article V] is binding law, but law which applies only to the ordinary Article V amendment process, and which has no application outside Article V Thus We the People of the United States can lawfully restrict—and indeed through Article V have lawfully restricted—the powers of Congress, state legislatures, and state conventions over Senate representation; but We have not—We could not—limit Our own power to alter or abolish even this seemingly entrenched feature of our government.²⁶⁶

Defining “the People” as the national people, as Amar does, leads one down the rabbit hole: The national people is the sovereign of the Constitution and of the national government, which is established by the Constitution; the Constitution itself is supreme over all other law, including state constitutions; the national people is, therefore, supreme over the state peoples; consequently, the national people can, by themselves without consent of the state peoples, amend the Constitution; and, through extra-Article V amendment, the national people can abolish the states.

The national people would not be truly “supreme” over the state peoples because by the result of this reasoning, the sovereign state peoples do not actually *exist*, because the national people is a *total* sovereign. Total sovereignty at the national level is incompatible with state sovereignty—the national people could change state constitutions or destroy the states entirely. Under that interpretation, the states are merely convenient repositories of delegated power—geographic *arrondissements* of the national body politic.

How, then, do we conceptualize the national people? It is important to remember that, as Justice Thomas wrote in his dissent in *U.S. Term Limits, Inc. v. Thornton*, “The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.”²⁶⁷

²⁶⁵ Akhil Reed Amar, Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 502–03 (1994); Amar, Philadelphia Revisited, *supra* note 264, at 1045–46; see also Beer, *supra* note 7, at 338 (arguing that the American people constitute a sovereign “not limited by positive law, not even by the law of the Constitution defining how the Constitution was to be amended, since that law too had been made by the constituent sovereign and so presumably could be overruled by it”).

²⁶⁶ Amar, Philadelphia Revisited, *supra* note 264, at 1070.

²⁶⁷ 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

Even in the exercise of its national powers, the federal government is *defined* in reference to the states. Seats in the House of Representatives are distributed by state. The equal suffrage of the Senate reflects the equality of the states. The states choose the President through the Electoral College. There is a difference between federalism and simple representation in the American system. That Mark Warner is a U.S. Senator from Virginia means something different for the character of the national government than Creigh Deeds's representation of Charlottesville in the Virginia Senate does for the Virginia government. The national people inherently reflects the state peoples, but the state peoples do not, necessarily, reflect the counties and cities.

When the Preamble speaks of "the People," therefore, it refers to a national people. But that national people must be interpreted through a lens; "the People" is *refracted* into the several state peoples, such that the practical, on-the-ground meaning of "the People" is the state peoples. In other words, the national people is the state peoples acting in concert, glued together in union, but on an even plane, not immixed into one undifferentiated whole. Amar's theory—and, indeed, all other nationalist theories—of "the People" falls before the pillar of federalism.²⁶⁸

2. *The Tenth Amendment*

If we accept this definition of the People, then the Tenth Amendment's reservoir of reserved powers lies at the state level. With the ratification of the Constitution, the state peoples—in concert, acting as the national people—delegated powers to the federal government and bound themselves together in union, while retaining all other powers in themselves or in their state governments.

This is consistent with the original meaning of the Tenth Amendment. According to Kurt Lash, "Although some Anti-Federalists complained that the Tenth Amendment's reference to 'the people' might be read as consolidating the nation into a single unitary mass, moderates had no difficulty in reading the clause as reserving nondelegated powers to the people of the individual states."²⁶⁹ In fact, the Bill of Rights as a whole was intended as an insurance policy. Anti-federalists feared that the Constitution would consolidate the states and destroy them in the process. Some federalists argued that a bill of rights was not needed be-

²⁶⁸ See Monaghan, *supra* note 16, at 121–22.

²⁶⁹ Kurt T. Lash, *The Lost History of the Ninth Amendment* 36 n.79 (2009).

cause the Constitution strictly enumerated those powers the new central government could wield.²⁷⁰ Rather, including a bill of rights created the danger that “it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated.”²⁷¹ But the federalists eventually agreed to the Bill of Rights in order “[t]o assure the continued existence of the states in a genuinely federal system of government.”²⁷² Those early amendments made plain what the structure of the Constitution suggested: The national government is one of enumerated powers; the remainder of the trappings of sovereignty remains with the sovereign state peoples.²⁷³ As Madison wrote in *The Federalist* No. 40, “the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.”²⁷⁴

Justice Thomas’s position in *Term Limits* is consistent with this interpretation of “the People.” It is plausible to read Justice Thomas’s opinion as recognizing that “the People” must be read through a lens. Justice Thomas believed that “the United States obviously is a Nation, and . . . it obviously has citizens.”²⁷⁵ But that does not mean that the Tenth Amendment refers to an unencumbered national people. Rather, it means that unenumerated powers default back to all the people to be exercised or not at the discretion of the state peoples. “It is up to the people of each State to determine which ‘reserved’ powers their state government may exercise,” Justice Thomas wrote. “But the Amendment does make clear that powers reside at the state level except where the Constitution removes them from that level.”²⁷⁶

Perhaps Justice Stevens believes that the state peoples exist, but as component parts of the national whole. That definition of the People, however, “leave[s] out the possibility that multiple sovereignties and divided loyalties can be consistent with nationhood. [Stevens] leave[s] out,

²⁷⁰ See, e.g., *The Federalist* No. 84, at 481–82 (Alexander Hamilton) (Clinton Rossiter ed., 1999); 10 DHRC, supra note 2, at 1502–03 (statement of Madison).

²⁷¹ 4 Elliot’s Debates, supra note 211, at 316 (statement of Charles Cotesworth Pinckney).

²⁷² Maier, supra note 71, at 462.

²⁷³ See Lash, supra note 269, at 71–93 (describing the combined meaning of the Ninth and Tenth Amendments).

²⁷⁴ *The Federalist* No. 40, supra note 69, at 219.

²⁷⁵ *Term Limits*, 514 U.S. at 859 (Thomas, J., dissenting).

²⁷⁶ *Id.* at 848.

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that is, the possibility of federalism.”²⁷⁷ Interpreting the Tenth Amendment as Justice Stevens does inverts its original meaning and reads the state peoples out of the Tenth Amendment.

CONCLUSION

Both the state peoples and the national people exist. The Constitution did not consolidate or destroy the states. All the state peoples—together as one sovereign national people—delegated power to the national government. They retained the rest of the powers in themselves or in their state governments. The Constitution, thus, contemplates true dual popular sovereignty as opposed to dual delegation. Because *both* classes of peoples are sovereign, neither can be *totally* sovereign; neither can destroy the other, and the states are glued together such that secession and nullification are unconstitutional. The framers did not, exactly, “split the atom of sovereignty,” as Justice Kennedy wrote in *Term Limits*.²⁷⁸ Rather, they created a balance of peoples with each class checking the other. “It is in a manner unprecedented,” Madison told the Virginia ratifying convention. “We cannot find one express example in the experience of the world.”²⁷⁹ Two hundred and twenty-six years later, his words still ring true.

²⁷⁷ Robert F. Nagel, *The Term Limits Dissent: What Nerve*, 38 *Ariz. L. Rev.* 843, 850 (1996).

²⁷⁸ *Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring).

²⁷⁹ 9 DHRC, *supra* note 2, at 995.

