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# U.S. Term Limits, Inc. v. Thornton: Who Are the People and Why Does it Matter?

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## NOTE

### *U.S. TERM LIMITS, INC. V. THORNTON: WHO ARE THE PEOPLE AND WHY DOES IT MATTER?*

*Benjamin S. Walton*<sup>†</sup>

#### ABSTRACT

The issue of who formed the Constitution—the people of the United States acting as one people group or as many distinct people groups—is an issue that directly affects the rights of the American people and the manner in which the people may define, exercise, and circumscribe their rights. In *U.S. Term Limits, Inc. v. Thornton*, several Justices on the United States Supreme Court debated whether the people acted as one people group or as multiple people groups when they formed the constitutional Union. Justice Stevens, who wrote for the majority, did not give a detailed analysis of this issue. Thus, the issue remains fairly open, and when it reappears before the Court, the Court needs to address it forthrightly, explicitly, thoroughly, and correctly.

The stakes in this debate are high. If the people of America acted as one people group to form the Constitution, then they reserved to themselves as one body all the rights not delegated to the Federal Government or to the state governments. Under this view, the people of Virginia as a corporate body have no rights; only the people of America as a whole possess rights, and only this national people group can stipulate how those rights will be exercised. If rights may be exercised only by the people of the nation as a whole, a simple majority of the nation's populace controls the exercise of reserved rights under the Tenth Amendment for all Americans. However, if the people of each state may determine how they wish to exercise their reserved rights for themselves, this can potentially accommodate the views and desires of more people and allow cultural diversity to prevail over cultural uniformity and conformity. The manner in which this issue is resolved will determine whether America is diverse or uniform respecting the exercise of popular rights.

The historical evidence surrounding the ratification of the Constitution strongly supports the proposition that the separate people groups of the

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individual states formed the Constitution. The political status of the people of the United States before the Constitution was that of thirteen independent and sovereign peoples, not of one politically unified mass of people. Thus, when the people acted to form the constitutional Union, they were acting as numerous separate people groups. Furthermore, the fact that each state ratified the Constitution for itself shows that the people of each state acted independently of the people of other states in deciding whether the people of each state would be subject to the Constitution. A simple majority of the American populace as a whole did not make this decision on behalf of the entire nation. Also, the official state ratifications of the Constitution demonstrate that the people of each state acted self-consciously as such to ratify the Constitution for each state individually. Finally, James Madison and Thomas Jefferson supported the idea of separate states with their own politically distinct people groups.

The evidence is available, and the Supreme Court should recognize it. Sovereignty resides in the people—not in the people of the nation as a whole, but in the separate peoples of the individual states.

#### I. INTRODUCTION

Exactly who are “the people” of the United States? This is a broad question, but this Note will examine the political definition of “the people” as that phrase is used in the Tenth Amendment.<sup>1</sup> In *U.S. Term Limits, Inc. v. Thornton*,<sup>2</sup> the United States Supreme Court was divided over the structural identity of the people who formed the Constitution. Justice Stevens, writing for the majority, seemed to embrace the idea that the people of America formed the Constitution as one people group.<sup>3</sup> Justice Kennedy wrote a concurring opinion in which he explicitly argued that one national people group formed the Constitution.<sup>4</sup> In a dissenting opinion, Justice Thomas argued that the peoples of the several states, as separate people groups, formed the Constitution.<sup>5</sup> This Note will examine whether the people of the United States formed the Constitution as one people group or as thirteen separate people groups.

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1. The Tenth Amendment provides: “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.” U.S. CONST. amend. X.

2. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

3. *See infra* Part III.A.

4. *See infra* Part III.B.

5. *See infra* Part III.C.

Why does this debate matter? The way in which one identifies the structure of “the people” who formed the Constitution has deeply significant ramifications for the manner in which American citizens define and exercise their rights. As Justice Henry Baldwin noted in 1837, the importance of this issue becomes manifest when one considers “whether a state restricts itself, or is restricted by an external power; whether the reservations are to the people collectively, or the people of each state.”<sup>6</sup> Reasoning from the idea that reservations in a grant are valid only if made by and for the grantor, Baldwin concluded that one of two propositions must be true: either “the people of the several states, have now no reserved powers, or . . . they are the granting power of the constitution . . . .”<sup>7</sup> In other words, if the people of America as one national people group formed the Constitution and delegated powers to the Federal Government, then the peoples of the several states, as such, have no rights *at all* reserved to them under the Tenth Amendment. Conversely, if the peoples of the states formed the Constitution as separate people groups, then the people of each state possess the rights reserved to “the people” under the Tenth Amendment.<sup>8</sup>

The implications of this distinction are significant.<sup>9</sup> If the rights of the people can be exercised only by the people of America acting as one people

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6. HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, DEDUCED FROM THE POLITICAL HISTORY AND CONDITION OF THE COLONIES AND STATES, FROM 1774 UNTIL 1788, at 64 (photo. reprint 2000) (Philadelphia, John C. Clark 1837).

7. *Id.* at 65; *see also id.* at 64. Baldwin recognized that if the peoples of the several states were the grantors of powers to the Federal Government, they, “as grantors, could make exceptions to the powers of congress, to their own reserved powers, and reserve what was not so granted or excepted.” *Id.* at 65. Thus, under this view, the people of each state hold for themselves the powers reserved to them under the Tenth Amendment; such powers are not held by the people of the nation as a whole.

8. *See* U.S. CONST. amend. X.

9. At least one scholar has denigrated the significance of this issue:

What useful purpose would be served by embracing the dissent’s claim 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”? It is surprising that, in the mid-1990s, four Justices of the nation’s highest court were willing to subscribe to such extremes of misguided provincialism, oblivious to the consequences that embodiment of these principles would entail.

Stanley H. Friedelbaum, *Term Limits, The State Courts, and National Dominion: The Vicissitudes of American Federalism*, 60 ALB. L. REV. 1567, 1580 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting)). Notwithstanding Professor Friedelbaum’s assertions, the Introduction to this Note seeks to

group, then forty-nine percent of the entire American population will never be able to exercise these rights in any way other than that prescribed or allowed by the majority of the national populace. However, if the separate people groups of the several states individually hold the rights reserved to the people under the Tenth Amendment, the people of Virginia can choose to exercise their rights in one way, the people of Texas in another, and the people of California in yet another. For example, the general right to privacy encompasses many specific rights (perhaps we could call them “sub-rights”), and different people disagree over the precise manner in which these more specific sub-rights are to be defined, exercised, and limited. The people of one state may wish to recognize an unlimited right to informed consent, while the people of another state may want to circumscribe this right in certain ways. The people of one state may wish to recognize an unqualified right to bodily integrity, while the people of another state may place various restrictions on this right vis-à-vis various state interests the people may deem sufficiently compelling to warrant such restrictions. Does the power to make these types of decisions reside with the people of each individual state, or with a simple majority of the American populace?

If the people of America as a whole possess the power to define and limit their reserved rights under the Tenth Amendment, there will be no diversity among the states, but rather a rigid uniformity that will stifle political experimentation and that may even hamper cultural development. If, however, the people of each state may decide for themselves the precise contours and boundaries of their own popular rights, the rights of the people will not be determined according to a one-size-fits-all approach. Rather, American society will be diversified in the manner in which many different people groups choose to define, exercise, and restrict their rights. When it comes to exercising popular rights, do we want diversity or uniformity throughout our vast country with its many millions of inhabitants? This is the issue. The debate over whether one people group or several people groups formed the Constitution will decide the manner in which Americans may exercise their rights.<sup>10</sup>

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raise some considerations indicating that this very issue is highly important, not only theoretically, but also practically in the consequences it logically entails.

10. Assuming *arguendo* that the American people as one single group possess the power to define and circumscribe the rights reserved to the people under the Tenth Amendment, we must ask how the American people as one large group would be able to prescribe the manner in which a particular right would be exercised. The only way for the people of America, considered as one large people group, to enact legislation determining the manner in which particular rights will be exercised is for their representatives in the

This Note proposes and will seek to demonstrate through historical evidence that the separate people groups of the individual states, not the people of the nation as a whole, formed the Constitution. The sovereignty that resides in the people does not reside in the people of America as a single group, but in the people of each state as a separate entity. Part II of this Note describes the views of this issue taken by the Supreme Court, the Senate, and various constitutional scholars in the nineteenth century. Part III examines the views of this issue taken by each of the Justices who authored an opinion in *U.S. Term Limits*. Part IV then investigates historical evidence relevant to a resolution of this issue. The political status of the people of the United States before they ratified the Constitution, the official ratifications of the Constitution by the original thirteen states, and the views of such notable Founders as James Madison and Thomas Jefferson all indicate that the separate people groups of the several states formed the Constitution and therefore possess the rights reserved to “the people” under the Tenth Amendment.

## II. BACKGROUND

Since the earliest days of the Union, judges, legislators, and constitutional scholars have discussed and debated whether one people group or thirteen people groups formed the Constitution. There is no clear consensus either in the Supreme Court’s jurisprudence or in the early scholarly commentary on the Constitution as to whether the people of America as a whole or the distinct people groups of the several states formed the Constitution.

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Federal Congress to act. *Cf. infra* text accompanying notes 91-92. However, if Congress has no jurisdiction over those matters reserved to the people under the Tenth Amendment, the people are left with only one means of determining how they will or will not exercise their rights: constitutional amendment. If the Constitution is amended to allow the Federal Government to pass laws defining or circumscribing a permissible scope of action for its citizens, then the people of America can accomplish their objective of prescribing how certain rights will and will not be exercised in their society. However, the process of amending the Constitution is extremely difficult and unlikely to occur very often. More importantly, a constitutional amendment delegating additional power to the Federal Government means that the people no longer possess that newly delegated power. This means that in order to exercise their reserved rights, the people of America have to give up the power over that right to the Federal Government. This result seems to contradict the very spirit of the Tenth Amendment. Proponents of the idea that the people of America formed the Constitution as a single people group should consider carefully the full implications of their position.

### A. *The Supreme Court*

Chief Justice John Marshall appears to have embraced the idea that the people of America, acting as one unified whole, formed the Constitution. It is unclear, however, whether the Court after Marshall has agreed with his view.

#### 1. The Marshall Court

In 1819, Chief Justice Marshall authored two opinions for the Court that addressed in part the subject of who the parties to the Constitution were. According to Marshall, the Constitution was formed by one American people. In *Sturges v. Crowninshield*,<sup>11</sup> Marshall stated that the Federal Government was created by “the American people.”<sup>12</sup> Although this phrase by itself does not conclusively indicate whether Marshall was referring to one people mass or to many separate people groups, he proceeded to clarify his intended meaning. Speaking of the powers reserved to the states, Marshall wrote that “[t]hese powers proceed, not from the people of America, but from the people of the several states . . . .”<sup>13</sup> In other words, Marshall maintained that the powers of the individual state governments proceed from the different people groups of the several states, but that the powers of the Federal Government proceed from the people of America as a whole.

In *McCulloch v. Maryland*,<sup>14</sup> decided a mere two-and-a-half weeks after *Sturges*,<sup>15</sup> Marshall explicitly rejected the proposition advanced by Maryland that the Constitution was formed by “the act of sovereign and independent states,” instead of by the people themselves.<sup>16</sup> Maryland contended that the powers of the Federal Government proceeded from the states.<sup>17</sup> Marshall, however, pointed out that the state legislatures merely elected the members of the Constitutional Convention, whereas the people were the ones who actually ratified the Constitution.<sup>18</sup> The states submitted the Constitution to the people, so that the people themselves could decide whether to adopt the Constitution.<sup>19</sup> Once ratified by the people, the

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11. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

12. *Id.* at 193.

13. *Id.*

14. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

15. *Sturges* was decided on February 17, 1819, and *McCulloch* on March 7, 1819.

16. *McCulloch*, 17 U.S. (4 Wheat.) at 402-03.

17. *Id.* at 402.

18. *Id.* at 403-05.

19. *Id.* at 403-04.

Constitution “bound the state sovereignties,” who could not override the decision of the people.<sup>20</sup>

Marshall’s point in *McCulloch* is not exactly the same point he appears to have made in *Sturges*. In *McCulloch*, Marshall specifically refuted the idea that the state governments were the parties to the Constitution. Marshall insisted that the people were the proper parties to the Constitution. It is unclear simply from the language in *McCulloch* whether Marshall would have opposed the proposition that the peoples of the several states acting as separate groups, rather than the people of America acting as a whole, formed the Constitution. However, it is indeed possible to interpret Marshall’s references in *McCulloch* to “the people” as conveying the sense of one single entity.<sup>21</sup> This interpretation of Marshall’s language in *McCulloch* is supported by his opinion in *Sturges*, where he clearly contrasted “the people of America” with “the people of the several states,” and asserted that it was “the American people” who created the Federal Government.<sup>22</sup> According to Marshall, therefore, the people of America formed the Constitution as one entity.<sup>23</sup>

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20. *Id.* at 404.

21. *Id.* at 402-05.

22. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

23. Some of Chief Justice Marshall’s language in *McCulloch* is problematic for his apparent view that the people of America as a whole formed the Constitution. Marshall states that “the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country.” *McCulloch*, 17 U.S. (4 Wheat.) at 404. If the people had to resume certain powers from each of the original thirteen state governments in order to transfer those particular powers to the Federal Government in the Constitution, this implies the Constitution was formed by the people groups of the several states, rather than by one national people group. The people of New York, the people of Georgia, or the united “people of America” as a whole cannot revoke the powers of the Delaware state government and re-grant those powers to the Federal Government. Only the people of Delaware themselves, who originally “surrendered all their powers” to the Delaware state government, can rightfully revoke those powers and re-grant them to the Federal Government. Marshall’s language here necessarily implies that the Constitution was formed by the people groups of the several states, yet he does not seem to realize the latent inconsistency between his clear language in *Sturges* and this particular statement in *McCulloch*. Since the interpretational conflict is between a fairly clear assertion in *Sturges* and an implicit conclusion from certain language in *McCulloch*, it seems fair to say that Marshall’s view was indeed that the people of America acted as one people group to form the Constitution. This is therefore the view this author is attributing to Marshall.



## 2. The Court After Marshall

After the Marshall era, the Court only rarely and sporadically commented on the nature of the Union. The few times the Court did discuss the nature of the Union, it did not clearly adopt the position Justice Marshall had expressed in 1819. In his dissenting opinion in the *Passenger Cases* in 1849,<sup>24</sup> Chief Justice Roger Taney observed that “[f]or all the great purposes for which the Federal Government was formed, we are one people, with one common country.”<sup>25</sup> Reading this statement in isolation, one might conclude that Taney viewed the Constitution as having been formed by one people group. However, this interpretation of Taney’s statement is not the only reasonable one. Taney made this assertion in the context of his contention that United States citizens have the right freely to travel in and to engage in commerce with every part of the Union.<sup>26</sup> As Taney observed, the Constitution was formed “to secure the freest intercourse between the citizens of the different States.”<sup>27</sup> For the purpose of achieving free intercourse and each of the other “great purposes for which the Federal Government was formed,” Taney asserted that the American people are “one people.”<sup>28</sup> This means that now that the Constitution has been formed, United States citizens are treated as one people group for certain purposes. However, it is not clear whether Taney intended his reference to “one people” to mean that the Constitution itself was actually formed by one people, or even whether United States citizens are “one people” for all purposes, instead of merely for those specific purposes for which the Constitution was formed. It is unclear whether Taney would have said that the people of the United States are one people or several peoples in the specific context of exercising the rights reserved to the people under the Tenth Amendment.<sup>29</sup>

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24. *Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (Taney, C.J., dissenting). Although Chief Justice Taney’s opinion in the *Passenger Cases* was a dissenting opinion rather than a majority opinion, the Court later observed that the statements in Taney’s opinion discussed here were consistent with the Court’s jurisprudence in general. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867). The Court quoted approvingly from this portion of Taney’s opinion in *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969). Thus, the Court has explicitly recognized the validity of the portion of Taney’s dissent discussed here.

25. *Passenger Cases*, 48 U.S. (7 How.) at 492.

26. *Id.*

27. *Id.*

28. *Id.*

29. If the American people are one people only for those purposes for which the Constitution was formed, this would seem to imply that they are not one people for purposes of the Tenth Amendment. This is because the purposes for which the Constitution was

In the 1920 case of *Hawke v. Smith*,<sup>30</sup> the Court stated that “the people” ordained the Constitution, and that “[t]he states surrendered to the general government the powers specifically conferred upon the nation . . . .”<sup>31</sup> One might interpret “the people” here to mean one people group, but the Court’s reference to the states surrendering powers to the Federal Government seems to imply that the states were parties to the Constitution. Unfortunately, the Court did not specify the precise manner in which states are parties to the Constitution. Did the states surrender certain powers because the state governments agreed to do so, or because the people of the states determined their state governments must do so? Later in its opinion, the Court noted that “the state and its people . . . alike assented” to the Constitution.<sup>32</sup> Again, the Court did not explain its precise meaning. Did the states and the people assent to the Constitution in the same way? Were the states parties to the Constitution just as the people were? Or, were the people the ones who formed the Constitution, while the states merely gave a type of assent that was not conclusive as far as the formal validity of the Constitution was concerned? Marshall would have agreed that the states “assented” to the Constitution, but he did not view the states as actually being parties to the Constitution. It is not clear whether the Court in *Hawke* intended to contradict Marshall’s view that the states were not themselves parties to the Constitution. It is plausible, however, to read the Court’s language in *Hawke* to imply that both the states and the people were parties to the Constitution.

Regardless of whether *Hawke* is interpreted to assert that the state governments themselves were parties to the Constitution, it does seem as though the Court viewed the people who formed the Constitution as being the peoples of the several states, rather than one unified people group. This may be inferred from the Court’s affirmation that it was “the state and *its* people” that assented to the Constitution.<sup>33</sup> Interestingly, the Court did not

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formed involve the powers delegated to the Federal government in the Constitution, but do not involve the powers reserved to the people or the states. If the people reserve certain powers to themselves that they do not deem necessary or prudent to delegate to the Federal government, this implies that these reserved powers are not necessary to the fulfillment of the specific purposes for which the people are forming a Federal government. Thus, the Tenth Amendment does not implicate the specific purposes for which the Constitution was formed. This means that if the people of the United States are one people *only* for those purposes for which the Constitution was formed, they are not one people for purposes of the Tenth Amendment and the exercise of reserved powers.

30. *Hawke v. Smith*, 253 U.S. 221 (1920).

31. *Id.* at 226.

32. *Id.* at 230.

33. *Id.* (emphasis added).

say that the states and the people of America assented to the Constitution. Rather, the Court spoke of a particular state and *the people of that state* as being the ones who assented to the Constitution. It is not entirely clear whether this necessarily implies the Court in *Hawke* viewed the peoples of the several states as the parties to the Constitution, but this is certainly a reasonable interpretation of the Court's language in *Hawke*.

*B. The Senate Resolutions of 1838 and 1860*

The issue of whether the people of America as a whole or the peoples of the several states formed the Constitution has not been definitively settled in the Supreme Court's jurisprudence. However, the Senate did address this issue in 1838 and again in 1860. According to the nineteenth-century Senate, it was the peoples of the several states who formed the Constitution.

In a series of resolutions in 1838, the United States Senate clearly set forth its own view of who the parties to the Constitution were. The first of these resolutions declared that the *states* were the ones who had adopted the Constitution, "and that each [state], for itself, by its own voluntary assent, entered the Union . . . ."<sup>34</sup> According to the second resolution, the states were the ones who delegated "a portion of their powers to be exercised by the Federal Government . . . ."<sup>35</sup> If this were not clear enough, the third resolution forthrightly affirmed that "[the Federal] Government was instituted and adopted by the several States of this Union as a common agent, in order to carry into effect the powers which they had delegated by the Constitution for their mutual security and prosperity . . . ."<sup>36</sup> In other words, the states were the ones who delegated powers to the Federal Government in the Constitution. Again, the fourth resolution declared that the states gave a "pledge to protect and defend each other, . . . on entering into the constitutional compact which formed the Union . . . ."<sup>37</sup> According to the Senate in 1838, therefore, the states themselves were parties to the Constitution.

Was the Senate contradicting the idea Marshall had articulated nineteen years earlier in *McCulloch*, that the people and not the state governments were the parties who had formed the Constitution? It is certainly not necessary to interpret these resolutions as opposing the idea that the people themselves formed the Constitution. Rather, when the Senate referred to "states," it is entirely plausible to interpret such a reference as connoting the

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34. S. Res. 1, 25th Cong., 6 CONG. GLOBE 98 (1838).

35. S. Res. 2, 25th Cong., 6 CONG. GLOBE 98 (1838).

36. S. Res. 3, 25th Cong., 6 CONG. GLOBE 98 (1838).

37. S. Res. 4, 25th Cong., 6 CONG. GLOBE 98 (1838).

peoples of the several states, rather than the governments of the several states. The thrust of these Senate Resolutions appears to be that the Union does not consist of one people mass ruled by one government, but that the Constitution was formed by separate entities, i.e., by states acting as distinct societal groups.

The Senate Resolutions of 1838 were not an unrepeated aberration in nineteenth-century legislative activity. In 1860, the Senate again passed a set of resolutions, the first of which affirmed that the *states* adopted the Constitution, “[acting] severally as free and independent sovereignties,” and “delegating a portion of their powers to be exercised by the Federal Government.”<sup>38</sup> The Second Resolution explicitly said that the states entered “into the constitutional compact which formed the Union” and gave mutual pledges and incurred “solemn obligations” to one other.<sup>39</sup> The Third Resolution referred to “the union of these States,” rather than speaking of a union of “people.”<sup>40</sup>

Thus, the Senate in 1838 and again in 1860 expressly affirmed the idea that the states formed the Constitution and are members of the Union. According to the Senate in the nineteenth century, the states delegated to the Federal Government the powers it possesses. While it is not clear whether the Senate meant that the states as people groups or the states as established governments formed the Constitution, it is certainly reasonable to interpret the Senate’s pronouncements to mean that the states, acting as distinct sovereign societal groups, formed the Federal Government. This interpretation of the Senate Resolutions of 1838 and 1860 is consistent with the other historical evidence presented in this Note.

### C. *Nineteenth-Century Constitutional Scholars*

The Supreme Court and the United States Senate are not the only sources of opinions on and disagreements over the nature of the Union. Several noted constitutional scholars of the nineteenth century expressed different opinions on who formed the Constitution. Unfortunately, there was no absolute consensus on this issue, although several scholars appear to have supported the view that the people groups of the several states formed the Constitution.

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38. S. Res. 1, 36th Cong., 29 CONG. GLOBE 2321 (1860).

39. S. Res. 2, 36th Cong., 29 CONG. GLOBE 2321 (1860).

40. S. Res. 3, 36th Cong., 29 CONG. GLOBE 2321 (1860).

### 1. William Rawle

In 1825, William Rawle explained his view that with the adoption of the Constitution, “[t]he people of the states unite[d] with each other, without destroying their previous organization.”<sup>41</sup> Rawle appears to have been saying that the people of each state united with the peoples of each of the other original thirteen states to form the Union, without destroying the organization of the state people groups as distinct societies. Rawle also stated that the Federal Government “is a society formed not only out of the people of other societies, but in certain parts, formed by the societies themselves.”<sup>42</sup> Rawle asserted that both the states and the people are “member[s] of the Union.”<sup>43</sup> Regardless of whether one agrees with Rawle’s view that the state governments themselves participated in forming the Federal Government, it is significant to note that Rawle viewed the people who formed the Constitution as consisting of people of separate societies who came together “without destroying their previous organization” as distinct societal entities.<sup>44</sup> According to Rawle, therefore, the peoples of the several states united to form a Federal Government, and they did not thereby obliterate the fact that they were distinct societies.

Perhaps the most revealing statement from Rawle is his reference to the fact that it was the people of each particular state who transferred to the Federal Government the powers it possesses. Rawle’s exact language is: “[E]very state must be viewed as entirely sovereign in all points not transferred by *the people who compose it* to the government of the Union . . . .”<sup>45</sup> Significantly, Rawle did not say that the people of America transferred powers to the Federal Government. Rather, he indicated that the people who compose each particular state acted as a state to transfer powers to the Federal Government. Rawle thus seems to have embraced the view that the peoples of each state acted as distinct bodies in forming the Constitution.

### 2. Joseph Story

In his *Commentaries on the Constitution of the United States*,<sup>46</sup> Justice Joseph Story clearly rejected the idea that the state governments formed the

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41. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 40 (Walter D. Kennedy & James R. Kennedy eds., Land & Land Publishing Division 1993) (1825).

42. *Id.* at 41.

43. *Id.*

44. *Id.* at 40.

45. *Id.* at 41-42 (emphasis added).

46. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (photo. reprint 1991) (Boston, Hilliard, Gray & Co. 1833).

Constitution.<sup>47</sup> He also firmly rejected the idea that the separate people groups of the several states formed the Constitution.<sup>48</sup> In support of his position that the people of America as a whole formed the Constitution, Story placed great weight on the language of the Preamble of the Constitution, which states that “the people of the United States” ordained and established the Constitution.<sup>49</sup> Story distinguished “the people of the United States” as used in the Preamble from “the distinct people of a *particular state* with the people of the other states.”<sup>50</sup> Story approvingly quoted Daniel Webster as maintaining, “So far from saying, that [the Constitution] is established by the governments of the several states, it does not even say, that it is established by *the people of the several states*. But it pronounces, that it is established by the people of the United States in the aggregate.”<sup>51</sup> According to Story, therefore, the people of America as a whole, not the separate people groups of the several states, formed the Constitution.

### 3. Henry Baldwin

In 1837, Justice Henry Baldwin published a short work in which he contended that the peoples of the several states, and not the people of America as a whole, formed the Constitution.<sup>52</sup> According to Baldwin, “The *people* of a *state*, who had by their state constitution, granted the *power* of legislation to their *state* legislatures; had plenary power, to take from them such portions as they pleased, and by their grant vest them in a federal legislature.”<sup>53</sup> In other words, Baldwin maintained that the people of each particular state revoked certain powers they had previously granted to their individual state government, in order to re-grant these powers to a new Federal Government.<sup>54</sup> In Baldwin’s view, the people of each state took this

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47. *Id.* at 281 n.2: “The constitution was neither made, nor ratified by the states, as sovereignties, or political communities. It was framed by a convention, proposed to the people of the states for their adoption by congress; and was adopted by state conventions,—the immediate representatives of the people.”

48. *Id.* at 319.

49. U.S. CONST. pmbl.

50. 1 STORY, *supra* note 46, at 319; *see also id.* at 327.

51. *Id.* at 332. The quote from Webster proceeds: “Doubtless the people of the several states, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they establish the constitution.” *Id.*

52. BALDWIN, *supra* note 6.

53. *Id.* at 44.

54. *Id.* at 44-45.

action for themselves as a people group distinct from the people groups of the other states.<sup>55</sup>

#### 4. Thomas Cooley

Writing in 1880, Thomas Cooley, a noted expositor of the Constitution in his day, affirmed that the people of the several states formed the Constitution and were parties to it.<sup>56</sup> Cooley noted that the Constitution “was submitted to the people of the several States” for ratification.<sup>57</sup> By adopting the Constitution thus submitted to them, “the people of the States, as well as the States themselves, . . . became parties to it.”<sup>58</sup> Furthermore, Cooley maintained that the powers not granted to the Federal Government in the Constitution “belong[] to the several States or to the people thereof.”<sup>59</sup> Cooley did not say that non-delegated powers belong to “the people of America,” but rather that they belong to the people of “the several States.”<sup>60</sup> When placed alongside his previous statement that the people of the several states ratified the Constitution, this subsequent statement apparently means that it is the distinct people groups of the several states, not one mass of people, who possess the powers not delegated to the Federal Government.

Several important nineteenth-century constitutional scholars believed the people groups of the several states formed the Constitution. At least one notable exception among these scholars was Justice Story, who believed the people of America acted as a unified whole in forming the Constitution. This issue has not been settled definitively by the Supreme Court, although it was addressed on two occasions by the United States Senate in the nineteenth century. Is it possible to address this issue today with any sureness and authority? Or is it hopelessly and forever irresolvable?

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55. *See, e.g., id.* at 12-13, 44-45, 62, 97.

56. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 26-27 (photo. reprint 2000) (Boston, Little, Brown & Co. 1880).

57. *Id.* at 26.

58. *Id.* at 26-27.

59. *Id.* at 29 (citing *United States v. Cruikshank*, 92 U.S. 542, 550 (1875); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865); *Briscoe v. Bank of Commonwealth of Ky.*, 36 U.S. (11 Pet.) 257 (1837); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

60. *Id.*

III. THE CONTEMPORARY RESURRECTION OF THE DEBATE IN *U.S. TERM LIMITS, INC. V. THORNTON*

In *U.S. Term Limits, Inc. v. Thornton*,<sup>61</sup> the Supreme Court held it was unconstitutional for Arkansas to amend its Constitution to prohibit candidates for the United States Congress from appearing on the general election ballot in Arkansas for more than a specified number of terms.<sup>62</sup> Justice Stevens penned the majority opinion;<sup>63</sup> Justice Kennedy wrote a concurring opinion; and Justice Thomas authored a dissenting opinion.<sup>64</sup> From these various opinions, it is evident that the Justices disagreed over whether the Constitution was formed by one people group or by many people groups. This Part will examine the Justices' views in turn.

A. *Justice Stevens*

Although Justice Stevens does not spend much time developing or defending his view, his statements indicate that he believes one American people group formed the Union. This is apparent from several observations. First, Stevens quotes Marshall's language in *Sturges* that the powers of the states "proceed, not from the people of America, but from the people of the several States . . . ."<sup>65</sup> In the context of *Sturges*, as noted above, this language indicates that Marshall believed the people of America as a whole, not the peoples of the several states, formed the Constitution.<sup>66</sup> Stevens appears to adopt Marshall's position.

Second, Stevens maintains that the states reserved to themselves and currently possess only those powers they originally possessed before the Constitution was adopted.<sup>67</sup> Stevens treats the issue in *U.S. Term Limits* as

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61. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

62. *Id.* at 783.

63. Justice Stevens was joined in his opinion by Justices Kennedy, Souter, Ginsburg, and Breyer. *Id.* at 781.

64. Justice Thomas was joined in his dissenting opinion by Chief Justice Rehnquist and Justices O'Connor and Scalia. *Id.*

65. *Id.* at 801 (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)).

66. See *supra* notes 11-13, 22 and accompanying text.

67. *U.S. Term Limits*, 514 U.S. at 801-02. Stevens relies on several authorities for this proposition: *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985) ("[T]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430, 436 (1819); 2 STORY, *supra* note 46, at 101-02 ("[T]he states can exercise no powers whatsoever, which exclusively spring out of the



whether the asserted right to fix representatives' term limits is a right reserved to the *states* under the Tenth Amendment.<sup>68</sup> Apparently, he does not consider the notion that the *people* of Arkansas can possess and exercise certain rights that the Tenth Amendment reserves to them as "the people" and not simply to the state governments. Rather, Stevens concludes that if states are to be permitted "to craft their own qualifications for [their Congressional representatives],"<sup>69</sup> the Constitution must first be amended to allow such state-imposed qualifications.<sup>70</sup> Since Stevens treats the issue as simply whether the right to add qualifications to those imposed by the Constitution is reserved to the *states*,<sup>71</sup> instead of also considering whether such a right is reserved to the *people*, he is apparently assuming that "the people" of the Tenth Amendment are not the people of a particular state, such as Arkansas. If "the people" in the Tenth Amendment referred to the individual people groups of the several states, Stevens' analysis would be patently incomplete. It is probable, therefore, that Stevens views "the people" as being the one people of America as a whole.<sup>72</sup>

Third, Stevens asserts as a "basic principle" that "the right to choose representatives belongs not to the States, but to the people."<sup>73</sup> The context of this statement indicates that Stevens' understanding of "the people" here is that they are one national entity.<sup>74</sup> Furthermore, Stevens states that in the case at hand, "the voters of Arkansas . . . were acting as citizens of the State of Arkansas, and not as citizens of the National Government. The people of the State of Arkansas have no more power than does the Arkansas

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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.").

68. *U.S. Term Limits*, 514 U.S. at 800 ("[W]e conclude that the power to add qualifications is not within the 'original powers' of the States, and thus is not reserved to the States by the Tenth Amendment.").

69. *Id.* at 838.

70. *Id.* at 783, 838.

71. *Id.* at 800-01.

72. This implication from Stevens' mode of analysis obtains further support from the fact that Stevens maintained that the right to impose state-specific qualifications on Congressional representatives may be permitted by constitutional amendment. *Id.* at 783, 838. The process of constitutional amendment is a national process. Presumably, Stevens would recognize that it is the people who act, through their representatives, to amend their Constitution. Thus, perhaps implicit in Stevens' analysis is the idea that the right to impose additional qualifications on representatives is a right possessed by the people of America as a whole, not by the states, and that the American people can exercise this right by amending their Constitution.

73. *U.S. Term Limits*, 514 U.S. at 820-21.

74. *Id.* at 821-22. Consider, for example, this statement by Stevens: "The Constitution thus creates a uniform national body representing the interests of a single people." *Id.* at 822.

Legislature to supplement the qualifications for service in Congress.”<sup>75</sup> From this assertion it is evident that Stevens does not interpret “the people” in the Tenth Amendment to mean (among other peoples) the people of Arkansas. Apparently, Stevens’ framework for interpreting the Tenth Amendment is that “the states” in the Tenth Amendment refer to the governments *or* the populaces of the individual states, and that “the people” refers to *all* of the “citizens of the National Government” acting as one group.<sup>76</sup>

*B. Justice Kennedy*

Justice Kennedy is quite explicit and unequivocal in expressing his view on who formed the Union: “In my view . . . it is well settled that *the whole people of the United States* asserted their political identity and unity of purpose when *they created the federal system.*”<sup>77</sup> Again: “[T]he National Government . . . owes its existence to the act of *the whole people who created it.*”<sup>78</sup> According to Kennedy, it was the people of America acting *en masse*, and not the peoples of the several states, who formed the Union. Referring to “a relationship between the people of the Nation and their National Government, with which the States may not interfere,”<sup>79</sup> Kennedy apparently interprets this relationship between the Federal Government and

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75. *Id.* at 822 n.32.

76. In addition to the statements of Stevens already discussed, there is another statement that supports this understanding of Stevens’ view. Stevens maintains the Framers intended “that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution.” *Id.* at 827. Since the people of Arkansas attempted to exercise this power, and Stevens denied the validity of this attempt on the grounds that the “states” do not possess this power, Stevens is implicitly viewing the people of a particular state as falling under the same category (that of a “state” for purposes of the Tenth Amendment) as a state government, rather than under a different category (that of “people”).

77. *Id.* at 838 (Kennedy, J., concurring) (emphasis added). Kennedy proceeds to criticize Justice Thomas’ dissent (which maintains that thirteen people groups formed the Constitution) in these words: “The dissent’s course of reasoning suggesting otherwise might be construed to disparage the republican character of the National Government, and it seems appropriate to add these few remarks to explain why that course of argumentation runs counter to fundamental principles of federalism.” *Id.* Evidently, Kennedy deems this issue important enough to deal with more explicitly in his concurring opinion than Stevens does in the majority opinion. As Kennedy observes, this issue implicates the very heart of the American system of government, concerning as it does “the republican character of the National Government” and “fundamental principles of federalism.” *Id.*

78. *Id.* at 839 (emphasis added).

79. *Id.* at 845.

the American people as a whole to mean that the people of Arkansas cannot, as the people of a single state, intrude upon ground that belongs exclusively to the Federal Government or to the entire people of America.<sup>80</sup> The important point to note from Kennedy's reasoning is that there seems to be three possible repositories of rights or powers: the Federal Government, the states, or the American people conceived of as one entity. For Kennedy, the people who can relate to, respond to, and act with respect to the Federal Government are the American people *en masse*, not the distinct peoples of the several states.

### C. Justice Thomas

Like Justice Kennedy, Justice Thomas makes his position clear: "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."<sup>81</sup> Thomas maintains that "the people of each State"—not the people of America as a whole—possess "the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress."<sup>82</sup>

Thomas defends his view by appealing to the manner in which the Constitution was originally ratified.<sup>83</sup> As Thomas explains, "The Constitution took effect once it had been ratified by the people gathered in convention in nine different States. But the Constitution went into effect only 'between the States so ratifying the same'; it did not bind the people of North Carolina until they had accepted it."<sup>84</sup> In other words, Thomas is saying that the very nature of the ratification process implies that the people of America did not act as one undifferentiated whole to ratify the Constitution.<sup>85</sup>

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80. *Id.* at 844-45.

81. *Id.* at 846 (Thomas, J., dissenting).

82. *Id.* at 845.

83. *Id.* at 846. Thomas also cites James Madison in support of the proposition that the people of the several states formed the Constitution. Thomas cites THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961), as well as Madison's remarks at the Virginia ratification convention, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 94 (photo. reprint 1996) (J. Elliot ed., 2d ed., Philadelphia, J. B. Lippincott Co. 1891) [hereinafter ELLIOT'S DEBATES].

84. *U.S. Term Limits*, 514 U.S. at 846 (Thomas, J., dissenting) (citation omitted) (quoting U.S. CONST. art. VII).

85. Indeed, one may further observe that since Article VII of the Constitution did not require unanimous ratification by the states for the Constitution to become effective, it was

According to Thomas, “the people of each State” adopted the Constitution and in so doing “surrendered some of their authority to the United States.”<sup>86</sup> Thomas’ words here express the view that it was not the people of America as a whole who delegated powers to the Federal Government. Rather, Thomas is arguing that the Federal Government derives its powers from the numerous distinct people groups of those states that ratified the Constitution. In Thomas’ view, “the people of the several States are the only true source of power . . . .”<sup>87</sup> For Thomas, therefore, power rests with the people of each individual state, not with the people of America *en masse*.<sup>88</sup>

Thomas interprets the Tenth Amendment to mean that all powers not delegated to the Federal Government “reside at the state level.”<sup>89</sup> In Thomas’ words, “All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.”<sup>90</sup> Essentially, Thomas is saying that the powers reserved to “the people” under the Tenth Amendment are reserved to the people of each individual state, not to the people of America as a whole. The peoples of the states hold the reserved powers, not the people of the nation. In fact, Thomas asserts that “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.”<sup>91</sup> Thomas maintains that the Constitution does not provide for any type of action to be taken by the people of America acting as one undifferentiated mass of people.<sup>92</sup>

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not even certain historically that the Constitution would end up binding all of the people of America, instead of merely binding the people of nine states. *See* 3 ELLIOT’S DEBATES, *supra* note 83, at 94 (James Madison’s remarks at the Virginia ratification convention).

86. *U.S. Term Limits*, 514 U.S. at 847 (Thomas, J., dissenting).

87. *Id.*

88. *See also id.* at 851 (“The Constitution derives its authority . . . from the consent of *the people* of the States. [It is a] fundamental principle that all governmental powers stem from the people of the States . . .”).

89. *Id.* at 848.

90. *Id.*

91. *Id.*

92. *Id.*

#### IV. THE SOLUTION TO THE DEBATE AS PROVIDED BY HISTORICAL RECORDS

Much is at stake with the interpretation of “people” in the Tenth Amendment.<sup>93</sup> The proper interpretation of “people” depends on the political status of “the people” before the Constitution was formed, as well as the manner in which “the people” ratified the Constitution. Also, it is helpful to ascertain the views of certain prominent Founding Fathers regarding the political composition of “the people” of the United States. An investigation of this historical evidence will demonstrate that “the people” who formed the Constitution<sup>94</sup> and “the people” who possess reserved powers under the Tenth Amendment<sup>95</sup> are the distinct people groups of the several states, not one undifferentiated, national people group.

##### A. *The Pre-Constitutional Political Status of the People*

To ascertain the pre-constitutional legal status of the people of the United States, it is necessary to examine such key historical documents as the Declaration of Independence,<sup>96</sup> the Articles of Confederation,<sup>97</sup> and the Treaty of Peace between the United States and Great Britain in 1783.<sup>98</sup> These documents demonstrate the way in which the people of the United States viewed themselves during the years immediately preceding the adoption of the Constitution.<sup>99</sup>

##### 1. The Declaration of Independence

The title of the Declaration of Independence itself asserts that this document is a declaration of thirteen states, not of one political entity: “The unanimous Declaration of the thirteen united States of America.”<sup>100</sup> Moreover, the signers of the Declaration referred to themselves as “the Representatives of the United States of America,”<sup>101</sup> indicating that they viewed themselves as representing a group of states, not a single entity. The

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93. *See supra* Part I.

94. U.S. CONST. pmbi.

95. U.S. CONST. amend. X.

96. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

97. THE ARTICLES OF CONFEDERATION (U.S. 1781).

98. The Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, TREATIES AND CONVENTIONS CONCLUDED BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, SINCE JULY 4, 1776, at 314-18 (photo. reprint 2006) (rev. ed., Washington, Government Printing Office 1873) [hereinafter Treaty of Peace].

99. The Constitution was drafted in 1787.

100. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

101. *Id.*

Declaration speaks of “one people” and “the People” in the context of general principles of legal philosophy applicable to all peoples at all times in history.<sup>102</sup> Notably, however, when the Declaration begins to apply these general principles to the specific situation in America in 1776, it speaks of “the patient sufferance of *these Colonies*” and of “the necessity which constrains *them* to alter *their* former Systems of Government.”<sup>103</sup> This language indicates that the signers of the Declaration of Independence viewed the people of the United States to be acting as separate and distinct people groups in achieving their political separation from Great Britain. It was the *colonies*, not the nation, who altered *their* governments. Presumably, each colony had to act for itself to alter its own “system of government,” since the people of one colony would have had no legal right to participate in the process of changing the political system of another colony. The people of each individual colony had to alter that colony’s “system of government” for themselves.

Another indication in the Declaration of Independence that the people of the United States were not simply one undifferentiated people group in 1776 may be found in the following language: “[T]hese United Colonies are, and of Right ought to be Free and Independent States; . . . as [such], they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”<sup>104</sup> In other words, each state asserted the right to exercise the full powers of an independent nation, including the powers to wage war, negotiate peace, make treaties, and establish international commerce. Thus, before the adoption of the Articles of Confederation in 1781, the American states were not formally united in a legal or political way. Under such a situation, it is difficult to maintain that the people of America comprised one undifferentiated people group that acted as one popular mass. How can a people be viewed as one entity instead of as thirteen separate entities when there are no legal bonds actually uniting that people?<sup>105</sup> The more sensible understanding seems to

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102. *Id.*

103. *Id.* (emphasis added).

104. *Id.*

105. Even if one assumes *arguendo* that the adoption of the Constitution was a legal bond uniting the people of the United States into one single people group for all purposes thereafter, one must realize that the Constitution could not actually have been formed by one people group. If the Constitution was what united the people of America into a single people group, then they were not one people group before the Constitution made them so. In the act of forming and adopting the instrument that made them one people group, the people could not yet have been acting as one people group. Thirteen people groups may act as thirteen

be that with the Declaration of Independence, the people of the United States consisted of thirteen separate and independent people groups, who when they acted, had to act as independent groups rather than as a simple, single body.

## 2. The Articles of Confederation

The Articles of Confederation formed a limited general government over the American states in 1781. The Articles were unequivocally formed by the state governments themselves, not by the people.<sup>106</sup> Thus, the only document creating a pre-constitutional legal bond between the states was created by the state governments, not by the people. There is no basis for supposing that the political composition of “the people of the United States” changed with the adoption of the Articles of Confederation. If after the Declaration of Independence and before the Articles of Confederation, “the people” consisted of the people groups of the several states, independently considered, the adoption of the Articles did nothing to alter this situation. The actions of the state governments in uniting for certain specified, limited purposes could not have imposed a radical change in the basic structural composition of the people. If independent people groups are to be united into one undifferentiated people group, this act of structural redefinition, to be valid, must be performed by the people themselves.<sup>107</sup> The people of the United States did not alter their structural composition when their state governments adopted the Articles of Confederation.

## 3. The Treaty of Peace with Great Britain

Two years after the Articles of Confederation were adopted in 1781, the United States and Great Britain entered into a peace treaty that formally concluded the American War for Independence.<sup>108</sup> The language in this Treaty indicates that the people of the United States were viewed by both

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people groups to make themselves one people group, but thirteen people groups cannot act as one people group to make themselves one people group. Rather, they only become one people group after they have completed the legal and political act that actually makes them one people.

106. THE ARTICLES OF CONFEDERATION (U.S. 1781); *see id.* art. III (stating that the states are the ones entering into “a firm league of friendship with each other”); *id.* art. XIII (indicating that the signers of the Articles understood that each of them represented the legislature of his own state).

107. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments . . . deriv[e] their just powers from the consent of the governed, . . . [and] it is the Right of the People . . . to institute new Government . . .”).

108. Treaty of Peace, *supra* note 98.

King George III and the United States Government as a collection of distinct people groups belonging to particular states.

In Article I of the Treaty, King George “acknowledges the said United States, viz. [the original thirteen states listed by name], to be free, sovereign and independent States . . . .”<sup>109</sup> Two important points should be noted here. First, the “United States” were not presented as one homogeneous nation, but as a collection of individual states that had banded together. Today, people think of one national government when they refer to the “United States.” This Treaty, however, used the term “United States” to refer to thirteen distinct, free, and independent states. Second, this formal Treaty explicitly recognized that the United States were “free, sovereign and independent States.”<sup>110</sup> This idea logically precludes the notion that the people of America were one undifferentiated whole. How can a single political constituency be governed by thirteen sovereign political entities that are independent of one another? In 1783, the people of the United States could not have been one undifferentiated whole, at least for political purposes.<sup>111</sup>

Article VII of the Treaty refers to “His Britannic Majesty and the said States” and then proceeds to mention “the subjects of the one and the citizens of the other.”<sup>112</sup> Thus, the people of the United States were viewed as being citizens of their respective states, not as citizens of one national government. Not only were the United States independent political governments, but also the people themselves were citizens of those individual, free states, not of one common political government. For political purposes, the people of America were not one people before the Constitution was adopted, but thirteen distinct peoples. The question now

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109. *Id.* at 315.

110. *Id.*

111. Of course, the people of the United States at that time were very closely united in terms of their religion and culture. People groups that are ruled by separate political governments can be united in non-political ways. For example, a common religion, such as Christianity or Islam, may unite peoples from different nations. In a sense, European Christians living in the Middle Ages were one people. Indeed, a people united by a common religion or common culture would probably feel a greater sense of unity than would a people simply united by a common political government. This is so because culture, beliefs, and ideas are more fundamental to human nature and identity than political governance. A sense of political unity will not necessarily overcome fundamental differences in thought and culture. There are many different ways in which a people may be spoken of as “one people.” This Note is simply examining whether the American people were “one people” in the political sense of that phrase.

112. Treaty of Peace, *supra* note 98, at 317.



becomes whether the people consolidated themselves into one political popular entity when they formed the Constitution.

*B. The Ratification Process*

On its face, the very process by which the Constitution was ratified demonstrates that the people of the United States did not act as one undifferentiated people in the formation of their Constitution.<sup>113</sup> If the people of each state could decide for themselves and for their own state whether they would be part of the new Federal Government, this implies that even an overwhelming majority of the American people could not force the entirety of the people in America to be ruled by the Constitution.<sup>114</sup> Moreover, the Constitution only required the consent of “the Conventions of nine States” to establish the Constitution “between the States so ratifying the Same.”<sup>115</sup> In other words, the people of America did not have to decide

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113. Henry Baldwin explained this argument eloquently when he wrote that it would be erroneous

if we so take the words of the preamble of the proposed constitution, as to be a declaration that the political existence, and organic power of the several states and people, had become so amalgamated into one body of supreme power, as to make it the sole grantor of the powers of the federal government, and competent to restrict the states, and control existing state constitutions. Their letter to congress, and of the latter to the several state legislatures, asking separate conventions of the people in each to ratify it; was an act indicating political fatuity, if the instrument contained, and was intended to be a declaration, that when ratified by such conventions of nine states, and thus established, it was not “by the people of the several states,” but of all collectively.

BALDWIN, *supra* note 6, at 62; *see also* THE FEDERALIST NO. 39, at 239-40 (James Madison) (Clinton Rossiter ed., 1961). Madison stated, “Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act.” *Id.* at 240. Madison viewed the process of state-by-state ratification as demonstrating that the formation of the Constitution was “the act of the people, as forming so many independent States, not as forming one aggregate nation.” *Id.*

114. 3 ELLIOT’S DEBATES, *supra* note 83, at 94 (James Madison’s remarks at the Virginia ratification convention). In Madison’s words:

Were [the Federal Government under the Constitution] a consolidated government, the assent of a majority of the people would be sufficient for its establishment; and, as a majority have adopted it already, the remaining states would be bound by the act of the majority, even if they unanimously reprobated it. Were it such a government as is suggested, it would be now binding on the people of this state, without having had the privilege of deliberating upon it. But, sir, no state is bound by it, as it is, without its own consent.

*Id.*; *see also* THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961).

115. U.S. CONST. art. VII.

as a whole whether they would all be ruled by the Constitution. Rather, the people of each state were to make this decision for themselves.<sup>116</sup> As Henry Baldwin observed, “all must agree, that when [the Constitution] was proposed for adoption in 1787, it could not be foreseen which of the states would so ratify it; the states therefore could not be named till their separate ratifications were given.”<sup>117</sup> Thus, Baldwin concluded that the reference in the Constitution’s Preamble to “the People of the United States”<sup>118</sup> is an adaptable phrase that refers generally to the people of those states that have chosen to ratify the Constitution.<sup>119</sup> According to Baldwin, the Preamble should be interpreted to mean that “[t]he people’ ‘of the several states, which may be included within this Union,’ [are] the constituent power of the federal government.”<sup>120</sup>

### C. *The Ratification Conventions*

The formal ratifications of the Constitution by the original thirteen states indicate that the representatives of the people in each of the state ratification conventions understood that they were acting on behalf of the people of their own respective states.

#### 1. Delaware<sup>121</sup>

In Delaware’s ratification of the Constitution, the delegates identified themselves as “the deputies of the people of the Delaware state, in Convention met.”<sup>122</sup> They declared that they ratified the Constitution “in virtue of the power and authority [given to them], for and in behalf of [themselves] and [their] constituents.”<sup>123</sup> Thus, the delegates in the Delaware convention understood that they were acting on behalf of the

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116. 3 ELLIOT’S DEBATES, *supra* note 83, at 94 (James Madison’s remarks at the Virginia ratification convention) (“[N]o state is bound . . . without its own consent.”); THE FEDERALIST NO. 39, at 239-40 (James Madison) (Clinton Rossiter ed., 1961); *see* BALDWIN, *supra* note 6, at 97.

117. BALDWIN, *supra* note 6, at 97.

118. U.S. CONST. pmb1.

119. BALDWIN, *supra* note 6, at 97. Baldwin stated that “at each period when any state ratified [the Constitution],” that state “became one of ‘the United States of America,’ by the act of the people of the states respectively.” *Id.* Baldwin also maintained that “the term ‘people,’ was a mere designation of the power by which the constitution was made.” *Id.* Baldwin viewed the term “people” in the Preamble as simply signifying that the Constitution was ratified by the people as opposed to some other alleged source of authority. *Id.*

120. *Id.*

121. This Note will discuss the state ratifications in their chronological order.

122. 1 ELLIOT’S DEBATES, *supra* note 83, at 319.

123. *Id.*

people of the state of Delaware. There was no pretention on their part to be acting as an incomplete portion of a larger, undifferentiated people group. The power of the Delaware delegates came from their “constituents,” the people of Delaware. The people of Delaware, through their elected representatives, acted on their own to ratify the Constitution for themselves. Their ratification bound only themselves. It was up to the other twelve states to ratify the Constitution, each on its own behalf.

## 2. Pennsylvania

Pennsylvania’s ratification was similar to Delaware’s. “[T]he delegates of the people of the commonwealth of Pennsylvania” ratified the Constitution “in the name and by the authority of the same people, and for [the delegates themselves].”<sup>124</sup> The Pennsylvania delegates understood they were acting for the people of Pennsylvania. There is no indication in the language of their ratification that they viewed themselves as merely one segment of a larger homogeneous popular entity. The delegates derived their authority from the people of Pennsylvania, not from the people of the United States, and as the heading of their ratification declared, they ratified the Constitution “In the Name of the People of Pennsylvania.”<sup>125</sup> Evidently, the people of Pennsylvania constituted a political entity that could act as one body either to accept or to reject the new Constitution.

During the debates in the Pennsylvania convention, James Wilson, one of Pennsylvania’s delegates to the Constitutional Convention, offered some remarks on the Preamble of the new Constitution and its significance. Wilson stated that the Preamble incorporates the principle that “the supreme power resides in the people.”<sup>126</sup> Contrasting the nature of British and American government, Wilson noted that under the Magna Charta, the rights of Englishmen were granted to them by the king, whereas under the American Constitution, the rights of American citizens resided in “the people at large,” who did not relinquish their rights by forming the Constitution.<sup>127</sup> Thus, Wilson concluded that a Bill of Rights enumerating the rights reserved to the American people “would be not only unnecessary, but preposterous and dangerous.”<sup>128</sup> Besides referring to “the people at large,”<sup>129</sup> Wilson also declared that “in this Constitution, *the citizens of the United States* appear dispensing a part of their original power in what

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124. *Id.*

125. *Id.*

126. 2 ELLIOT’S DEBATES, *supra* note 83, at 434.

127. *Id.* at 435.

128. *Id.* at 436.

129. *Id.* at 435.

manner and what proportion they think fit.”<sup>130</sup> Again, Wilson asserted, “[t]o every suggestion concerning a bill of rights, *the citizens of the United States* may always say, We reserve the right to do what we please.”<sup>131</sup>

It is unclear whether Wilson was intending by his references to “the citizens of the United States” and “the people at large” to contrast the people of America as a whole with the peoples of the several states. At the very least, it is evident from the context that Wilson was contrasting the people as the source of their rights with the civil government as the source of political rights. However, even granting that Wilson viewed the people of the United States as one undifferentiated whole, this does not imply that the other Pennsylvania delegates agreed with Wilson on this point. Rather, the plain language of the delegates acting as a group in their ratification of the Constitution declared that they were acting “in the name and by the authority of the [people of Pennsylvania],”<sup>132</sup> not on behalf of a mere subset of a larger entity. The clear language of Pennsylvania’s official ratification discussed above is more authoritative than an argument based on implications from one delegate’s personal language. Even if Wilson viewed the people of America as one simple people mass, the other Pennsylvania delegates certainly gave no indication that they agreed with Wilson on that point. Indeed, the language of Pennsylvania’s ratification indicates the delegates generally viewed the people of Pennsylvania as a politically independent entity.

### 3. New Jersey

The New Jersey ratification cited the resolutions by the New Jersey legislature regarding the holding of a ratification convention in that state. One of these resolutions declared that the delegates elected to the convention would have power to ratify the Constitution “in behalf and on the part of this state.”<sup>133</sup> In other words, it was the *state* of New Jersey (i.e., the people of New Jersey acting through their elected delegates) that ratified the Constitution. Acknowledging themselves to be “the delegates of the state of New Jersey, chosen by the people thereof,” the delegates ratified the Constitution “for and on the behalf of the people of the said state of New Jersey.”<sup>134</sup> Thus, the New Jersey delegates understood themselves to represent their own state (i.e., the people of the state), not a

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130. *Id.* at 437 (emphasis added).

131. *Id.* (emphasis added).

132. 1 ELLIOT’S DEBATES, *supra* note 83, at 319; *see also supra* notes 124-25 and accompanying text.

133. 1 ELLIOT’S DEBATES, *supra* note 83, at 320.

134. *Id.* at 321.

portion of a larger political entity. In ratifying the Constitution, the delegates were acting on behalf of and expressing the will of the people of New Jersey. Their decision to ratify the Constitution bound only the people group of New Jersey.

#### 4. Connecticut

Connecticut's ratification was quite brief. The delegates identified themselves as "the delegates of the people of [the] state [of Connecticut]" and declared that they ratified the Constitution.<sup>135</sup> Significantly, just as the Pennsylvania ratification had done,<sup>136</sup> the Connecticut ratification contained a heading that read, "In the Name of the People of the State of Connecticut."<sup>137</sup> In other words, the people of the state of Connecticut viewed themselves as a self-contained body that could meet separately from the peoples of the other states and decide for themselves as an independent people group whether to ratify the new Constitution.

#### 5. Massachusetts

The Massachusetts delegates stated that they ratified the Constitution "in the name and in behalf of the people of the commonwealth of Massachusetts."<sup>138</sup> Thus, the people of Massachusetts came together as a body through their delegates and gave their corporate assent to the Constitution. There is some language in Massachusetts' ratification that seems upon first glance to intimate the view that the people of America were a single entity. The delegates referred to the opportunity of "the people of the United States" to "enter[] into an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution."<sup>139</sup> One might interpret this language to mean that the Massachusetts delegates viewed the people of America as acting as one large group to form the Constitution. However, this interpretation seems implausible when one considers certain other language in Massachusetts' ratification.

Interestingly, the Massachusetts convention recommended several amendments to the Constitution, the first of which was: "That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised."<sup>140</sup> The Massachusetts convention thus was concerned to clarify that non-

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135. *Id.*

136. *Id.* at 319.

137. *Id.* at 321.

138. *Id.* at 322.

139. *Id.*

140. *Id.*

delegated powers were reserved to the *states*. Although the Tenth Amendment says that non-delegated powers “are reserved to the States respectively, or to the people,”<sup>141</sup> Massachusetts did not mention the people as a reservoir of non-delegated rights. Since it was the people of Massachusetts, acting through their delegates, who ratified the Constitution, it would not make much sense to interpret their recommendation to mean that each state government possesses all powers the Federal Government does not possess. Rather, it seems more reasonable to interpret Massachusetts’ proposed amendment to mean that the *peoples* of the states possess all powers they do not expressly delegate to the Federal Government. If the people of Massachusetts were adopting the Constitution, they would naturally want to clarify *their own* reserved rights. The people of Massachusetts apparently viewed reserved rights as residing in the peoples of each individual state, not in the people of America as a single whole. This is why they could say that “all powers not expressly delegated . . . are reserved to *the several states* . . . .”<sup>142</sup>

#### 6. Georgia

Identifying themselves as “the delegates of the people of the state of Georgia,” the delegates to the Georgia convention ratified the Constitution “in virtue of the powers and authority [given to them] by the people of the said state for that purpose, for and in behalf of [themselves] and [their] constituents.”<sup>143</sup> The people of Georgia vested their delegates with power to ratify the Constitution for and on behalf of the people of Georgia. There is no indication here that the people of Georgia or their delegates viewed themselves as acting as a mere district of a larger political entity, instead of as a politically independent and self-contained people group.

#### 7. Maryland

Maryland’s ratification is short. The delegates stated they were “the delegates of the people of the state of Maryland,” and then declared that they ratified the Constitution “for [themselves], and in the name and on the behalf of the people of [the] state [of Maryland].”<sup>144</sup> The Maryland delegates were explicitly acting for the people of their state as a whole. The idea that they were acting as a mere voting district of a larger populace is a notion that must be read into their actions, for it does not appear upon the

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141. U.S. CONST. amend. X.

142. 1 ELLIOT’S DEBATES, *supra* note 83, at 322 (emphasis added).

143. *Id.* at 324.

144. *Id.*

face of their language. Rather, the *prima facie* sense of Maryland's ratification (as well as the other states' ratifications) is that the people of an independent, sovereign state met via their delegates and decided as an independent body that they would join the new constitutional Union.

#### 8. South Carolina

South Carolina's ratification was typical. It began, "In Convention of the people of the state of South Carolina, by their representatives . . . ."<sup>145</sup> The Convention ratified the Constitution "in the name and behalf of the people of [the] state [of South Carolina]."<sup>146</sup> Like Massachusetts, the South Carolina convention declared that nothing in the Constitution "warrants a construction that *the states* do not retain every power not expressly relinquished *by them*, and vested in the general government of the Union."<sup>147</sup> According to this language from the South Carolina convention, the states were the parties who relinquished certain powers which were then vested in the Federal Government. However, the South Carolina convention was explicitly acting on behalf of the *people*, not the state government, of South Carolina.<sup>148</sup> It is not reasonable to interpret the South Carolina convention as saying that the people of South Carolina ratified the Constitution, but that any rights the people did not give the Federal Government were retained by the state government.<sup>149</sup> Rather, the reasonable interpretation of South Carolina's declaration that the *states* retain non-delegated powers is that the *people* of each individual state retain all powers not delegated to the Federal Government. If the people are the ones delegating certain powers, then it must be the people who are the ones retaining all non-delegated powers.

#### 9. New Hampshire

The "Convention of the Delegates of the People of the State of New Hampshire"<sup>150</sup> ratified the Constitution "in the name and behalf of the

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145. *Id.* at 325.

146. *Id.*

147. *Id.* (emphasis added).

148. *Id.*

149. How can a state government *retain* what it did not have in the first place? If *all* non-delegated rights are *retained* by the state governments, then this logically implies that the people have no rights, *and* that they had no rights to begin with. To say that South Carolina advocated this notion is simply not historically credible.

150. 1 ELLIOT'S DEBATES, *supra* note 83, at 325 (from the heading of New Hampshire's ratification).

people of the state of New Hampshire.”<sup>151</sup> In addition to Massachusetts and South Carolina, New Hampshire was another state that recommended a constitutional amendment regarding reserved rights. New Hampshire proposed: “That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to *the several states*, to be by them exercised.”<sup>152</sup> New Hampshire did not say that non-delegated powers were reserved to the American people as a whole, but to “the several states.” Surely the delegates representing the people of New Hampshire were not asserting that all powers not delegated to the Federal Government necessarily resided in the state governments. Rather, the people of New Hampshire evidently wanted to reserve rights to *themselves* as a people. While Americans of the founding era generally understood that people have rights, many of them apparently viewed these rights as residing in the separate people groups of the several states, not in one national people group *en masse*.

#### 10. Virginia

The delegates of the Virginia ratification convention, “the delegates of the people of Virginia, duly elected,”<sup>153</sup> ratified the Constitution “in the name and in behalf of the people of Virginia.”<sup>154</sup> Again, the people of this particular state<sup>155</sup> ratified the Constitution for themselves as a distinct people group. There is some language in Virginia’s ratification that upon a cursory glance seems to indicate that the American people are one single people group. The delegates maintained that “the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them.”<sup>156</sup> One might wish to interpret “the people of the United States” here as indicating the people of America conceived of as one single entity. However, Virginia proposed the following amendment to the Constitution: “That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the [Federal Government].”<sup>157</sup> Once again, an original ratifying state insisted that the powers not delegated to the Federal Government were retained by

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151. *Id.* at 326.

152. *Id.* (emphasis added).

153. *Id.* at 327.

154. *Id.*

155. Or, more properly, this particular commonwealth.

156. 1 ELLIOT’S DEBATES, *supra* note 83, at 327.

157. 3 ELLIOT’S DEBATES, *supra* note 83, at 659.



each respective *state* in the Union. As noted above with respect to similar amendments proposed by other states,<sup>158</sup> it is much more reasonable to interpret the term “state” in this context as referring to the people of each individual state, rather than to the government of each state, especially since the Virginia ratification spoke of “the *people* of the United States” as retaining all powers not granted to the Federal Government by the Constitution.<sup>159</sup> If Virginia can say that “the people” retain non-delegated powers, and that “each state” retains non-delegated powers, then “the people” must mean the people of each state, not the people of the nation as a whole.

#### 11. New York

The members of New York’s ratification convention identified themselves as “the delegates of the people of the state of New York, duly elected,”<sup>160</sup> and ratified the Constitution “in the name and in the behalf of the people of the state of New York.”<sup>161</sup> The New York convention made numerous declarations in its ratification, including the declaration “that every power, jurisdiction, and right, which is not by the . . . Constitution clearly delegated to the [Federal Government], remains to the people of the several states, or to their respective state governments, to whom they may have granted the same . . . .”<sup>162</sup> This statement seems to resemble the Tenth Amendment more closely than the proposed amendments by other states considered above. New York’s language straightforwardly expresses the understanding that non-delegated powers are reserved to the people groups of each state as such, not to the people of America as a single entity. According to New York’s declaration here, the people of each state possess all powers they have not delegated to either the Federal Government or their own state government.

#### 12. North Carolina

North Carolina and Rhode Island were the only original states that did not ratify the Constitution until after the Federal Government was already established under the new Constitution.<sup>163</sup> A North Carolina convention ratified the Constitution on November 21, 1789, “in behalf of the freemen,

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158. *See supra* notes 140-42, 147-49, 152 and accompanying text.

159. 1 ELLIOT’S DEBATES, *supra* note 83, at 327 (emphasis added).

160. *Id.*

161. *Id.* at 329.

162. *Id.* at 327.

163. *See id.* at 333, 335.

citizens and inhabitants of the state of North Carolina.”<sup>164</sup> A previous North Carolina convention that had failed to ratify the Constitution had proposed numerous amendments to the Constitution, the first of which was: “That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the [Federal Government].”<sup>165</sup> As with many states already examined,<sup>166</sup> North Carolina viewed the people and governments of each state, not the people of the country as a whole, as retaining the rights not delegated to the Federal Government. Rights that belong to “*each state* in the Union . . . respectively”<sup>167</sup> may belong to either the people or the government of each state, but they logically cannot belong to the people of America considered as one undifferentiated people group.

### 13. Rhode Island

Finally, Rhode Island ratified the Constitution on May 29, 1790.<sup>168</sup> “[T]he delegates of the people of the state of Rhode Island and Providence Plantations, duly elected,”<sup>169</sup> ratified the Constitution “in the name and in the behalf of the people of the state of Rhode Island and Providence Plantations.”<sup>170</sup> There are some places where the Rhode Island delegates generically mentioned “the people,” which by itself could be interpreted as referring to either one people group or many people groups. The delegates affirmed that “all power is naturally vested in, and consequently derived from, the people,”<sup>171</sup> and that “the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness.”<sup>172</sup> Immediately after these statements, however, the delegates made it clear who “the people” were to whom they were referring:

[T]he rights of the states respectively to nominate and appoint all state officers, and every other power, jurisdiction, and right, which is not by the said Constitution clearly delegated to [the Federal Government], remain to *the people of the several states*,

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164. *Id.* at 333.

165. 4 ELLIOT’S DEBATES, *supra* note 83, at 244.

166. *See supra* notes 140-42, 147-49, 152, 157-59, 162 and accompanying text.

167. 4 ELLIOT’S DEBATES, *supra* note 83, at 244 (emphasis added).

168. 1 ELLIOT’S DEBATES, *supra* note 83, at 335. Rhode Island was the only one of the original thirteen states that sent no delegates to the Constitutional Convention in Philadelphia. *See id.* at 332.

169. *Id.* at 334.

170. *Id.* at 335.

171. *Id.* at 334.

172. *Id.*

*or their respective state governments, to whom they may have granted the same . . . .*<sup>173</sup>

The Rhode Island delegates understood that the people of the several states, not the people of the nation acting as one single entity, were the source of the Federal Government's powers and the repository of all non-delegated powers.

In its ratification, Rhode Island also proposed various amendments to the Constitution, the very first of which was: "The United States shall guaranty to each state its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Constitution expressly delegated to the United States."<sup>174</sup> Even if one interprets the language here of "sovereignty, freedom, and independence" to refer to the rights and powers of the state governments instead of the rights and powers of the people, one cannot fairly interpret the Rhode Island delegates as saying that "every power, jurisdiction, and right" that is not delegated to the Federal Government resides in the state governments. This interpretation would leave the people themselves no rights or powers at all, but would relegate all rights and powers to either the Federal Government or the state governments. As noted above with respect to similar amendments proposed by other states,<sup>175</sup> this language is most reasonably interpreted to mean that the *people* of each respective state possess the rights and powers they have not delegated to either their state government or the Federal Government. The important point, however, is to note that the language both of this amendment proposed by Rhode Island and of similar amendments proposed by other states cannot grammatically be interpreted to refer to one great national body of people possessing rights *en masse* as a single entity. Rhode Island specifically asserted that non-delegated powers reside with *states* in their individual capacity, which precludes the notion that rights reside in a *national people group*.

Thus, the delegates in every single one of the original thirteen states ratified the Constitution on behalf of the people of their own state. Delegates representing the people of each state came together independently of the people of other states and decided whether to adopt the Constitution for their own state. Five of the original thirteen states proposed amending the Constitution to recognize essentially that non-delegated rights and powers were retained by the people of the several states or their state

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173. *Id.* (emphasis added).

174. *Id.* at 336.

175. *See supra* notes 140-42, 147-49, 152, 157-59, 165-67 and accompanying text.

governments.<sup>176</sup> Two other states made declarations to this same effect.<sup>177</sup> The evidence surrounding the actual ratification of the Constitution by the individual state ratification conventions strongly suggests the conclusion that the people of the United States did not act as a single political people group to ratify the Constitution, but rather acted as politically independent people groups to ratify the Constitution, each state for itself.

*D. The Views of Particular Founding Fathers*

In addition to the preceding historical evidence concerning the pre-constitutional political status of “the people” and the state ratification conventions, the views of two prominent statesmen during the Founding Era further demonstrate that the people of America were not viewed as one homogeneous political entity. Statements by both James Madison and Thomas Jefferson indicate that these Founders viewed the people of the United States as composed of separate political entities—the people groups of the several states.

1. James Madison

During the debates in the Virginia ratification convention, James Madison made the following clarification regarding who the parties to the Constitution were: “Who are the parties to [the Federal Government under the Constitution]? The people — *but not the people as composing one great body; but the people as composing thirteen sovereignties*. . . . [N]o state is bound by it . . . without *its own consent*.”<sup>178</sup> Madison was unequivocal: “the people” who formed the Constitution were not one undifferentiated people group, not a single national entity, but rather an aggregate of numerous sovereign people groups. According to Madison, the people of the United States were acting not as “one great body,” but as many separate bodies, each of whom was sovereign in its own right.

In *The Federalist No. 39*, Madison asserted that “the Constitution is to be founded on the assent and ratification of the people of America.”<sup>179</sup> Whom did Madison view as “the people of America” in this regard? “[T]his 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

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176. See *supra* notes 140-42 (Massachusetts), 152 (New Hampshire), 157-59 (Virginia), 165-67 (North Carolina), 174-75 (Rhode Island) and accompanying text.

177. See *supra* notes 147-49 (South Carolina), 162 (New York) and accompanying text.

178. 3 ELLIOT’S DEBATES, *supra* note 83, at 94 (emphasis added).

179. THE FEDERALIST NO. 39, at 239 (James Madison) (Clinton Rossiter ed., 1961).

which they respectively belong.”<sup>180</sup> Thus, for Madison, “the people of America” formed the constitutional Union *not* as one national people group, but as separate people groups composing the several states. Madison continued, “It is to be the assent and ratification of the several *States*, derived from the supreme authority in each State—the authority of the people themselves.”<sup>181</sup> Since Madison did not view the people of America as one people group, but rather as numerous people groups, he could say that the *states* ratified the Constitution. He could not have said that the states ratified the Constitution if a single national people group actually formed the Constitution.

Madison authored the Virginia Resolutions of 1798,<sup>182</sup> in which the General Assembly of Virginia declared “that it view[ed] the powers of the federal government as resulting from the compact to which *the states* are parties, as limited . . . .”<sup>183</sup> Madison here again maintained that the states themselves were parties to the Constitution. Given Madison’s insistence in the Virginia ratification convention debates and in *The Federalist No. 39* that *the people* ratified the Constitution, it is only reasonable here to take his reference in the Virginia Resolutions to “the states” as meaning the peoples of the several states, rather than the state governments.

## 2. Thomas Jefferson

The primary author of the Declaration of Independence, Thomas Jefferson, evidently believed that the people of the United States were not one national people group, but separate state people groups. Jefferson drafted the Kentucky Resolutions of 1798 and 1799,<sup>184</sup> the first of which declared that “the several states . . . by compact . . . constituted a general government for special purposes, [and] delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government . . . .”<sup>185</sup> Regardless of whether one interprets Jefferson’s reference to “the several states” here to mean the state governments or the peoples of the individual states, Jefferson’s words certainly cannot mean that one national people group formed the compact establishing the new Federal Government.

The first resolution also asserted that “to this compact each state acceded as a state, and is an integral party,” and that “as in all other cases of

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180. *Id.*; see also *id.* at 240.

181. *Id.* at 239 (emphasis added).

182. Contained in 4 ELLIOT’S DEBATES, *supra* note 83, at 528-29.

183. *Id.* at 528 (emphasis added).

184. Contained in 4 ELLIOT’S DEBATES, *supra* note 83, at 540-45.

185. *Id.* at 540.

compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.”<sup>186</sup> In other words, Jefferson was saying that the *states* are the parties to the Constitution, and that each state is to judge for itself whether the Federal Government has transgressed its constitutional bounds in a given situation. For Jefferson, the right to determine the boundaries of the Federal Government’s constitutional powers resides with the states individually.<sup>187</sup> Thus, any state may challenge the Federal Government’s usurpation of unconstitutional power,<sup>188</sup> regardless of what a majority of the people of America as a whole think of the matter.

#### V. CONCLUSION

Political sovereignty in American government ultimately resides with the people. But who are the people? The way in which one answers this question is critical, for it determines who has the power to exercise the rights reserved to “the people” under the Tenth Amendment. If the people who formed the Constitution were one national people group, then any rights reserved by the people to themselves may only be exercised as prescribed by a majority of the American populace. However, if the people who formed the Constitution were the several people groups of independent states, then the rights reserved to the people may be defined, exercised, and circumscribed in different ways, according to the different desires of the peoples of different states.

The historical evidence examined in this Note demonstrates that the people who formed the Constitution were the separate people groups of the several states. Justice Thomas is correct. Justices Stevens and Kennedy appear to be mistaken. If the Supreme Court does not explicitly recognize that the peoples of the several states formed the Constitution, the ability of American citizens to exercise their rights in the manner they desire will be severely burdened. The peoples of different states will not be free to exercise their rights in different ways according to their different desires, but all people throughout the United States will have to bow to the will of a bare majority of American citizens. This is not the freely diverse country the Founders envisioned. It is a consolidated and restrictively conformist nation. The issue of who formed the Constitution is not an arcane, pedantic,

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186. *Id.* (emphasis omitted).

187. *Id.*

188. This is exactly what Kentucky and Virginia did with their resolutions in 1798 and 1799. These states were protesting the Alien and Sedition Acts. See 4 ELLIOT’S DEBATES, *supra* note 83, at 528, 545.

meaningless debate. On this issue rests the very nature of American society itself—whether it will be diverse from state to state or uniform throughout the country.

When this issue reappears before the Supreme Court, what will the Court do? Will it continue to embrace the line of reasoning that logically requires America to be a conformist society, or will it embrace the Founders' vision of a diverse American society?

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