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Martin S. Flaherty

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JOHN MARSHALL, *McCULLOCH v. MARYLAND*, AND “WE
THE PEOPLE”: REVISIONS IN NEED OF REVISING¹

MARTIN S. FLAHERTY*

John Marshall may not have been Shakespeare, but he remains our closest judicial equivalent. Two hundred years after his rise to Chief Justice, no American jurist remains so studied, interpreted, reinterpreted, debated, and invoked.² Even debates about the twists and inevitability of Marshall's reputation have Shakespearean counterparts.³ In one further parallel, the work of each writer furnishes a wealth of quotations that are so entrenched in their respective cultures that it is often forgotten that each writer provided the sources in the first place—at least, that is, until they are reencountered at symposia such as this. As with Shakespeare's “major” plays, this last phenomenon is especially true of Marshall's “great” cases such as *Marbury v. Madison*⁴ and *McCulloch v. Maryland*,⁵ several passages from which have literally been carved

* Professor of Law & Codirector, Joseph R. Crowley Program in International Human Rights, Fordham Law School. My thanks to Lance Banning, R.B. Bernstein, Chris Eisgruber, Abner Greene, Charles Hobson, Larry Kramer, John Murrin, Jack Rakove, Paul Schwartz, and Bill Treanor, for conversations, comments, and suggestions. My thanks as well to Cara Hirsch, Rebecca Misner, and Annie Tsai for research assistance.

1. Cf. Edmund S. Morgan, *The American Revolution: Revisions in Need of Revising*, 14 WM. & MARY Q. (3d ser.) 3 (1957).

2. For examples of this concededly impressionistic assertion, see such bicentennial commentary as Symposium, *Chief Justice John Marshall and the United States Supreme Court, 1801-1835*, 33 J. MARSHALL L. REV. 743 (2000), Symposium, *John Marshall*, 17 ST. JOHN'S J. LEGAL COMMENT. (forthcoming 2002), and of course, Symposium, *The Legacy of Chief Justice John Marshall*, 43 WM. & MARY L. REV. 1321 (2002). See also Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439 (analyzing the force of Marshall's prose). For a dissenting view on Marshall's literary strengths, see Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 5 (2001).

3. See Michael J. Gerhardt, *The Lives of John Marshall*, 43 WM. & MARY L. REV. 1399 (2002). For a leading challenge to the inevitability of Shakespeare's reputation, see GARY TAYLOR, *REINVENTING SHAKESPEARE: A CULTURAL HISTORY, FROM THE RESTORATION TO THE PRESENT* (1989). But see RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 62-64 (1990) (challenging the notion that Shakespeare's reputation is purely accidental).

4. 5 U.S. (1 Cranch) 137 (1803).

5. 17 U.S. (4 Wheat.) 316 (1819).

in stone as reminders at the justices' version of "poet's corner" in the crypt-like basement of the Supreme Court.

One passage from *McCulloch*, too long to carve, famously raises an issue that is not logically necessary to any part of the opinion, but which nonetheless poses perhaps the most basic question of constitutional law:

In discussing this question [concerning the constitutionality of the Bank of the United States], the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states.⁶

Employing the type of understatement that reflects utter certainty, Marshall had no doubt about the answer:

It would be difficult to sustain this proposition. . . . From these conventions [held in the states], the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established," in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.⁷

Within the legal world, Marshall's ostensibly nationalistic analysis has been taken to mean pretty much what it appears to say. As one commentator puts it, "To Marshall, the sovereign was hardly the states—it was 'We the People.' It was 'We the People' who ordained and established the Constitution, not 'We the

6. *Id.* at 402.

7. *Id.* at 403-04.

States.”⁸ This view by definition denies that the Constitution resulted from an agreement or compact among the states. The usual—and critical—corollary that follows holds that the national populace erred on the side of according power to the national government at the expense of the states, as *McCulloch* appears to indicate. At the very least, the idea of a unitary founding people has given rise to a presumption that federal rather than state claims should prevail in areas of modern constitutional controversy.⁹

These nationalistic readings of Marshall in turn corresponded with a nationalistic interpretation of the Founding itself. Never, in fact, had Marshall’s apparent views appeared more solid than in light of historical scholarship of the past few generations, including pathbreaking work by Bernard Bailyn, Lance Banning, Forrest McDonald, Edmund S. Morgan, Jack Rakove, John Phillip Reid, and Gordon Wood, to name a few.¹⁰ This work in particular has done much to recapture the Founding’s understandings—indeed, reinvention—of popular sovereignty and the national government. Almost any historian who ventured into the world of law and encountered Marshall’s account would likely have viewed it as a sort of *Emanuel’s* version of recent historiography—a bit too simplified, perhaps, but user-friendly and essentially right.

Recently, however, all this has come under challenge. Ironically, revisionism has issued less from law schools or history departments¹¹ than from Marshall’s own former home at the Supreme

8. Louise Weinberg, *Of Sovereignty and the Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1150 (2001); see also Christopher L. Eisgruber, *The Fourteenth Amendment’s Constitution*, 69 S. CAL. L. REV. 47, 66 (1995) (“Marshall treated the American people as a single entity incapable of making a binding agreement with itself.”).

9. See *infra* text accompanying notes 38-61.

10. Essential works in this literature include: BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992); LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* (1995); FORREST MCDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969). For a historiographical overview, see Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 535-56 (1995).

11. But see FORREST MCDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1976*, at 7-26 (2000).

Court itself. The past decade's well known "federalism", or "states' rights,"¹² cases have proceeded in lockstep with accounts about the nation's origins that are almost as state-oriented as the results they announce. More nuanced though nonetheless state-oriented claims have in the meantime come from important scholars.¹³ At its most unconventional, the case law in particular asserts the proposition that it really was "the states, in their sovereign capacity," that established the Constitution. With this alternative creation myth comes an alternative presumption against controverted assertions of federal power and for claims of state privilege.¹⁴

This trend has gone so far that one Justice has attempted to lay claim to Marshall himself. Not long ago, Justice Thomas forcefully argued that both a closer and more contextual reading of *McCulloch* reveals that Marshall's identification of the popular sovereign was not so nationalistic as legend has it.¹⁵ On his view, not only is the conventional account of the Founding wrong, but so too is equating that account with John Marshall. Despite *McCulloch*'s own nationalistic result, moreover, Thomas and his fellow dissenters cash out Marshall's position on the creators of the Constitution to further support an interpretive presumption for state rather than Federal authority. Thomas's reinterpretation fell just one vote shy of becoming the modern Supreme Court's understanding of the Marshall Court's understanding of who established and ordained the Constitution. The state-oriented presumption that Thomas's reinterpretation inevitably furthers, however, survives and thrives in the Court's continuing line of "states' rights" decisions.¹⁶

This Article argues that this latest attempt to revise Marshall is wrong for the right reasons. Against the conventional wisdom,

12. For now, I note only that I employ the term "states' rights" more for its popular currency than for its theoretical accuracy. See Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999). Charles Black correctly pointed out that "rights" are more appropriately attributed to individuals than governmental units. See CHARLES BLACK, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 41-85 (1997).

13. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

14. See *infra* text accompanying notes 38-61.

15. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 849 (1995) (Thomas, J., dissenting).

16. See *infra* text accompanying notes 38-61.

Justice Thomas not only correctly reads Marshall as resisting the idea that a single, consolidated American people created the Constitution, but that he actually fails to do justice to his own thesis. That said, Thomas and his fellow revisionists still err in concluding that the less-nationalistic creation myth that results presumptively benefits the state governments rather than federal authority. As if all this were not counterintuitive enough, this Article finally suggests that the general Founding understanding of who created the Constitution may well prove to be closer to the nationalist misunderstanding of Marshall's position than to his actual, more state-oriented beliefs.

Part I provides the modern and analytic background. It begins by demonstrating how determining just who the founding popular sovereign was has become nearly as important now as it was during Marshall's day, and for similar reasons. Almost invariably, the answer given to the question of "founding popular sovereignty"¹⁷ is a good predictor of the doctrinal positions that will result. The question's newfound importance issues—sometimes consciously and sometimes not—directly from the Court's recent "states' rights" jurisprudence. Conscious grapplings with the issue reveal at least three positions along a national/state spectrum. Nationalists, not surprisingly, argue for the position that a single, national "We the People of the United States" established the Constitution. "States' rights" advocates, in contrast, assert that the Constitution sprang from "We the States." In between, others stake out the position that it was "We the *Peoples*" of the respective states who created the new government. Insofar as this position, too, denies the unity of the founding populace, state defenders have laid claim to this position as well. As this part will note, strict logic indicates that none of the holdings in recent case law turns on which of these positions prevail, anymore than in *McCulloch* itself. This part will conclude, however, that the common sense connection between a given creation myth and a given set of results has long made strict logic beside the point.

17. I employ the term "founding popular sovereignty" specifically to apply to the issue of who established the Constitution as opposed to uses of popular sovereignty that are either ambiguous or that refer to government accountability to the electorate.

Part II considers the renewed debate over Marshall's own positions with regard to both who established the Constitution and what presumptions should result. As noted, the conventional wisdom has held that Marshall was the iconic defender of the "We the People" view, nowhere more so than in *McCulloch*'s account of popular sovereignty. When, however, Justice Kennedy recycled the mundane point in *Term Limits*,¹⁸ Justice Thomas countered with an ostensibly more rigorous reading seeking to locate Marshall at least in the "We the Peoples" camp.

Part III looks past this dispute to recapture Marshall's own thinking. Casting the net even more widely confirms not only Thomas's revisionism, but that the previously indisputable nationalist view is simply untenable. Yet this part also demonstrates that Thomas and his fellow dissenters incorrectly assumed that any version of a multiple Founding must redound to the benefit of the states. The basic error lies in placing too much emphasis on state boundaries and too little on the states' conventions. Though the revisionists acknowledge that the conventions, as "the people" of the states, differed from the states, in the sense of the state governments, they miss the distrust of those state governments that the use of conventions reflected. Put another way, the Thomas view wrongly privileges geography over the experience that Founders such as Marshall had that prompted them to respond to the vices of the states to begin with.

Looking back, this Article concludes with a final twist suggesting that Marshall's understanding of the Founding may actually have been less nationalistic than the Founding itself. Looking ahead, it also notes that whatever the Founding effected, the Civil War, Reconstruction, and other subsequent eras of higher lawmaking cannot continue to be ignored in considering the nation's current sovereignty foundation. In the meantime, what can be said with confidence is that Marshall's contribution to the question conceded the importance of state borders more than previously thought, yet tamed that concession by demonstrating how and why the governments of the states ought not be considered the beneficiaries.

18. 514 U.S. 779.

I. THE STAKES THEN AND NOW

A. *Federalism Re(?)dux*

Figuring out who created the Constitution hardly began with *McCulloch*. Among its predecessors, the project goes at least as far back as *Chisholm v. Georgia*.¹⁹ There, for example, Justice James Wilson emphasized what historian Gordon Wood has called the “primal power of the people.”²⁰

To the Constitution of the *United States* the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* that Constitution. They *might* have announced themselves “SOVEREIGN” people of the *United States*: But serenely conscious of that *fact*, they avoided the *ostentatious declaration*.²¹

Likewise, in *Ware v. Hylton*,²² Justice Chase addressed much the same issue in declaring, “There can be no limitation on the power of *the people* of the *United States*. By their authority, the State Constitutions were made, and by their authority the Constitution of the *United States* was established.”²³ Immediately foreshadowing *McCulloch*, Justice Story turned to the question in *Martin v. Hunter’s Lessee*,²⁴ stating: “The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’”²⁵

Perhaps the most thorough early consideration of founding popular sovereignty came from a previous Chief Justice, John Jay:

19. 2 U.S. (2 Dall.) 419 (1793).

20. WOOD, *supra* note 10, at 532.

21. *Chisholm*, 2 U.S. at 454.

22. 3 U.S. (3 Dall.) 199 (1796).

23. *Id.* at 236 (opinion of Chase, J.).

24. 14 U.S. (1 Wheat.) 304 (1816).

25. *Id.* at 324.

Experience disappointed the expectations they had formed from it [the Articles of Confederation]; and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the *people* of the *United States*, do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the *United States* is likewise a compact made by the people of the *United States* to govern themselves as to general objects, in a certain manner.²⁶

Nor was *McCulloch* the last case to take up the "We the People" question. In *Craig v. Missouri*,²⁷ the Court began an extended analysis, stating, "The government of the United States was one for the whole of 'the people of the United States.'"²⁸ Somewhat later, still another Chief Justice looked at the issue from a less nationalistic perspective. Writing in *Dred Scott*, Roger Taney concluded that, "The brief preamble ... declares that it [the Constitution] is formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States"²⁹ Apparently asserting an even more state-oriented position, Chief Justice Waite asserted "that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people."³⁰

Discussions, analyses, and allusions to founding popular sovereignty have continued in a steady stream to the present. *Not*

26. *Chisholm*, 2 U.S. at 470-71 (opinion of Jay, C.J.).

27. 29 U.S. (4 Pet.) 410 (1830).

28. *Id.* at 415.

29. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410-11 (1857).

30. *Munn v. Illinois*, 94 U.S. 113, 124 (1876).

counting recent "states' rights" decisions,³¹ a nonexhaustive list includes: *Kansas v. Colorado*,³² *Carter v. Carter Coal Co.*,³³ *Gray v. Sanders*,³⁴ *Colten v. Kentucky*,³⁵ *Employees v. Department of Public Health & Welfare*,³⁶ and *E.E.O.C. v. Wyoming*,³⁷ to name a few.

In nearly all these cases the Court addressed the "We the People" question en route to resolving a federalism dispute. Anything less would be surprising. As Chief Justice Waite's opinion suggests, the states have long been leading candidates as the Constitution's creators, and that possibility has for just as long been seen as relevant to how the states function within the framework that the Constitution sets up. Whether this correlation necessarily follows is another matter to be considered later. Suffice it to say for now that the Court has usually thought so, as its repeated forays into the Constitution's genesis indicate.

It therefore should come as no surprise that recent years have been boom times for such explorations. While the practical effect of it all may be an open question,³⁸ arguably never has the Court struck down so many acts of Congress in so short a time in the name of "states' rights."³⁹ This "counterrevolution" began with the little noted *Gregory v. Ashcroft*,⁴⁰ then accelerated through *New York v. United States*,⁴¹ *United States v. Lopez*,⁴² *Printz v. United States*,⁴³ *Alden v. Maine*,⁴⁴ and *United States v. Morrison*.⁴⁵ To these, add the Court's recent Eleventh Amendment jurisprudence, which

31. See *infra* text accompanying notes 38-61.

32. 206 U.S. 46, 90 (1907).

33. 298 U.S. 238, 292-97 (1936).

34. 372 U.S. 368, 377 (1963).

35. 407 U.S. 104, 122 (1972) (Douglas, J., dissenting).

36. 411 U.S. 279, 317-24 (1973) (Brennan, J., dissenting).

37. 460 U.S. 226, 250 (1983) (Stevens, J., concurring).

38. See Henry Paul Monaghan, Comment, *The Sovereign Immunity Exception*, 110 HARV. L. REV. 102 (1996).

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

40. 501 U.S. 452 (1991).

41. 505 U.S. 144 (1992).

42. 514 U.S. 549 (1995).

43. 521 U.S. 898 (1997).

44. 527 U.S. 706 (1999).

45. 529 U.S. 598 (2000).

has curtailed the opportunities to sue states for the violation of federal law out of deference to their "sovereignty." Prominent in this regard are *Pennsylvania v. Union Gas Co.*,⁴⁶ *Blatchford v. Native Village of Noatak*,⁴⁷ and *Kimel v. Florida Board of Regents*.⁴⁸ What defeats the "states' rights" cause has suffered, moreover, have been narrow, such as *Term Limits*.⁴⁹ Taken together, these cases have fueled much academic commentary.⁵⁰ So complete do the states' victories appear that many in court and academy herald a "restoration" of American federalism.⁵¹

Whether or not that claim holds water, several features of this ostensible restoration insure renewed prominence for the "We the People" question. For starters, these cases ride an ongoing crest of originalism. Nearly all of the cases feature opinions from justices who have either pledged allegiance to original understanding as a central method of constitutional interpretation, such as Justices Scalia and Thomas,⁵² pragmatists who deploy it when useful, including Justices O'Connor and Kennedy,⁵³ or serial dissenters who chose to fight history with history, especially Justice Souter.⁵⁴ Taken together, these varying originalist tendencies have time and again guaranteed lengthy judicial detours into the understandings of the Founding generation.

Furthering this turn to history is a lack of alternatives upon which the Court may base its judgments. Text has rarely been an option. The document itself specifies few safeguards for state governments,⁵⁵ far fewer than even the individual rights set out

46. 491 U.S. 1 (1989).

47. 501 U.S. 775 (1991).

48. 528 U.S. 62 (2000).

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

50. See, e.g., John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) (praising same).

51. *Id.*

52. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584-90 (1995) (Thomas, J., concurring); *Harmelin v. Michigan*, 501 U.S. 957, 961-85 (1991).

53. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715-45 (1999); *New York v. United States*, 505 U.S. 144, 163-66 (1992).

54. See, e.g., *Alden*, 527 U.S. at 760-95 (Souter, J., dissenting).

55. Here the most notable, and admittedly entrenched example, is equal suffrage in the Senate. U.S. CONST. art. I, § 3, cl. 1. Yet beyond this, even provisions that at first glance seem to safeguard the states in reality do so at the expense of guaranteeing not state autonomy, but federal intervention. Among provisions in this latter group are the Guarantee Clause, U.S. CONST. art. I, § 4, and the Militia Clause, U.S. CONST. art. I, § 8, cls. 15-16.

prior to the Bill of Rights.⁵⁶ To paraphrase Justice Scalia on reproductive rights,⁵⁷ "the Constitution says absolutely nothing about" state sovereignty, much less anything about the "commandeering of state executive officials."⁵⁸ Yet exactly these unenumerated protections have been found sufficiently compelling to trump duly enacted Federal statutes.

The same goes for structure. Nothing at issue in any of the Court's neo-"states' rights" jurisprudence logically follows from the fact that the Constitution contemplates two levels of government. In *Printz*, for example, Justice Scalia attempted to demonstrate that the nation's two-tier governmental framework confirms a constitutional prohibition against the dragooning of nonjudicial state officials into implementing federal policy.⁵⁹ As Justice Breyer wryly noted, one problem with this conclusion is that the European Union, a framework with two-tiers of truly sovereign governments, commandeers national officials in just the manner the majority said cannot occur in such arrangements and does so as a matter of course.⁶⁰ With text that is missing in action and structural arguments that are circular, history is usually all that is left.⁶¹

B. Competing Creation Myths

The Court should and does consider founding popular sovereignty amidst the resulting history. Nothing in recent opinions, however, matches Marshall's disquisition on the topic in *McCulloch*. Rather, the approach of the current Justices usually crops up as a threshold trope, based on assumed, well-settled evidence, as a prelude to a lengthier discussion of the "original understanding" regarding the more specific issue under dispute, such as state immunity to suits based on federal law.⁶² Prelude or not, when the question of who established the Constitution appears, the discussion falls under one

56. In contrast to "states' rights," Article I, Sections 9 and 10 set out numerous individual rights, including habeas, no bill of attainder, no ex post facto laws, and the obligation of contracts. U.S. CONST. art. I, §§ 9-10.

57. See *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting).

58. *Id.* See generally U.S. CONST. arts. I-VII.

59. *Printz v. United States*, 521 U.S. 898, 918-22 (1997).

60. *Id.* at 976-78 (Breyer, J., dissenting).

61. For a more detailed critique, see Flaherty, *supra* note 12, at 1286-96.

62. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999).

of three rubrics. Most often, state-oriented justices take a "We the States" view, suggesting that the original popular sovereigns were the thirteen sovereign states themselves. At the opposite end of the spectrum is the "We the People" position, in the sense that the Constitution's foundation rests on the assent of a single "We the People of the United States." Somewhere in the middle, though closer to the "states' rights" end than the nationalist pole, comes the "We the Peoples" account, a nuanced understanding that posits that the several discrete populaces of the states, rather than the states themselves, presided over the creation of the Constitution.

Turn first to the "We the States" view. This most state-orientated of interpretations merits pride of place as the most popular on the current Supreme Court. In one typical articulation, Justice O'Connor teaches that, "the States *entered the Federal system* with their sovereignty intact."⁶³ Or again we learn that the states "*adopted the Constitution*."⁶⁴ In this, the Court echoes popular political rhetoric. Perhaps the most prominent "We the States" advocate in this regard was the man who appointed several of the current Justices, Ronald Reagan, who liked to instruct that, "the States created the Federal Government."⁶⁵

Once popular as the "compact theory,"⁶⁶ these and other such statements convey the image of thirteen sovereign governments coming together to set out a new governmental arrangement amongst themselves. While alternatives are almost never explored, these entities appear to be the states' governments rather than conventions, the populace, or any other rivals that could claim to embody a given state. This reading seems most natural on a number of counts. From a "plain meaning" standpoint, the use of "state" in Supreme Court opinions and in common political parlance almost always means the state as represented through its government.

The specific judgments that result today usually wind up announcing "state" immunities, protections, or other privileges that redound to those governments. The state governments, in other words, created a Constitution that reserved special "rights" for state

63. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (emphasis added).

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

65. President Ronald Reagan, First Inaugural Address (Jan. 20, 1981).

66. See *infra* text accompanying notes 184-85.

governments. Madison, however, would chide Jefferson for too readily, and sloppily, equating the government of a state with a state in its sovereign capacity when discussing the creation of the Federal Constitution.⁶⁷ Modern federalism opinions that assign original popular sovereignty to the "states" without more are open to exactly the same reprimand.

By contrast, the "We the People" school could be neither more clear nor more antithetical. Justice Souter's dissent in *Alden v. Maine* sets out the nationalist position by noting James Wilson's view "that sovereignty was in fact not located in the States at all: 'Upon what principle is it contended that the sovereign power resides in the state governments? ... [M]y position is, that sovereignty resides in the people ...'"⁶⁸ A more idiosyncratic "We the People" advocate is Justice Kennedy, usually a "states' rights" champion who has on occasion rejected at least certain especially extreme state claims. In *Term Limits*, Kennedy seized just such an occasion to place himself in what he saw as quintessentially the tradition of John Marshall. "It might be objected," he wrote, "that because the States ratified the Constitution, the people can delegate power only through the States or by acting in their capacities as citizens of particular States."⁶⁹ After approvingly citing *McCulloch*, Kennedy endorsed the idea of "[t]he political identity of the entire people of the Union."⁷⁰

In these and other statements, the "We the People" view posits a founding popular sovereign that is truly national. Stated more fully, the interpretation holds that the Constitution owes its foundation to a single people that gave their assent to the document outside normal government institutions—national (under the

67. Letter from James Madison to Thomas Jefferson (Dec. 29, 1798), in 17 PAPERS OF JAMES MADISON 191-92 (David B. Mattern et al. eds., 1991) (asking "[h]ave you ever considered thoroughly the distinction between the power of the State, & that of the Legislature, on questions relating to the federal pact").

68. *Alden v. Maine*, 527 U.S. 706, 777 (1999) (Souter, J., dissenting) (quoting James Wilson) (citations omitted). Souter also denies that Wilson was a radical nationalist and asserts instead that he was within the mainstream. *Id.* at 777 n.16 ("But while Wilson's view of sovereignty was indeed radical in its deviation from older conceptions, this hardly distanced him from the American mainstream....").

69. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 840 (1995) (Kennedy, J., concurring).

70. *Id.* at 841.

Articles of Confederation) or state—transforming them in the process. No less crucially, this idea invariably presages doctrinal conclusions that reject state privileges and validate federal authority.⁷¹

Challenging these two poles, finally, comes the “We the Peoples” position. Set out by Justice Thomas, at one point this idea technically commanded the assent of three other Justices, though it is unclear to what extent they remain truly committed to it—as opposed to the “We the States” interpretation—rather than having simply signed onto a lengthy and complex dissent without opting out of every point with which they disagreed.⁷² As Thomas expresses it, “the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them. The people of each State obviously did trust their fate to the people of the several States when they consented to the Constitution,” he elaborates, “[a]t the same time, however, the people of each State retained their separate political identities.”⁷³

In this way the “We the Peoples” position parts company with essential aspects of its competitors. Unlike the “We the States” view, it refuses to equate measures of a state government with the expression of a state in its sovereign capacity. Yet unlike the classic “We the People” view, it also refuses to assume that expressions of popular sovereignty by default had to be national. Instead, a people could be defined by a state’s borders but still express their sovereign will outside the channels of state government. Exactly this occurred, moreover, nine, then thirteen, times at the present republic’s Founding.

71. Cf. *Alden*, 527 U.S. at 778 (Souter, J., dissenting) (discussing the sovereignty of the people as it applies to sovereign immunity).

72. See *Term Limits*, 514 U.S. at 846 (Thomas, J., dissenting). Joining him were Chief Justice Rehnquist and Justices O'Connor and Scalia, consistent “states’ rights” votes all. *Id.*

73. *Id.* at 849. On textual, historical, and structural grounds, Henry Monaghan stakes out one further position that falls between a simple “We the People” and “We the Peoples” view. Thus, for him, “[a]t its creation, the American Constitution rested upon two pillars: namely, ‘We the People’ (nationally understood) and the several states (i.e., ‘We the People’ thereof) as independent political communities. The result was a constitutional order that, as Madison stated, was ‘neither wholly *national* nor wholly *federal*.’” Monaghan, *supra* note 13, at 129 (citations omitted). Monaghan captures this position nicely in entitling his article, *We the People[s]*. *Id.*

For Justice Thomas in particular, the "We the Peoples" account has attractions beyond its ostensible historical accuracy. As he applies it to the doctrinal issues in *Term Limits*, the threshold existence of thirteen sovereign peoples supports the conclusion that the people of any state—at least as manifested through a state constitutional amendment—can place constraints on the tenure of their federal representatives.⁷⁴ Beyond this, the Thomas dissent suggests that the people of the state can achieve the same ends through ordinary legislation; an extension that effectively benefits state governments as if the underlying basis of the Constitution had been "We the States" after all.⁷⁵ The use of an apparently moderate historical interpretation in the service of a "states' rights" result cannot fail to have a certain tactical appeal. Thomas's intermediate interpretation has the further virtue of support from a proper reading of John Marshall, in reality, a long misunderstood "We the Peoples" advocate. In this light, the Thomas version of the theory offers two challenges to the conventional wisdom for the price of one.

C. *The Irrelevance of Logical Irrelevance*

Does choosing among these creation stories matter? Dispassionate legal analysis suggests not. Professor Larry Kramer has rightly pointed out that determining the nature of the popular sovereign that created this new constitutional order is not the same thing as determining the nature of the order itself.⁷⁶ "We the People of the United States" could easily have decided, among other things: that the power of the new Federal government should be minute; state sovereign immunity, broad; and an authority to "commandeer" state executive officials, nonexistent. "We the States," conversely, could just as easily have ordained a consolidated national government that came out differently on any or all of these issues. It follows that nothing predetermines that the intermediate possibility of "We the Peoples of the United States"

74. *Term Limits*, 514 U.S. at 849 (Thomas, J., dissenting).

75. See *id.* at 916-17 (Thomas, J., dissenting). But see *infra* text accompanying notes 285-87.

76. Professor Larry Kramer of New York University School of Law has raised this point several times in private conversations.

would have had to have adopted a set of intermediate positions if those several peoples thought it best to create a framework on one end of the spectrum or the other. Historian G. Edward White hints at this in aptly stating that Marshall began *McCulloch* "by asking, rhetorically, whether the Constitution was a creation of the sovereign states or of the people."⁷⁷

Put another way, the freedom which a popular sovereign by definition enjoys means that it is at liberty to transcend its own likely inclinations or tendencies. As a result, the "We the People" question is logically distinct from almost any of the federalism issues that it prefaces. Marshall appears to have recognized this dichotomy when saying that it was "counsel for the state of Maryland" who had thought it of "some importance" to identify the founding sovereign "in the construction of the constitution."⁷⁸

Yet just because an alternative is possible does not mean that it is likely. Common sense and intuition indicate that although a sovereign may not be compelled to create a regime in its own image, chances are it will. It would be odd for a nationally oriented lawgiver not to create a nationally oriented government, or a state-oriented counterpart not to guard state authority, or an intermediate sovereign not to settle for some set of compromises. These presumptions might well be rebutted in specific instances. A decision by the sovereign states, through their several governments, allowing for a national military⁷⁹—even Federal control of their own militias⁸⁰—would make sense in light of a demonstrated national weakness or internal inability to put down insurrections.⁸¹ Such departures, however, would do nothing to refute an overall supposition that the states readily gave away authority to a rival center of power without a compelling reason. The popular sovereignty question can never replace further analysis of a particular issue, yet it remains a vital foundational inquiry nonetheless.

77. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 27 (1988).

78. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819).

79. U.S. CONST. art. I, § 8, cls. 12-14; art. II, § 2, cl. 1.

80. U.S. CONST. art. I, § 8, cl. 15; art. II, §2, cl. 1.

81. For accounts concerning internal instability, see RAKOVE, *supra* note 10, at 33-34; WOOD, *supra* note 10, at 393-413. For a treatment dealing with national weakness, see generally FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973).

So, more importantly, has nearly everyone thought. Throughout our history, leading constitutional figures have in fact assumed that whatever created the republic goes a long way toward determining what kind of republic was created. As noted, this leitmotif is at least as old as judicial review itself. However "irrelevant" to the specific issue at hand, the "We the People" problem has attracted a judicial roster that includes Jay, Wilson, Story, Taney, Waite, Douglas, Brennan, and of course John Marshall himself.⁸² This list, moreover, does not include those statesmen engaging in constitutional interpretation from the other branches, a perspective recently rediscovered⁸³ and reasserted.⁸⁴ Nor, as also noted, do the "People," "States," or "Peoples," show any sign of quitting the stage. To the contrary, the recent spate of divided "states' rights" decisions has given consideration of founding sovereignty a renewed vitality that is likely to persist as long as the justices and their academic allies divide on the underlying doctrine.⁸⁵ Whatever its logical connection to particular results, the Constitution's creation myth remains "of some importance" if for no other reason than our constitutional culture continues to deem it so.

82. See *supra* text accompanying notes 18-54.

83. David P. Currie's project of recapturing constitutional argumentation in Congress and the Presidency has been especially valuable in this regard. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829* (2001). For an assessment of the project's value in this regard, see Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1090-91 (2001); see also JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999) (examining constitutional debate outside the judiciary).

84. For work debating judicial primacy in constitutional interpretation, see MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999); Kramer, *supra* note 2; Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for his Critics*, 83 GEO. L.J. 373 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Mark V. Tushnet, *Two Versions of Judicial Supremacy*, 39 WM. & MARY L. REV. 945 (1998); Symposium, *The Federalist Society Sixth Annual Symposium on Law and Public Policy: The Crisis in Legal Theory and the Revival of Classical Jurisprudence*, 73 CORNELL L. REV. 281, 371-400 (1988) (essays by John Harrison, Burt Neuborne, Robert Nagel, and Steven Ross).

85. See *supra* text accompanying notes 38-61.

II. MARSHALL, THE POPULAR SOVEREIGN(S), AND THEIR LEGACY

A. *Conventional Wisdom*

So close is the renewed scrutiny that Marshall himself has been transformed from a source of authority to a subject of controversy. Recently, usual understandings of Marshall's position on founding sovereignty have been contested in much the same way as the issue itself.

For the most part, the conventional scholarly wisdom places Marshall and *McCulloch* firmly in the "We the People" camp. Somewhat surprisingly, this standard view rests less on extended analysis than on quotations from *McCulloch*. To this extent, some traditional assessments offer only slightly more express guidance than Marshall himself as to whether "the people" really did mean a single American people. All treatments, however, make clear that Marshall had no truck with the idea that "the states," in the sense of state governments, acted as the founding sovereigns. This acknowledgment usually combines with a nationalist tone and an apparent binary conception of the available choice to leave a single national populace the remaining alternative.

These features characterize the older views in particular. Marshall's first great biographer, Albert Beveridge, takes up *McCulloch*, declaring that Marshall's treatment of founding sovereignty "gives an historical account of the Constitution which, for clearness and brevity, never has been surpassed."⁸⁶ Noting that Marshall rejected compact theory, Beveridge emphasizes *McCulloch*'s assertion that "[t]he Government of the American Nation is, then, 'emphatically and truly, a government of the people. In form and in substance it emanates from them.'"⁸⁷ For good measure, Beveridge adds that "the grandeur" of Marshall's assertion "was to be enhanced forty-four years later, when, standing on the battlefield of Gettysburg, Abraham Lincoln said that 'a

86. ALBERT J. BEVERIDGE, 4 *THE LIFE OF JOHN MARSHALL* 292 (1919). Beveridge then quotes the three paragraphs from *McCulloch* that constitute this account in full. *Id.* at 292 n.2.

87. *Id.* at 293 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)).

government of the people, by the people, for the people, shall not perish from the earth.”⁸⁸

Edward S. Corwin gave the same answer less floridly and a bit more clearly:

At the very outset of his argument in the *Bank* case Marshall singled out the question the answer to which must control all interpretation of the Constitution: Was the Constitution, as contended by counsel for Maryland, “an act of sovereign and independent States” whose political interests must be jealously safeguarded in its construction, *or was it an emanation from the American people* and designed for their benefit? Marshall answered that the Constitution, by its own declaration, was “ordained and established” in the name of the people.⁸⁹

Over time the conventional view had become even more clearly nationalistic. According to Leonard Baker, *McCulloch*’s “first problem was whether the Constitution stemmed from the people of America or from the states.”⁹⁰ If “the Constitution emanated from the people, then what was done in the name of the Constitution could not be challenged by the state powers.”⁹¹ Having set these binary stakes, Baker answers that, “[i]n dealing with this question, Marshall was not even kind to the advocates of states’ rights.”⁹² To the contrary, he notes, “[t]hat the conventions were held in the separate states was explained by Marshall as a fact of *geographical necessity* rather than as a significant political influence.”⁹³ The respected historian R. Kent Newmyer echoed this point, stating that Marshall asserted that ratification took place at the state level, “not because the states were sovereign, but because that was the only practical and convenient way to proceed, since the American

88. *Id.* at 293 (quoting Lincoln). Beveridge adds, but does not elaborate, that “the Nationalist ideas of Marshall and Lincoln are identical.” *Id.* at 293 n.3.

89. EDWARD S. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION* 130-31 (1919) (emphasis added).

90. LEONARD BAKER, *JOHN MARSHALL: A LIFE IN LAW* 594 (1974).

91. *Id.*

92. *Id.* at 594-95.

93. *Id.* at 595 (emphasis added). Echoing Baker, Henry Monaghan argues that “[f]or Marshall, the fact that the Constitution was ratified by the people voting in their separate states at conventions was a natural administrative convenience.” Monaghan, *supra* note 13, at 135 n.85.

people could not ratify en masse."⁹⁴ Perhaps most concise is Charles Hobson, one of Marshall's most recent biographers and current director of Marshall's Papers at The College of William and Mary. As Hobson puts it, "Marshall premised constitutional nationalism on a theory of the Constitution as a constituent act of the people of the United States, not a compact among the several states."⁹⁵

Amidst this accord, G. Edward White offers at least one distinctive voice. At first blush, White might seem to explain *McCulloch* in conventional terms. In his important *The Marshall Court and Cultural Change*, he characterizes the opinion as asserting that, "[i]n the process of ratification sovereignty had not been transferred from the states to the Union, but to the people, and then to the Union."⁹⁶ More importantly, White relies heavily on what Gerald Gunther has termed Marshall's "out-of-court"⁹⁷ commentary, to emphasize Marshall's "denial of the legitimacy of compact theory."⁹⁸

But to say that White believes Marshall championed the "We the People" position would be a mistake. To the contrary, White's work is careful to note that for Marshall the choice between popular sovereigns came down to the state governments versus "the people who made up those states,"⁹⁹ "the people ... as representatives of states,"¹⁰⁰ and "the people of the states."¹⁰¹ White, in other words,

94. R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 897 (2000).

95. CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 111 (1996). Hobson's assertion comes in the course of discussing three cases: *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), and *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). HOBSON, *supra*; see also *id.* at 116-26 (discussing *McCulloch* and the reactions it provoked).

Francis Stites agrees with this assertion when he says that for Marshall, "[T]he Constitution was not a compact between sovereign states but an instrument of government created by the people 'in their highest capacity' as sovereign individuals." FRANCIS N. STITES, *JOHN MARSHALL: DEFENDER OF THE CONSTITUTION* 130 (1981). Stites might be read as developing some distinction between a sovereign American people and sovereign individuals in general, but the context and brevity of his analysis make it clear that his agenda on this point is to reiterate the traditional view.

96. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 545 (1988).

97. Gerald Gunther, *Unearthing John Marshall's Major Out-of-Court Constitutional Commentary*, 21 STAN. L. REV. 449 (1969).

98. WHITE, *supra* note 96, at 563.

99. WHITE, *supra* note 77, at 27.

100. WHITE, *supra* note 96, at 563.

101. *Id.*

views Marshall as rejecting "We the States" in favor of "We the Peoples."¹⁰² What he does not do, however, is fully reconcile Marshall's concept of multiple sovereigns with his seemingly complete rejection of compact theory. If Marshall's denial that the Constitution is a compact means that the several states could not have signed on, left unclear is why this same denial does not have a similar effect on the peoples of the several states. Working the other way, if the peoples of the states could no more have agreed to create a Constitution than the states themselves, left in doubt is the basis for viewing the peoples as the true popular sovereigns.

For present purposes, what matters are less-specific aspects of White's analysis than the ongoing dominance of the conventional wisdom. In fairness, White's references to founding popular sovereignty, although more thorough, do not pretend to offer a full-fledged revisionist challenge to the received wisdom on Marshall and founding sovereignty.¹⁰³ In the absence of such attempts, Marshall's place as the champion of "We the People" seemed secure.

B. Kennedy v. Thomas

The real challenge to the conventional wisdom came not from scholars, but from the Court itself. *Term Limits*, which considered the foundational question of whether the states could mandate rotation in office for their Congressional representatives, provided the setting.¹⁰⁴ The various opinions in the case may not have produced the most searching discussion of federal/state sovereignty since *McCulloch*. They do, however, offer the best window on the Justices' differing conceptions regarding the issue since the recent

102. White's *McCulloch* analysis more or less rejects the "We the People" thesis sub silentio. At one point, his silence actually amounts to omission when he oddly and uncharacteristically quotes Marshall's "out-of-court" conclusion that "[o]ur Constitution is not a compact. It is the act of the people of the United States assembling in their respective states, and adopting a government for the whole nation," *id.* at 564 (quoting John Marshall, *A Friend of the Constitution*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 203 (Gerald Gunther ed., 1969) [hereinafter DEFENSE]), but omits the sentence that came in between, declaring "[i]t is the act of a single party." *Id.*

103. White's massive study is more concerned with, among other things, linking the Marshall Court's jurisprudence with conceptions of republicanism and with examining changing conceptions of the judiciary's role in the Federal system. WHITE, *supra* note 96, *passim*.

104. U.S. *Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783-87 (1995).

line of "states' rights" cases began, including their conceptions of *McCulloch*.

Justice Kennedy's concurring opinion provided the conventional foil. In part to defend his defection from his usual "states' rights" allies, Kennedy wrote separately in large part to defend the "We the People" thesis.¹⁰⁵ "In my view," the concurrence begins, "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."¹⁰⁶ Not content with this, Kennedy also takes on the "We the Peoples" case (the "We the States" view apparently not even rising to the level of meriting refutation). Conceding that the people of his state retained separate political identities, the opinion asserts that "[i]t does not at all follow from this that the sole political identity of an American is with the State of his or her residence."¹⁰⁷ Instead, "the people of the United States . . . have a political identity as well, one independent of, though consistent with, their identity as citizens of [a] State."¹⁰⁸

Making this argument inevitably leads to Marshall and *McCulloch*. No sooner does the concurrence quote Madison, than it turns to *McCulloch*'s declaration that the government "is emphatically, and truly, a government of the people."¹⁰⁹ For Kennedy, it is axiomatic that by "the people" Marshall meant the national populace rather than the peoples of the several states. "It might be objected," he acknowledges, "that because the States ratified the Constitution, the people can delegate power only through the States or by acting in their capacities as citizens of particular States. But in *McCulloch v. Maryland*, the Court set forth its authoritative rejection of this idea."¹¹⁰ For good measure, Kennedy ends his treatment of *McCulloch* quoting at length

105. Kennedy apparently reconciles his commitment to the "We the People" thesis with his usual position in favor of most "states' rights" claims by emphasizing that what the national populace created was a national government that is supreme within a nonetheless limited sphere that the judiciary must be vigilant in policing. See *id.* at 841 (Kennedy, J., concurring).

106. *Id.* at 838.

107. *Id.* at 840.

108. *Id.*

109. *Id.* 839 (Kennedy, J., concurring) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 316 (1819)).

110. *Id.* at 840 (citation omitted).

Marshall's famous passage about the meaning of ratification taking place in the states, which he clearly takes to be nationalist.¹¹¹

What seemed—and at least concerning Marshall has been¹¹²—so mundane and well-settled for Justice Kennedy proved to be anything but for Justice Thomas and the three “states’ rights” Justices who joined his dissent.¹¹³ It appears in fact that Thomas’s challenge of the “We the People” credo prompted Kennedy to take up its defense. The standard invocation of Marshall that the defense made, in turn, gave the dissent its opportunity to debunk that ostensible shibboleth as well.¹¹⁴

Thomas makes clear from the outset that “first principles” of founding sovereignty should preface consideration of doctrine, and that the only proper understanding on this point is that “We the Peoples” created the Constitution.¹¹⁵ As the dissent puts it:

Our system of government rests on one overriding principle: All power stems from the consent of the people. To phrase the principle in this way, however, is to be imprecise about something important to the notion of “reserved powers.” 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.¹¹⁶

Thomas bases his reading on structure and text. He notes first that the Article VII ratification process mandated that the Constitution would take effect only after nine conventions assembling within existing state borders approved the proposal, and then it would be in “effect only ‘between the States so ratifying the same.’”¹¹⁷ Thomas expressly concludes that this formula demonstrates the Constitution could not have been the work of a

111. *Id.* at 840-41.

112. See *supra* text accompanying notes 76-89.

113. See *Term Limits*, 514 U.S. at 845 (Thomas, J., dissenting).

114. Kennedy makes clear that he writes in direct response to the dissent’s views on founding popular sovereignty. *Id.* at 838 (Kennedy, J., concurring). Apart from an initial passing reference to *McCulloch* in the main body of his opinion, Thomas indicates that his reinterpretation of *McCulloch* comes in response to Kennedy. *Id.* at 849-50 & n.2 (Thomas, J., dissenting).

115. *Id.* at 846, 883 (Thomas, J., dissenting).

116. *Id.* at 846.

117. *Id.* (quoting U.S. CONST. art. VII).

single national populace and implicitly views the reliance on conventions rather than the state governments as proof that neither could the Constitution have been ordained by "We the States."¹¹⁸ As for text, Thomas asserts that the Preamble's ostensibly nationalist use of "We the People of the United States"¹¹⁹ actually amounted to no more than a technical and stylistic change to the original draft formulation that declared, "We the people of the States of New-Hampshire, Massachusetts, Rhode Island and Providence Plantations" and the rest.¹²⁰

Thomas further bases his thesis on Marshall and *McCulloch*. Here he seizes on Marshall's observation that "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."¹²¹ Kennedy, following the usual view, can only conclude that Marshall referred to the practical or geographical impossibility of bringing the American people together, even if only in the form of delegates to one grand ratifying convention. For Thomas, however, Marshall's observation is constitutional first and last.

As with many revisionist assertions,¹²² Thomas stakes his claim on greater rigor. In his view, the clue that unlocks the meaning of Marshall's assertion can be found by reading the materials on the case that *U.S. Reports* includes beyond the Court's opinion.¹²³ In particular, this means the summary of argument made by counsel for the state of Maryland that prompted Marshall's foray into founding sovereignty in the first place.¹²⁴ As the dissent rightly observes, Maryland's counsel¹²⁵ presented a stark choice between

118. The closest Thomas comes to making this latter point explicit is his approving reference to Marshall's rejection of state compact theory. *See id.* at 849 n.2.

119. *Id.* at 846 n.1 (quoting U.S. CONST. pmbl.).

120. *Id.* (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 565 (M. Farrand ed., 1911)).

121. *Id.* at 849 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819)).

122. Whether Thomas himself views his interpretation of *McCulloch* as revisionist is another matter. He notes no opinion or scholarly work interpreting the case, apparently content instead to let the evidence on which he relies speak for itself.

123. *Id.* at 853-55 (discussing *McCulloch*, 17 U.S. at 316-400).

124. *Id.* (discussing *McCulloch*, 17 U.S. at 362-77).

125. Although the dissent does not identify him, Thomas refers to the argument made by Walter Jones. *McCulloch*, 17 U.S. at 362-63. Underscoring *McCulloch's* contemporary importance, each side had the benefit of some of the best constitutional advocates of the day.

the national populace school of "We the People" and the compact theory of "We the States."¹²⁶ But Marshall navigated between these extremes. As Thomas also rightly contends, Marshall rejected "counsel's conclusion that the Constitution was ... merely 'a compact between the States.'"¹²⁷ Nonetheless—and here marks Thomas's revisionism—Marshall also rejected the simple nationalist view. The evidence is Marshall's acceptance, even to the point of paraphrasing, of Maryland's own repudiation of the nationalist view in arguing that:

[T]he constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective States. To suppose that the mere proposition of this fundamental law threw [sic] the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish.¹²⁸

Marshall, in other words, split the difference, much like the Constitution itself. He adopted Maryland's repudiation of the nationalist view. Yet in doing so he made clear that neither did he accept the compact-theory baggage that the state attached to its repudiation. In this way, Thomas concludes, *McCulloch*'s celebrated passages should properly be moved into the "We the Peoples" camp.¹²⁹

For Thomas, state-oriented doctrine immediately follows. The most compelling application arises out of *Term Limits* itself. There "the people" of Arkansas, by amending their own Constitution, sought "to prescribe eligibility requirements for the candidates who

Besides Jones, Maryland retained Joseph Hopkinson and Luther Martin, a leading and increasingly state-oriented member of the Founding generation, who was arguing his last important case before the Court. WHITE, *supra* note 96, at 543. Arguing for the United States were Attorney General William Wirt, Daniel Webster, and, delivering the most widely regarded performance of all, William Pinckney. *Id.* at 246. As another measure of *McCulloch*'s importance, the Court waived its usual two-day limit on oral argument. STITES, *supra* note 95, at 130.

126. U.S. *Term Limits, Inc. v. Thornton*, 514 U.S. 779, 853-55 (1995) (Thomas, J., dissenting) (discussing *McCulloch*, 17 U.S. at 362-77).

127. *Id.* at 849 n.2 (quoting *McCulloch*, 17 U.S. at 363 (argument of Walter Jones)).

128. *Id.*

129. *Id.*

seek to represent them in Congress."¹³⁰ Under the "We the Peoples" thesis, the dissent argues, this ought to have been an easy case.¹³¹ On that theory, "[t]he Constitution derives its authority . . . from the consent of *the people* of the States," as manifested in the state ratifying conventions.¹³² As a result, any authority not granted to the federal government by the Constitution is ultimately reserved to these founding sovereigns, a conclusion later made explicit in the Tenth Amendment. Stated this way, the sole question in *Term Limits* becomes whether the federal Constitution precludes actions for which the peoples of the states never gave authority.¹³³ Employing various standard methods of interpretation—express text, necessary implication, original understanding, structural analysis—the dissent sees no such impediment for the people of Arkansas with regard to placing term limits on their federal representatives. Yet the strength (or lack thereof) of this conclusion is not what made *Term Limits* an especially good case to apply "We the Peoples" analysis in this way. What did make this a good case was that, in this instance, the eligibility requirements were not imposed by the state legislature but by "the people themselves."¹³⁴ If they did not do this through a convention, as during the Founding, they at least did so through the rough modern equivalent of a state constitutional ballot initiative—an exercise that would appear to have rendered the act more solemn and fundamental than a simple statute.¹³⁵

But the "We the Peoples" view does not merely support acts of the people of each individual state. In the dissent's hands, it no less benefits state governments. As Thomas makes clear from the outset, the reserved power of a particular state's people need not be asserted through a constitutional amendment in a specific instance.¹³⁶ Such an assertion can just as easily be made through "the elected legislature of that State,"¹³⁷ so long as the people have

130. *Id.* at 845.

131. *Id.* at 845-46.

132. *Id.* at 851.

133. *Id.* at 847.

134. *Id.* at 845.

135. *Id.* at 779, 783-84.

136. *Id.* at 845-46 (Thomas, J., dissenting).

137. *Id.* at 845.

"authorize[d] their elected state legislators to do so."¹³⁸ So long as a state constitution confers authority on the legislature to act, any statute within that delegation ultimately rests on the consent, not just of the state's most recent electorate, but of its founding people. The dissent, moreover, places no limits on whether such a state constitutional delegation need be express or general, even with regard to actions bearing upon federal matters.¹³⁹ Nor is it easy to see how it could, given that the terms of such a delegation would be purely matters of state law. What is clear is that the state restricts the invalidation of federally imposed term limits whether by amendment or statute.¹⁴⁰ So extended, the "We the Peoples" thesis leads to a result as beneficial to a state's government as to extraordinary manifestations of its populace. In such fashion, resort to a "We the States" account becomes redundant.¹⁴¹

How else a "We the Peoples" founding benefits state government is less clear. In the course of his analysis, Thomas does distinguish *Term Limits* from the Court's other recent federalism cases. That case, he points out, deals with "whether Article I bars state action that it does not appear to forbid."¹⁴² By contrast, cases such as *Garcia*,¹⁴³ *National League of Cities*,¹⁴⁴ and *New York v. United*

138. *Id.* at 846.

139. *Id.* at 851-52.

140. *Id.* at 917 & n.39.

141. In the context of *Term Limits*, the "We the Peoples" hypothesis actually supports the state governments *more* than the "We the States" view. Specifically, Thomas rejects the majority's attempt to limit the "reserved" powers that states can exercise to those that they did not possess at the time of the Founding, including the authority to place requirements on who could sit in Congress. As Thomas puts it, while this conclusion would follow if the state governments had created the Constitution, it could not if the peoples of the states did so:

The majority's essential logic is that the state governments could not "reserve" any powers that they did not control at the time the Constitution was drafted. But it was not the state governments that were doing the reserving. The Constitution derives its authority instead from the consent of *the people* of the States. Given the fundamental principle that all governmental powers stem from the people of the States, it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled.

Id. at 851. Whether the majority adopted the "We the States" account, as Thomas asserts, is another matter. *Id.* at 800-05.

142. *Id.* at 853.

143. *Garcia v. San Antonio Metro. Transit Auth.*, 569 U.S. 528 (1985).

144. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

*States*¹⁴⁵ ask “whether any principle of state sovereignty implicit in the Tenth Amendment bars congressional action that Article I appears to authorize.”¹⁴⁶ Thus, in *Term Limits*, the state action should win because its people enjoy a sovereign founding power that they never gave up, as reflected in the Constitution’s own silence. In the other cases, the states should, or at least could, win because “principles of state sovereignty” that the Constitution affirmatively recognizes bar federal actions that would otherwise be legitimate, such as the regulation of state employees. Unlike reserved powers, these “sovereignty principles” do not necessarily follow from the mere fact that the peoples of the states created the Constitution, because approving them would presumably have required an affirmative decision rather than simply declining to delegate additional power. On the dissent’s analysis, in other words, a “We the Peoples” account of the Founding does not necessarily mean that “the peoples,” without more, decided to recognize state sovereign immunity, or an anticommandeering principle, or a bar against federal regulation of state functions.

Or does it? In the short term, the dissent aimed to distinguish the two types of cases to parry the majority’s use of certain language from *Garcia*. Suggestive, however, is Thomas’s apparently approving reference to invoking “traditional aspects of state sovereignty” to invalidate federal statutes on the heels of his “We the States” account.¹⁴⁷ More important, however, is the dynamic that use of creation myths propels. With the exception of Justice Kennedy, it seems no accident that all of the Justices who accept “state sovereignty” principles signed on to Thomas’s version of both the Founding and Marshall. As they have made clear elsewhere, for them it can be a short leap from conflating a state-oriented refusal to give up authority with a no less state-oriented grant of state sovereignty protections.¹⁴⁸ Given that founding popular sovereignty

145. 505 U.S. 144 (1992).

146. *Term Limits*, 514 U.S. at 853 (Thomas, J., dissenting).

147. *Id.* at 852 (quoting *National League of Cities*, 426 U.S. at 841).

148. Exactly this process occurred in the line running from *New York v. United States*, 505 U.S. 144 (1992), through *Printz v. United States*, 521 U.S. 898 (1997), and culminating in *Reno v. Condon*, 528 U.S. 141 (2000). In *New York*, the majority ultimately concluded that its pro-state “anticommandeering” principle resulted from the Constitution’s failure to grant the federal government that power. *New York*, 505 U.S. at 187-88. *Printz* appeared to follow this logic, or at least did not assert otherwise. See Flaherty, *supra* note 12 at 1283-85. In

"does not erase state boundaries, but rather tracks them,"¹⁴⁹ the same considerations that prompted the peoples not to part with their powers to create terms limits likewise led them to approve sovereignty constraints to protect the state governments from federal encroachment.

III. MARSHALL REDUX

A. Revisionism Without More

It would at first appear difficult to sustain either of Justice Thomas's propositions, whether on Marshall's conception of the Founding or the doctrinal implications that result. Further review, however, suggests that the dissent in *Term Limits* fares at least as well as counsel for the state of Maryland in *McCulloch*, and that Maryland did not do all that badly. Contrary to conventional wisdom, Thomas rightly reads Marshall as adopting Maryland's repudiation of the "We the People" account, the more safely to put forth a "We the Peoples" understanding. In this world turned upside down, Thomas's revisionism suffers only because of its lack of confidence. Conversely, the dissent would have done well to balk before it converted its more state-oriented account into state-determinative outcomes. As *McCulloch*'s outcome hints, tracking state boundaries furnishes only one set of presumptions about founding sovereignty. Set against these are the presumptions that arise from placing sovereignty outside normal state government processes—the other key feature of the "We the Peoples" account. For Marshall, if not for the Founding generation, this set of considerations not only applied in the first instance, but applied more strongly.

But perhaps things need not get even this far. Whatever evidence Thomas brings to bear on the Founding, his reinterpretation is hardly compelling on its own terms. For one thing, *McCulloch*'s

Reno, however, the Court in passing indicated that the anticommandeering bar had been a sovereignty principle all along. *Reno v. Charlie Condon*, 528 U.S. 141, 149 (2000) ("In *New York and Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.").

149. *Term Limits*, 514 U.S. at 849 (Thomas, J., dissenting).

language at no point expressly adopts anything approaching a "We the Peoples" thesis. Although Marshall repeatedly employs the terms "the people" and "they," at no point does he clarify what he means in terms of "peoples" or—more likely given the usage of the day—"people" of the respective, several, individual, or separate states, or even just states without more. For another example, Thomas builds his entire case on Marshall's apparent borrowing of a single phrase. The resulting burden the words must shoulder becomes even heavier given that Thomas ignores Marshall's extensive cribbing from the arguments made on behalf of the United States.¹⁵⁰

Marshall's asymmetrical debt on this score leads to an even more telling problem. Despite his commitment to greater context, Thomas fails to acknowledge the structure of the argument in which Marshall's borrowing appears. Recall that Marshall introduces his discussion of founding popular sovereignty in response to "counsel for the state of Maryland[s]" assertion of compact theory, along with the corollaries that the powers of the federal government were delegated by the states, that the states alone are sovereign, and that the federal government must exercise its delegated powers in subordination to the states.¹⁵¹ Marshall makes clear that he raises Maryland's specific points, which he collapses into one "proposition," to show how "difficult to sustain" they are.¹⁵² As he rejects one after the other, nowhere does he indicate that the state has put forward anything worth salvaging.¹⁵³

Then again, Thomas's revisionist take does have several things going for it, not all of which the dissent itself brings out. First, nowhere in *McCulloch* does Marshall expressly equate "the people" with a single, national populace. This failure alone makes the opinion seem a curious choice as a talisman for the "We the People" view. Second, and following from this failure, the dissent does properly look to sources beyond the opinion itself to resolve the ambiguity.¹⁵⁴ Third, the resemblance between Jones's "threw the

150. See *infra* text accompanying notes 155-60.

151. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819).

152. *Id.*

153. *Id.* at 402-04.

154. See Flaherty, *supra* note 10, at 553-54.

American people into one aggregate mass"¹⁵⁵ and Marshall's "compounding the American people into one common mass"¹⁵⁶ does suggest that the opinion at least bowed to counsel's rhetoric and so, at least presumptively, his substance as well. Bolstering this surmise, though again the dissent does not mention it, was Marshall's habit of drawing extensively from lawyers' arguments, often nearly verbatim.¹⁵⁷ *McCulloch* was no exception, as far more extensive borrowing from the arguments for the United States indicate.¹⁵⁸ Nor was Marshall in a position to do anything else but borrow given that he issued the Court's opinion a mere four days after the conclusion of six days of oral argument.¹⁵⁹

Yet without more one way or the other, the revisionist challenge would appear to be just that. The "rediscovery" of Marshall's reliance on Jones suggests that the conventional wisdom may have also viewed *McCulloch*'s rejection of Maryland's position too completely. On its own, however, the suggestion hardly seems sufficient to overturn the standard account itself. For that matter, defenders of the conventional wisdom would not be without rejoinders. Far from agreeing with the state, for example, Marshall could simply have been turning its argument on its head as would any cagey lawyer. Why think, without further evidence, that *McCulloch*'s echoing of Jones indicates that Marshall subtly adopted Maryland's rejection of the "We the States" view while accepting a "We the Peoples" understanding that the state itself never put forward? Far more straightforward is a reading in which Marshall employs Jones's repudiation of the nationalist understanding to trivialize it. No one thought that "We the People" could assemble to ordain the Constitution, not because, as Jones argued, the alternative was a state-bound compact theory, but rather, as one of Marshall's biographers later stated, because of "geographical necessity."¹⁶⁰

But there is more evidence—substantial, well-known, and readily available in accurate form for the past several decades.¹⁶¹ As the

155. *McCulloch*, 17 U.S. at 316 (argument of Walter Jones).

156. *Id.* at 403.

157. See WHITE, *supra* note 96, at 247-50.

158. *Id.*

159. *McCulloch*, 17 U.S. at 321, 400.

160. BAKER, *supra* note 90, at 595.

161. See, e.g., Gunther, *Introduction to DEFENSE*, *supra* note 102, at 1.

man who reintroduced this evidence has written, *McCulloch* produced a substantial out-of-court debate, "with the Chief Justice of the United States in the unique role of waging newspaper battle with the chief ideological opponents of the Supreme Court."¹⁶² This battle had two chapters. The Court handed down *McCulloch* on March 6, 1819.¹⁶³ Before the month was out, Virginia's *Richmond Enquirer* published a series of attacks on the case by "Amphictyon," probably Judge William Brockenbrough.¹⁶⁴ To these Marshall anonymously replied as "A Friend to the Union" in the *Philadelphia Union* during the next month. Less than a month later, the *Richmond Enquirer* published an even more extensive set of four essays, these written by "Hampden," in reality the formidable Judge Spencer Roane of the Virginia Court of Appeals.¹⁶⁵ Marshall responded with a nine-part reply under the pseudonym, "A Friend of the Constitution" in the *Alexandria Gazette*.¹⁶⁶

Until Gerald Gunther reconstructed this exchange, Marshall's first contribution had been known only in garbled form and his second set of essays had been lost for nearly 150 years.¹⁶⁷ This long gap may have had something to do with the usual treatment of Marshall on founding sovereignty. Reliance on outside materials to resolve ambiguities in *U.S. Reports* simply was not an option for most of our history, especially when it took the Thomas dissent to put those ambiguities back in play.

B. Marshall's Creation Myth

What matters, however, is what the exchange shows. Whether as "A Friend to the Union" or "A Friend of the Constitution," Marshall's basic response to his two adversaries proceeds in two stages. Initially, Marshall concentrates on reaffirming *McCulloch's* denial that the Constitution was established by the

162. *Id.*

163. BAKER, *supra* note 90, at 593.

164. Gunther, *Introduction* to DEFENSE, *supra* note 102, at 1.

165. Roane's "Hampden" Essays, in DEFENSE, *supra* note 102, at 106.

166. For the definitive scholarly account of how these essays originated, how Marshall's contributions were garbled or lost, and how the exchange was reconstructed, see Gunther, *Unearthing John Marshall's Major Out-of-Court Constitutional Commentary*, *supra* note 97, at 449-55.

167. Gunther, *Introduction* to DEFENSE, *supra* note 102, at 2, 14-15.

state government. After this, he turns to defending the Court against the accusation that it claimed the Constitution was conversely the creation of the American people as one undifferentiated mass. Along the way, Marshall makes clear that the position *McCulloch* actually staked out fell in between—that the Constitution was created by the peoples of the several states composing distinct political societies assembling in their highest sovereign capacity.

Consider the initial stage. Marshall's first sustained discussion of the issue leaves no doubt that any argument that the state governments established the new national order is untenable. At the same time, it also makes plain that the *McCulloch* opinion specifically, if not entirely clearly, asserted that the Constitution was instead established by the peoples of the respective states. The analysis in "A Friend to the Union" merits quotation at some length:

I will proceed to consider the first objection made to the opinion of the Supreme Court. It is stated to be "the denial that the powers of the federal government were delegated by the states."

This assertion is not literally true.—The court has not, in terms, denied "that the powers of the federal government were delegated by the states," but has asserted affirmatively that it "is emphatically and truly a government of the people," that it "in form and in substance emanates from them."

If Amphycion chuses [sic] to construe the affirmative assertion made by the court into a negative assertion that "the powers of the government were not delegated by the states," I shall not contest the point with him unless he uses the word "states" in a different sense from that which a great part of his argument imports. In what sense, let me ask, does he use the word? Does he mean the people inhabiting the territory which constitutes a state? Or does he mean the government of that territory? If the former, the controversy is at an end. He concurs with the opinion he arraigns. The Supreme Court cannot be mistaken. It has said, not indeed in the same words, but in substance, precisely what he says. The powers of the government were delegated, according to that opinion, by the people assembled in convention in their respective states, and deciding, as all admit, for their respective states.

If Amphictyon means to assert, as I suppose he does, that the powers of the general government were delegated by the state legislatures, then I say that his assertion is contradicted by the words of the constitution, and by the fact[s of ratification].¹⁶⁸

The powers of the general government were in no way "delegated by the state legislatures."¹⁶⁹ So much for "We the States." That said, the Court never denied that those powers were delegated by "states' in a different sense."¹⁷⁰ If "Amphictyon" thinks the Court meant to deny that the delegated powers came from "the people inhabiting that territory which constitutes a state," then "the controversy is at an end."¹⁷¹ Instead, the Court's critic "concurs with the opinion he arraigns."¹⁷² The Supreme Court agrees that the "powers of the government were delegated, according to that opinion, by the people assembled in convention in their respective states."¹⁷³ So much for "We the Peoples."

Furthermore, "A Friend of the Union" goes on to turn "Amphictyon's" reliance on Madison's famous "Report of 1800" on its head to make the same point.¹⁷⁴ He then makes the point yet again by declaring that the *McCulloch* opinion accords "precisely" with "Amphictyon's" apparent concession, "That the constitution was submitted to conventions elected by the people of the several states; that is to say, to the states themselves in their highest political and sovereign authority."¹⁷⁵ Marshall pounces upon this statement to exclaim, "He admits that the powers of the general government were not delegated by the state governments, but by the people of the respective states. That is the very proposition advanced by the Supreme Court, and advanced in terms too plain to be mistaken."¹⁷⁶

Nor does Marshall retreat from this position later on. As put forth by "A Friend of the Constitution:"

168. Marshall, *A Friend to the Union*, in DEFENSE, *supra* note 102, at 84-85.

169. *Id.* at 85.

170. *Id.* at 84.

171. *Id.* at 84-85.

172. *Id.* at 85.

173. *Id.*

174. *Id.* at 87.

175. Marshall, *A Friend of the Constitution*, in DEFENSE, *supra* note 102, at 194.

176. *Id.* at 88-89.

The counsel for the state of Maryland, we are told, contended that the constitution was the act of sovereign states, as contradistinguished from the people. In opposition to this proposition, the court maintained that the constitution is not the act of the state governments, but of the people of the states. In the course of this argument, the term—*the people*—without any annexation, is frequently used; but never in a sense excluding the idea that the people were divided into distinct societies, or indicating the non-existence of the states.¹⁷⁷

Typical of his more nationalistic emphasis, "A Friend of the Constitution" does follow this assertion with a forceful discussion that "the people of the United States" nonetheless have a "national existence."¹⁷⁸ The United States goes to "war as a nation."¹⁷⁹ The Constitution states that a Senator must be a "citizen of the United States."¹⁸⁰ Fairly read, however, these and other examples indicate that Marshall has moved on to speak of the nature of the republic *after* it has been constituted—"a nation; but a nation composed of states in many, though not in all, respects, sovereign"—rather than the nature of the popular sovereigns who did the constituting.¹⁸¹ Marshall, moreover, introduces his examples in immediate response not to the founding sovereignty argument made by Maryland, but to "Hampden's" accusation that the Supreme Court meant to claim that the Constitution did not recognize the states.¹⁸²

Striking in all of this is Marshall's willingness to accept that multiple founding sovereigns means constitutional compact—albeit in a qualitatively more limited way than compact theory usually connotes. "A Friend to the Union" does it in the course of tossing "Amphictyon's" use of Madison's landmark "Report of 1800" back in his face. The Report grew out of the failure of the Virginia and Kentucky Resolutions, which drew censure in the place of the

177. *Id.*

178. *Id.* at 194-95.

179. *Id.* at 195.

180. *Id.*

181. *Id.* Earlier Marshall cites with approval Madison's assertion in *The Federalist No. 39* that the Constitution (as opposed to its ratification) is neither "national" nor "federal," "but a composition of both." *Id.* at 194 (citing THE FEDERALIST NO. 39 (James Madison)).

182. *Id.* at 194.

expected endorsement from other state legislatures. To explain and defend Virginia's position, Madison served as principal author of a resolution that the legislature subsequently adopted. According to Marshall, "Amphictyon" misread the Report to assert standard "We the States" compact theory.¹⁸³ Marshall denies this. Quoting from the Report, he (rightly) invokes Madison as asserting a compact among the several peoples:

The report continues: "Whatever different constructions of the term 'states' in the resolution may have been entertained, all will at least concur in that last mentioned" (the people composing those political societies in their highest sovereign capacity) "because," the report proceeds, "in that sense the constitution was submitted to the 'states.' In that sense the states ratified it; and in that sense they are consequently parties to the compact from which the powers of the federal government result."¹⁸⁴

According to Marshall, "[t]his celebrated report, then, concurs exactly with the Supreme court, in the opinion that the constitution is the act of the people."¹⁸⁵

No less striking, though more subtle, is the concurrence from Marshall's second alter ego. This appears as "A Friend of the Constitution" floats an argument, elaborated later, that the Constitution is not "a league, or a contract of alliance between the states, sovereign and independent," as were the Articles of Confederation.¹⁸⁶ After sketching the distinction, Marshall blandly adds that "The people of the United States have certainly a right, if they choose to exercise it, to reduce their government [back] to a league."¹⁸⁷ In isolation, this could mean that "We the People" could reemerge for the purpose of unounding the national government and reconstituting what Marshall viewed as thirteen sovereign state governments joined by treaty. No small conceptual problem with this reading would be explaining how what had been a single founding entity could use its sovereign authority to dismember, if

183. Marshall, *A Friend to the Union*, in DEFENSE, *supra* note 102, at 88.

184. *Id.* at 87-88.

185. *Id.* at 88.

186. Marshall, *A Friend of the Constitution*, in DEFENSE, *supra* note 102, at 199.

187. *Id.*

not extinguish, itself. But even if that problem could be overcome, there remains the Report of 1800. Given Marshall's earlier position, a more coherent interpretation would take Marshall to say that as the thirteen sovereign peoples entered a compact establishing a true (though limited) national government, so too could they dissolve the pact and return to the status quo ante.

At this point turn, as Marshall does, to the second phase of his defense. Here each set of essays answers the charge that *McCulloch* never meant to imply that its use of "the people" as the founding agents meant the national populace as opposed to those within the states. Once more the initial treatment by "A Friend to the Union" deserves a fuller quotation:

Amphyction adds, that those conventions represented "not the whole mass of the people of the United States, but the people only within the limits of the respective sovereign states." "The individuality of the several states was still kept up, &c."

And who has ever advanced the contrary opinion? Who has ever said that the convention of Pennsylvania represented the people of any other state, or decided for any other state than itself? [W]ho has ever been so absurd as to deny that "the individuality of the several states was still kept up?" Not the supreme court certainly. Such opinions may be imputed to the judges, by those who, finding nothing to censure in what is actually said, and being predetermined to censure, create odious phantoms which may be very proper objects of detestation, but which bear no resemblance to any thing that has proceeded from the court.

Nothing can be more obvious than that in every part of the opinion, the terms "state" and "state sovereignties" are used in reference to the state governments, as contradistinguished from the people of the states. The words of the federal convention, requesting that the constitution might "be submitted to a convention of delegates chosen in each state by the people thereof," are quoted; and it is added, "This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people." That is, to the people of the respective states; for that is the mode of proceeding said to have been recommended by the convention, and to have been adopted.—After noticing that they assembled in their respective states, the opinion adds: "And

where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one mass."

Yet Amphyction affects to be controverting the reasoning of the supreme court when he says that the convention of our state [Virginia] did not represent all the people of the United States, that "the individuality of the several states was still kept up." Disregarding altogether the language of the court, he ascribes to the judges an opinion which they say, "no political dreamer was ever wild enough to think of."¹⁸⁸

Note that Marshall speaks about more than mere geographic necessity to account for the several conventions. Instead, the conventions represented not "the people of any other state"¹⁸⁹ nor "decided for any other state than itself,"¹⁹⁰ but rather "the people of the respective states," as reflected in the plan of ratification.¹⁹¹ What held generally, held for Virginia, whose convention "did not represent all the people of the United States."¹⁹² To say otherwise would be "controverting the reasoning of the supreme court."¹⁹³ It follows that the better reading of *McCulloch* presumed that the "individuality of the states" was kept up in the sense, as seen earlier, of states as "the people composing those political societies in their highest sovereign capacity."¹⁹⁴ According to the Court, the conventions reflected different sovereign peoples, not the logistical difficulty of a grand national convention. So much for "We the People."

"A Friend to the Union," the later alter ego, agrees in this phase of the argument as well. Marshall notes Roane's contention that, "The constitution of the United States was not adopted by the people of the United States as one people, it was adopted by the several states,"¹⁹⁵ adding that "Hampden" "proceeds to show that

188. Marshall, *A Friend to the Union*, in DEFENSE, *supra* note 102, at 89-90.

189. *Id.* at 89.

190. *Id.*

191. *Id.* at 90.

192. *Id.*

193. *Id.*

194. *Id.* at 87.

195. Marshall, *A Friend of the Constitution*, in DEFENSE, *supra* note 102, at 197.

the constitution was adopted by the people of the several states acting in separate conventions.”¹⁹⁶ To this Marshall replies, “This is precisely what the court had previously said.”¹⁹⁷ Continuing, Marshall, as before, accuses his accuser of willfully misconstruing *McCulloch*’s obvious meaning with the claim that the opinion’s use of “the people” meant national populace. It did not.

The opinion cannot be inspected without perceiving that these words are not quoted, as “importing” in the constitution, “the people of America in exclusion of those of the *several* states,” but as importing the people, in exclusion of their governments.

The court then has not denied, but has affirmed, that the constitution was adopted by the people acting as states.¹⁹⁸

This lengthy, though highly abridged, excursion might end here but for the one passage that appears to stand apart. Given the conventional wisdom, it is also the passage that has received more attention than anything considered so far. In his penultimate essay, “A Friend of the Constitution” takes up Roane’s argument that the Supreme Court lacked the jurisdiction to settle the Bank controversy. This apparently follows, Marshall states, because of “Hampden’s” fundamentally erroneous reliance on classic compact theory, specifically “that our constitution is a mere league, or a compact, between the several state governments, and the general government.”¹⁹⁹ Since treaties or contracts among sovereigns, cannot be resolved by the contracting parties, the Court, as the adjudicatory division of one of these parties, has no authority to settle the dispute. *Pacta sunt servanda*, but not by any of the governments who made the pact.

Marshall replies that this type of analysis has no place because

the constitution of the United States is not an alliance or league between independent sovereigns; nor a compact between the government of the union, and those of the states; but is itself a government, created for the nation by the whole American

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 201.

people, acting by convention assembled in and for their respective states.²⁰⁰

Even just to this point, the reference to "whole" American people indicates a nationalist shift in tone. But in light of all that has come before, perhaps the most prudent reading would view Marshall as simply stating that, in fact, the entire national populace did sign on to the Constitution, even though they did so as the several founding sovereigns. From here he first takes aim at the idea that the Constitution is a treaty or forms a league, in part precisely because "We the States" did not create it.²⁰¹

Then comes the more problematic language. "A Friend" turns his sights from the Constitution as "league" or "treaty" to the Constitution as "compact" or "contract,"—or, more strictly speaking, "compact theory." Marshall notes that such agreements require parties. But where are they? The federal government "can certainly not be a party to the instrument by which it was created."²⁰² Nor "have the state governments made this instrument."²⁰³ To the contrary, it "is the act of people themselves, and not the act of their governments."²⁰⁴ So far, perhaps, so good. But then comes the language:

There is then no agreement formed between the government of the United States and those of the states. Our constitution is not a compact. *It is the act of a single party.* It is the act of the people of the United States, assembling in their respective states, and adopting a government for the whole nation.²⁰⁵

Has Marshall, almost in passing, abandoned his careful defenses of "We the Peoples", and let his true nationalist colors show? Perhaps. Or perhaps he has simply gotten carried away in his refutation of Roane, pushing back harder because he has been pushed himself.

There is no denying that the "single party" language does not sit easily with Marshall's repeated and lengthy apologia for ratification

200. *Id.* at 202.

201. *Id.* at 202.

202. *Id.* at 203.

203. *Id.*

204. *Id.*

205. *Id.* (emphasis added).

by "the people of the respective states." All things considered, the most plausible reconciliation must be that Marshall means no more than his repeated assertions that no compact exists among the various governments, state and national. The Constitution is in no way a *governmental* compact.²⁰⁶ More daringly, it is the act of a single party when considering governments as the only potential candidates for entering the contract. From this governmental perspective, neither those parties, nor the resulting contract, exists. What does exist is the single party of the American people. But from the perspective not of governments, but of founding sovereigns, what was the single party, the people of the United States, becomes a different sort of party, better understood as multiple: the people of the different states meeting in convention expressing the highest sovereignty of those states. To say Marshall changed his conception of founding sovereignty at the eleventh hour, therefore, is to commit a type of categorical error. Reconciling Marshall's language in this way has the virtue of preserving his equally striking acceptance of the Report of 1800's view of the Constitution as a more limited compact among the sovereign peoples. More importantly, the interpretation offered here preserves everything else Marshall wrote on the issue in the two sets of essays. Yet even if the "single party" cannot in the end be squared with everything else, the choice then becomes to privilege a single sentence over page upon page of clear and close analysis. Failing that, "We the Peoples" should prevail after all.

C. Marshall's Conclusions, Doctrinal and Beyond

Marshall's endorsement of "We the Peoples" may confound expectations, but he will confound expectations still further in denying that state government benefits as a result. This latter set of expectations flows from the geographic divisions on which ratification by several sovereign peoples rest. It stands to reason that the people within a given state would not lightly delegate authority to a national government when their own government would presumably be closer, more responsive, and focused on that particular people's character, needs, and desires. Out of this

206. *Id.* at 197-203.

supposition arises an array of doctrinal conclusions that Brokenbrough, Roane, Thomas, and countless advocates in between have put forward. Grants of federal power should be construed narrowly.²⁰⁷ State immunities should be presumed.²⁰⁸ Federal bars to reserved state authority should rarely be inferred.²⁰⁹

Yet a "We the Peoples" understanding need not go down this path. The first clue is *McCulloch* itself, which famously features a comparatively broad construction of federal power and justification of an implicit federal bar to state taxation authority. Many more indications come from Marshall's defense. One is the sheer vehemence of the disagreement between Marshall on the one hand, and "Amphictyon" and "Hampden" on the other,²¹⁰ given that each of them at some point relies on the "We the Peoples" model, especially Marshall and Roane. One further indication, of course, is the substantive disagreement between them, both in elaborating *McCulloch* and addressing questions beyond it.²¹¹ No less importantly, the essays indicate why a less state-oriented path should be available. Ratification may have tracked state borders, he reminds, but it also reflected fundamental dissatisfaction with the state governments themselves. As is central to Founding scholarship, this dissatisfaction led precisely to approval of the Constitution by state conventions rather than state governments. For Marshall, what matters about ratification by "We the Peoples" was not geographic division, but this more profound and immediate feature of the process.

That said, Marshall's statements on the matter accord with the view that while the choice of creation myth does not compel any doctrinal conclusions, it can point toward them. "A Friend to the Union" tends to emphasize the connection. Marshall's opportunity comes in response to "Amphictyon's" claim "that the constitution ought to receive the same construction, whether its powers were delegated by the people or the states."²¹² Marshall responds that he

207. See *supra* note 39.

208. See *supra* notes 66-67 and accompanying text.

209. See *supra* notes 72-75 and accompanying text.

210. See generally DEFENSE, *supra* note 102.

211. See *supra* notes 183-206 and accompanying text.

212. Marshall, *A Friend to the Union*, in DEFENSE, *supra* note 102, at 82.

"shall not controvert the proposition,"²¹³ but indicates his disagreement anyway. "Amphictyon," Marshall argues, cannot be serious that a particular account of the Founding has no connection to doctrine because of "the extreme importance he attaches to his theory [of the Founding]."²¹⁴ The same point about attaching extreme importance to founding sovereignty, of course, could be said about "A Friend to the Union." Continuing, Marshall chides that "[i]f the powers of the general government were to be in no degree affected by the source from which they were derived, it is not easy to comprehend how [in Amphictyon's view] the liberty of the American people can depend on the adoption of one opinion or the other [about who established the Constitution]."²¹⁵

Turning to a specific conclusion, Marshall denies his opponent's argument that the state legislatures can canvass or remonstrate against Congress or the President because the state governments created them. This does not follow because the right "to remonstrate against the abuse of power, must reside in all who are affected by those measures . . . , whether it was delegated by them or not."²¹⁶ But Marshall also suggests that there is a connection after all. Coming at the problem the other way, "Amphictyon's" error on the right to remonstrate demonstrates his error in asserting "We the States" theory. Marshall pushes his adversary's argument to show that if it is correct, that the state governments have a power to remonstrate as founding sovereigns, it follows that the people of the states cannot do so separately or individually. Yet since "this conclusion be false, as it must be, the premises," that is that the state governments created the federal government, "are false also."²¹⁷

Later, "A Friend of the Constitution" does deny a necessary link between the process of creation and what is created. "The character of a government depends on its constitution" he stresses, "not on its being adopted by the people acting in a single body, or in single bodies."²¹⁸ Running one direction: "The kingdom of Great Britain

213. *Id.*

214. *Id.*

215. *Id.* at 82-83.

216. *Id.* at 83.

217. *Id.*

218. Marshall, *A Friend of the Constitution*, in *DEFENSE*, *supra* note 102, at 197.

and Ireland is a consolidated kingdom. Yet it formerly consisted of three distinct kingdoms—England, Scotland, & Ireland; and this union was effected by their several parliaments, acting separately in each kingdom.”²¹⁹ “They the Kingdoms,” in other words, established a unified, national state. Going the other way, the 1792 French Convention almost established a federal republic, which would not have been less so “because it was adopted by the representatives of the whole people, acting in mass.”²²⁰ These examples, however, do not belie the relevance of adoption to result, especially given that one remained hypothetical. Aside from his treatment of “Amphictyon” for disingenuously denying *any* connection, Marshall simply devotes too much effort and passion to getting the creation myth right to suppose that he is merely concerned with historical accuracy.

Nor does Marshall always see the connection as merely relevant. In at least one instance, he treats an issue as if the type of creation myth one accepts does necessarily determine the outcome. That instance is the same one that occasioned his often misconstrued “single party” rhetoric.²²¹ Recall that “Hampden” accused the Supreme Court of “deciding a cause not within its jurisdiction.”²²² This charge, as noted, was based on the proposition that when “We the People” created the Constitution, they did no more than enter into a league or compact. Either treaty or contract law principles would therefore apply in resolving disputes among the parties. Under these bodies of law, the settlement of disputes fell to the parties to the agreement, not the court of a government that (under treaty law) was a mere creation of the league or (under contract law) one of the interested parties.²²³

“A Friend of the Constitution” greets this argument grumbling that this “last accusation” seems so imaginative that it somehow escaped the learned counsel for Maryland.²²⁴ He does not, however, speculate that “We the States” could have agreed to make the Supreme Court the final arbiter of controversies, a choice along the

219. *Id.* at 197-98.

220. *Id.* at 198.

221. See *supra* notes 200-06 and accompanying text.

222. Marshall, *A Friend of the Constitution*, in *DEFENSE*, *supra* note 102, at 200.

223. *Id.* at 201-02.

224. *Id.* at 201.

lines of the decision by England, Scotland, and Ireland to create a consolidated kingdom.²²⁵ Instead, as also noted, Marshall concentrates on demonstrating that the Constitution cannot possibly be a league or compact among sovereign states because it was "We the Peoples"—not sovereign governments—that created it.²²⁶ This is because the several peoples, not to mention one national people, could not have entered into the type of agreement that would automatically subject disputes between the governments they established to treaty or contract principles. As "Hampden's" argument held, those bodies of law apply to an agreement's original parties. Since no government was a party in the creation of the Constitution, the jurisdictional objection must fail. More importantly, it fails as a direct function of Marshall's understanding of who created the Constitution.

But whether Marshall views founding sovereignty as on occasion dispositive or, more often, probative, the large question remains: what results does he derive in light of the creation myth he puts forward? To coin a phrase, happily the question is not of an intricacy proportioned to its interest. Nothing about his fidelity to "We the Peoples" prevented Marshall from rejecting the state-oriented alternatives placed before him in *McCulloch*. To the contrary, his understanding of ratification in those terms pushed him just the other way.

So well-known and expounded are *McCulloch*'s reasoning and results that they do not need elaborate attention here. For present purposes, it suffices to note first that *McCulloch* itself rejected Maryland's argument against a narrow construction of Congressional power. To do this, Marshall famously deployed the doctrine of implied powers, then bolstered it with an expansive reading of the "Necessary and Proper Clause."²²⁷ Next, the Court rejected Maryland's argument that the Constitution established no bar against a state taxing a federal instrumentality that Congress

225. Treaties that establish a transnational arbiter are today commonplace. See, e.g., European Convention on Human Rights, Protocol 11 (Nov. 1, 1998), available at <http://conventions.coe.int/treaty/EN/Treaties/html/005.htm>. Such treaties can even establish jurisdiction for disputes between the original parties and other institutions that the treaty creates in addition to the court. See, e.g., Treaty of Rome, Mar. 25, 1957, 1 C.M.L.R. 573.

226. Marshall, *A Friend of the Constitution*, in DEFENSE, *supra* note 102, at 202-03.

227. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-24 (1819).

created.²²⁸ Here, only a little less famously, Marshall relied on the destructive potential of the taxing power, together with the argument that the Maryland legislature did not represent the rest of the country, to hold that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by congress."²²⁹ Though current scholarship may debate just how nationalist Marshall was in the abstract, or from a modern viewpoint, *McCulloch* still merits its reputation for denying the state-centered reasoning placed before it. It was just for this reason, rather than simply validating the Bank, that *McCulloch* was among the most controversial opinions that the Marshall Court handed down.²³⁰

More to the point, Marshall in no way retreated from *McCulloch*'s positions even as he made clear that the opinion never meant to adopt anything other than a "We the Peoples" account of founding sovereignty. No sooner does "A Friend to the Union" issue his first essay, which set forth that founding account, than he launches a second and last article devoted almost entirely to defending the Court's reading of the Necessary and Proper Clause.²³¹ Marshall accordingly contends that the Court correctly rejected the "restricted interpretation" that would have limited federal power and instead applied a "fair interpretation," that facilitated without enlarging the grant of powers to Congress.²³² Likewise, "A Friend of the Constitution" similarly defended *McCulloch*'s reasoning against the more sophisticated "Hampden." In this far more wide-ranging and in-depth response, Marshall once again repeats but does not retreat. To note one theme, Marshall denies that the Court ever contended for "additional" powers that were never granted, as opposed to "incidental" powers implicit in the grant.²³³ Of relevance here is not just Marshall's careful defense, which often includes quoting long passages from *McCulloch* itself.²³⁴ It is also that Marshall mounts this defense against opponents to whom he,

228. *Id.* at 424-36.

229. *Id.* at 436.

230. WHITE, *supra* note 77, at 27.

231. Marshall, *A Friend to the Union*, in DEFENSE, *supra* note 102, at 91-105.

232. *Id.* at 92-93.

233. *E.g.*, Marshall, *A Friend of the Constitution*, in DEFENSE, *supra* note 102, at 171 (distinguishing "incidental" and "additional" in a dictionary sense).

234. *E.g.*, *id.* at 182-83 (quoting *McCulloch*) (citation omitted).

at various points, attributes the same conception of founding sovereignty that he himself holds.²³⁵

It might be objected, of course, that Marshall was “nationalist” only in the context of 1819. A “We the Peoples” view might once have been consistent with rejecting extreme antebellum “states’ rights” challenges. Nearly 200 years later, the conception could only support today’s more “modest” federalism claims, and still less coexist with the federal colossus that has emerged since the Civil War and New Deal. On this view, *McCulloch*’s treatment of federal authority sits more comfortably alongside *United States v. Lopez*²³⁶ than *Wickard v. Filburn*.²³⁷ To the extent *McCulloch*’s analysis followed from Marshall’s view of founding sovereignty, so much the worse for *Wickard*.

This objection falls short for a number of reasons. First, it is not strictly accurate even on its own terms. Aspects of *McCulloch*’s judgment have actually proven more nationalistic than the nation has since been prepared to accept, and not because of the last few years of “states’ rights” jurisprudence. With *James v. Dravo Contracting Co.*,²³⁸ the Court “decisively rejected the argument that any state regulation which indirectly regulates the Federal Government’s activity is unconstitutional.”²³⁹ Beyond this, and as more than a few post-New Deal scholars have argued, remaining faithful to Marshall’s principles requires applying them in light of the nation’s changed circumstances rather than merely replicating a specific application that he made or would have made. Here, classically, Marshall’s analysis of the Commerce Clause supports *Wickard*, not because Marshall would have decided the case the same way had he gotten it in 1824,²⁴⁰ but because his reasoning

235. See, e.g., Marshall, *A Friend to the Union*, in DEFENSE, *supra* note 102, at 88-89; Marshall, *A Friend of the Constitution*, in DEFENSE, *supra* note 102, at 194.

236. 514 U.S. 549 (1995).

237. 317 U.S. 111 (1942).

238. 302 U.S. 134 (1937).

239. *North Dakota v. United States*, 495 U.S. 423, 434 (1990) (plurality opinion) (discussing *James*). Earlier, Justice Holmes presaged this result writing in dissent that: “The power to tax is not the power to destroy while this Court sits.” *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

240. The year of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

supports it given the consolidation of the national economy since then.²⁴¹

A more fundamental problem with the temporal objection is that it remains unproven and perhaps unprovable. Certainly scholars on the left²⁴² and right²⁴³ commonly identify Marshall's jurisprudence as continuing to cut in nationalist directions. So long as this remains the case, Marshall's first principles regarding founding sovereignty likewise remain a vital part of the results he cashed out as currently understood. Considered from the opposite direction, Marshall's views on who established the Constitution cannot be consigned to the "states' rights" persuasion unless the judgments and rationales he espoused can as well. One doesn't have to see Marshall as a New Dealer to concede that his views on ratification prefaced doctrines that can still support national authority and, even more to the point, oppose claims of state sovereignty.²⁴⁴

On a more fundamental level, moreover, the preface is the story. Marshall's explications of *McCulloch* make clear not just that his "We the Peoples" understanding appeared side by side with what for him were nationalist rejections of any array of state sovereignty claims. He further suggests *why* the "We the Peoples" approach broadly supports such denials.

Marshall sought to remind Americans that the "sovereign" state governments had acquitted themselves so poorly under the Articles of Confederation that the need for constitutional reform had become overwhelming. The approval for such reform ultimately fell not to the state governments that had occasioned the need for change, but to the sovereign peoples of the respective states, meeting in

241. For one of the most recent and rigorous versions of this type of argument, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

242. See, e.g., Eisgruber, *supra* note 2; Eisgruber, *supra* note 8.

243. See, e.g., John Yoo, *McCulloch v. Maryland*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 241 (William N. Eskeridge, Jr. & Sanford Levinson eds., 1998).

244. Cf. WHITE, *supra* note 96, at 486. This point goes double when one recalls that judicial review as comprehended during Marshall's day was extremely deferential to exercises of Congressional authority. More broadly, if the more constrained nationalism of Marshall's day suggests that his jurisprudence supports recent "states' rights" decisions as restoring a previous federalism balance, the more constrained idea of judicial review during the same period undercuts those decisions from a separation of powers perspective. See Kramer, *supra* note 2, at 74-128. It is difficult to see how the former historical point, if accepted, should count as a limit on modern analysis, but the latter one should not.

convention. For similar reasons, the nature of the reform that the people approved became a limited but genuine national government that greatly curtailed state authority. For present purposes, what matters is less the specific solutions and borders the resulting Constitution attempted to map out. Instead, it is Marshall's reminder that the most important aspect of ratification was not geography after all, but the reasons for ratification—substantive and procedural—in the first place.

Marshall's invocation of the "critical period"²⁴⁵ comes late in the "Friend of the Constitution" essays in immediate response to reliance by "Hampden" on the "We the States" compact theory. The key passage, interestingly, begins as a prospective warning against returning to an Articles of Confederation regime, though eventually moves back to note the choices facing the country at the time. "[L]ook back," Marshall pleads,

to that awful and instructive period of our history which preceded the adoption of our constitution. These states were then truly sovereign, and were bound together only by a league. Examine with attention, for the subject deserves all your attention, the consequences of such a system. They are truly depicted in the *Federalist*, especially in the 15th No. of that work. The author thus commences his catalogue of the ills it had brought upon us—"We may indeed, with propriety, be said to have reached almost the last stage of national humiliation. There is scarcely any thing that can wound the pride, or degrade the character, of an independent people, which we do not experience." And he concludes his long and dark detail of those ills with saying,—*"To shorten an enumeration of particulars which can afford neither pleasure nor instruction, it may in general be demanded, what indication is there of national disorder, poverty, and insignificance, that could befall a community so peculiarly blessed with natural advantages as we are, which does not form a part of the dark catalogue of our public misfortunes."*²⁴⁶

245. ROBERT A. EAST, JOHN QUINCY ADAMS: THE CRITICAL YEARS, 1785-1794, at 85 (1962) (quoting Adams).

246. Marshall, *A Friend of the Constitution*, in DEFENSE, *supra* note 102, at 199-200 (quoting THE FEDERALIST NO. 15 (Alexander Hamilton)).

The grim enumeration in *The Federalist No. 15*, which was written by Alexander Hamilton,²⁴⁷ to which Marshall refers, includes: state failure to enforce national treaty obligations; state failure to pay off war debts to allies; exclusion from the Mississippi; a weak national defense; a lack of public credit; British refusal to evacuate the forts in the Northwest; national commerce in disarray; disrespect by foreign nations; low values for improved land; and scarce private credit.²⁴⁸

This list refers more to problems of disunity than, what scholars since Gordon Wood have emphasized, instances of democratic excess within states.²⁴⁹ As David Golove has pointed out, these difficulties resulted from problems of collective agency.²⁵⁰ This emphasis is not surprising given Marshall's immediate concern with refuting Roane's extreme compact theory and *The Federalist's* early concern with lamenting national weakness. The second order of concerns, however, also makes an appearance. Failure to live up to treaty obligations, for example, refers to the states' refusal to insure payment to British creditors and to compensate loyalists for wartime confiscations. Each count is an example of state legislatures declining to take measures to protect the property rights of unpopular minorities.²⁵¹ More broadly, Marshall's generic reference to *The Federalist* thereby includes famous catalogues of the excessive, unclear, and even despotic measures that the states enacted within their borders during this period.²⁵²

Common to each set of concerns, the state governments had demonstrated that they could no longer be relied upon without a radical change in the system, nor could they be trusted to effect that radical change. Marshall alludes to the results and the process:

247. For an excellent account of Hamilton's own consistent nationalism, see David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 760-819 (2000).

248. THE FEDERALIST NO. 15, at 106-07 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

249. WOOD, *supra* note 10, at 391-429; see also MORGAN, *supra* note 10, at 265-67; RAKOVE, *supra* note 10, at 28-31.

250. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1098-99 (2000).

251. *Id.* at 1102-27.

252. See, e.g., THE FEDERALIST NO. 48, at 308-13 (James Madison) (Clinton Rossiter ed., 1961).

Such was the situation to which these states were brought, in four years of peace, by their league. To change it into an effective government, or to fall to pieces from the weight of its constituent parts, & the weakness of its cement, was the alternative presented to the people of the United States. The wisdom and patriotism of our country chose the former.²⁵³

Again emphasizing disunity, "A Friend of the Constitution" observes that the ills brought about by a league with a true "We the States"²⁵⁴ pedigree threatened to "fall to pieces." As his earlier remarks imply, neither did the constituent parts of that league have exemplary records internally. An alternative was presented, and accepted, by "the people of the United States." Forming a nation through the state governments had become untenable. But neither did it come about through one consolidated people, easy as it might be to equate a more unified solution with a unified sovereign. Instead, as Marshall had been at pains to point out, "the people of the United States" is properly understood to mean the peoples of the several states in their highest sovereign capacity, assembled in conventions. It was, in short, citizen dismay with their own governments that functioned as a principle that opposed, and could even trump, local allegiance based upon geographical division.

In this way, Marshall accords with the conventional wisdom after all. Older accounts of the Founding commonly emphasized the theme of state frustration of national unity in much the same manner as "A Friend of the Constitution."²⁵⁵ Nor has the validity of this view been challenged. To the contrary, modern scholarship continues to take it as a given that the foreign policy ills that Hamilton enumerated under the state-centered Articles of Confederation were a principal reason leading to constitutional

253. Marshall, *A Friend of the Constitution*, in DEFENSE, *supra* note 102, at 200.

254. It should be pointed out that Marshall, and Hamilton for that matter, exaggerate the sovereign independence of the states during this period. See RICHARD M. MORRIS, *THE FORGING OF THE UNION* 55-79 (1987) (asserting that state sovereignty had been greatly constrained even under the Articles of Confederation). One reason why Marshall and Hamilton may have overstated the matter would have been to contrast the greater anarchy under a previous era of considerable state sovereignty with the unity under a Constitution in which the position of the states was significantly reduced.

255. *E.g.*, EDWARD S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER V. STATE POWER* 21-30 (1913).

reform and in shaping it subsequently.²⁵⁶ Of these ills, three were especially pressing. First, Congress lacked the authority to retaliate against British trade restrictions. Second, state legislatures refused to comply with the 1783 Treaty of Paris that concluded the war between the United States and Britain. Finally, Spain closed New Orleans and the lower Mississippi to American navigation.²⁵⁷ In the absence of an effective national government, the states either could not address these matters collectively, or worse, sought to promote their own concerns at the expense of the national interest. Professor Golove nicely captures this latter phenomenon in noting that conflicts over national and state authority "were recurrent under the Confederation ... [as] ... states' rights proponents did succeed in creating controversy and uncertainty and sometimes even in seriously subverting Congress's foreign policy initiatives—indeed, so severely as to place the peace of the nation in jeopardy."²⁵⁸

What modern scholarship has added to the picture is a new appreciation for the minor theme in Marshall's analysis—dissatisfaction with the state governments domestically. As Jack Rakove has written, "[h]ow the states were responding to this task [of coping] with the aftermath of a prolonged revolutionary struggle that had placed so enormous a strain on American society ... became, by 1787, as important an element in the movement for constitutional reform as the more conspicuous failings of Congress."²⁵⁹ The founding generation's assessment of this response, to put it mildly, was not good. In one state after another, it seemed, legislatures were enacting ill-advised, or even tyrannical, laws—laws that infringed on contractual obligations, confiscated property, transferred wealth through inflationary schemes, and limited trial by jury. No less troubling, it became apparent to some

256. See, e.g., FELIX GILBERT, *TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY* (1961); MARKS, *supra* note 81; RICHARD B. MORRIS, *THE AMERICAN REVOLUTION RECONSIDERED* (1967); PAUL A. VARG, *FOREIGN POLICIES OF THE FOUNDING FATHERS* (1963). For a superb account focusing on the treaty power, see Golove, *supra* note 250, at 1102-49. For a summary, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2112-20 (1999).

257. RAKOVE, *supra* note 10, at 26-27.

258. Golove, *supra* note 250 at 1103. Golove specifically refers to clashes with regard to the treaty power.

259. RAKOVE, *supra* note 10, at 29.

that these results came about not because state government was unresponsive to local desires, but because it was if anything too responsive.²⁶⁰ As Gordon Wood put it, "In the 1780's the Americans' inveterate suspicion and jealousy of political power, once concentrated almost exclusively on the Crown and its agents, was transferred to the various state legislatures."²⁶¹

However critiqued,²⁶² essentially this story has remained at the center of modern understandings of the Founding for several decades.²⁶³ So entrenched has it become that it has arguably muscled aside the older theme of national disunity even as it complements it.²⁶⁴ More importantly, the account can be extended too far, to imply that the Constitution represented some sort of repudiation of republican self-government, especially at the state level, rather than an attempt to save republicanism from itself on both the state and national levels.²⁶⁵ All that granted, the core of the story remains. Contrary to certain suddenly popular accounts, the reform movement that led to the Constitution was not simply about promoting majoritarian government. Rather, in fundamental ways, it was about responding to perceived excesses by majoritarian state governments in foreign and domestic affairs. A national government that operated on individuals, a revived commitment to bicameralism, and an enhanced and more independent judiciary were just some of the familiar mechanisms that resulted.²⁶⁶

And conventions. Theoretically, the state governments could have atoned for their previous misdeeds and effected the necessary reforms themselves. An immediate stumbling block in this regard

260. For a summary, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1758-71 (1996).

261. WOOD, *supra* note 10, at 409.

262. For critiques of Wood's thesis and the so-called "republican synthesis" it heralded, see Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1594-97 (1987); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992); Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. (3d ser.) 334 (1982); *Forum, The Creation of the American Republic, 1776-1787: A Symposium of Views and Reviews*, 44 WM. & MARY Q. (3d ser.) 549 (1987).

263. Flaherty, *supra* note 10, at 535-49.

264. Gordon Wood's foundational *Creation of the American Republic* set the tone for subsequent scholarship in barely touching upon foreign affairs concerns.

265. See Kramer, *supra* note 2, at 35-44.

266. For a classic account, see WOOD, *supra* note 10, especially at 430-564. For a widely regarded updating and elaboration, see RAKOVE, *supra* note 10, *passim*.

was Article XIII of the Articles of Confederation, which provided that no alteration could be made unless it "be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state."²⁶⁷ As events would later bear out, neither Article XIII nor its unanimity requirement had to be an insurmountable barrier if reformers convinced enough of the nation to ignore them. Not even the Articles, therefore, prevented the state governments from acting as the agents of reform.

Yet reform came not through the state governments, but through state conventions. Especially to the reformers, the difference was critical. Developing what had once been a legally deficient body from English constitutional history, Americans came to see specially elected conventions as more legitimate and representative than an ordinary legislature. Conventions could therefore serve as the source of constitutional rules that bound legislatures precisely because they embodied "the people" more fundamentally—as Marshall put it "the people composing those political societies in their highest sovereign capacity."²⁶⁸ As Wood has written, this quest for a manifestation of the people that was more fundamental than ordinary government in part reflected a general "mistrust of all men and all institutions set above the people-at-large."²⁶⁹

But reliance on conventions further reflected more specific dissatisfaction with the behavior of the particular state governments at hand.²⁷⁰ Conventions, therefore, became the mechanism for constitutional reform within certain states, with Massachusetts leading the way in 1780. For similar reasons, conventions became the device set forth in Article VII of the Federal Constitution.²⁷¹ In practical terms, they responded to the Federalist calculation that perhaps the same state governments that had created the need for the Constitution, and would lose power in consequence, might not look kindly on the proposed solution.²⁷² More profoundly, the state conventions allowed the Constitution's defenders to "pose as

267. ART. CONFED., art. XIII (1781).

268. Marshall, *A Friend to the Union*, in DEFENSE, *supra* note 102, at 87.

269. WOOD, *supra* note 10, at 328.

270. *Id.*

271. U.S. CONST., art. VII, cl. 1.

272. See RAKOVE, *supra* note 10, at 101.

champions of the people's superiority to their governments."²⁷³ Even relatively obscure Federalists could argue that "all power is in the people, and not in the state governments."²⁷⁴ Less obscure allies like Madison further saw that the Constitution ratified in this way, "would rest on stronger foundations than all those state constitutions that had not been framed by special conventions On this basis," he could conclude, such a constitution could make "inroads" into state power, and the ensuing conflicts "could be more readily resolved in favor of the federal government."²⁷⁵

Somewhat surprisingly, the same historians who have done so much to recapture the significance of conventions have not closely examined the question of whether the conventions that did the actual ratifying were understood to embody one national people or the several peoples of distinct political societies. That task has been most thoroughly considered by a legal scholar, Henry Monaghan. Relying both on constitutional structure and contemporary expressions, above all Madison's, Monaghan concludes that "[a] significant number of Americans simultaneously held—in varying mixtures and intensities—some concept of a 'We the People' of the United States and (more importantly for my argument) some concept of 'We the People' of Delaware, and so on."²⁷⁶ To what extent Monaghan's measured answer captures the Founding is another,

273. MORGAN, *supra* note 10, at 281.

274. MACLAINE, 4 ELLIOT'S DEBATES 161 (1941).

275. RAKOVE, *supra* note 10, at 101.

276. Monaghan, *supra* note 13, at 138. That said, Monaghan's assessment does not purport to characterize ratification only, but also understandings of the resulting government, including the process for future higher lawmaking in Article V. In this regard, Monaghan rightly invokes Madison's famous conclusion that the "constitutional order [is] 'neither wholly national nor wholly federal.'" *Id.* at 139 (quoting THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter, ed., 1961)). It should be noted, however, that on the question of ratification, Madison clearly adopted a wholly federal position that might serve as a textbook explication of the "We the Peoples" view. As the crucial passage goes:

On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. 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. The act, therefore, establishing the Constitution will not be a *national* but a *federal* act.

THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961).

and far larger, question. What should be clear by now is that Marshall defended *McCulloch* in terms of Monaghan's second concept. Yet what should be no less clear is that in doing so, Marshall emphasizes the separation of the various peoples from their respective governments, rather than from one another.

CONCLUSION

Another large question is what any of this means for the Supreme Court's recent federalism jurisprudence. Addressing the matter adequately might well take a separate article fully as long as this. Even then, Marshall's restored understanding of founding sovereignty does not so much promise specific results as create general presumptions. But the presumptions matter. As I have sought to demonstrate, and as Marshall's essays demonstrate, battles over competing creation myths have raged throughout our constitutional history. If nothing else, the participants in this ongoing debate agree with Madison that "the authority of a constitution depended on the form of its promulgation,"²⁷⁷ whether as rhetoric, symbol, or predictor of the sort of government that a particular type of founding sovereign, or sovereigns, would create. For now, suffice it to say that Marshall's articulation of a "We the Peoples" genesis offers a way of thinking about the Founding that suggests the Court has been drifting in the wrong direction.

The point holds for each type of case in which federalism claims have been advanced. A "We the Peoples" account, as elaborated by Marshall, cuts against the holdings in cases such as *Lopez*²⁷⁸ and *Morrison*²⁷⁹ in the same manner that it did in *McCulloch* itself. In Marshall's hands, nothing about his understanding of sovereigns expressing the will of distinct political societies defined by state borders prevented him from opting for the less-restrictive approach to the scope of federal power. From this starting point he did not infer that the peoples of the states would have delegated power to the new government parsimoniously. To the contrary, Marshall's beliefs concerning the failures of the states' governments—the same

277. RAKOVE, *supra* note 10, at 101.

278. *United States v. Lopez*, 514 U.S. 549 (1995).

279. *United States v. Morrison*, 529 U.S. 598 (2000).

conviction that had lead to reliance on conventions—underscore what for him was a more profound aspect of the Founding that cut just the other way. This is not to say that Marshall would have relied upon the distrust of state government that conventions reflected to validate the New Deal. It is to claim, however, that Marshall's take on ratification offers an analytic approach that pushes against state-oriented conclusions notwithstanding its recognition of state borders.

Still less does the Marshall brand of "We the Peoples" support decisions that recognize barriers to federal authority that might otherwise be exercised. Here cases such as *Gregory v. Ashcroft*,²⁸⁰ *New York v. United States*,²⁸¹ *Printz*,²⁸² and *Alden*²⁸³ run up against a threshold presumption precisely because they immunize the same state actors that were bypassed by their own peoples in effecting the constitutional reform that their own performance necessitated. Even more than the decisions restricting federal power, doctrines insulating state government from federal supervision run counter to White's observation—which Marshall's understanding of the founding sovereignty reflected—that his own decisions "did not so much promote federal sovereignty as restrict state sovereignty."²⁸⁴

Finally, consider *Term Limits* itself. On one hand, Justice Thomas sought to distinguish the case from *McCulloch* analysis on the ground that a power to control term restrictions for federal officers was not expressly, impliedly, or arguably delegated in the Constitution.²⁸⁵ On the other, he reasoned that the case did not implicate immunity barriers to federal power but instead turned on the reservation of a founding power (to impose term restrictions) by the sovereign peoples.²⁸⁶ Citing the Tenth Amendment, Thomas assumed that the several peoples would have had every reason to hold on to this power rather than give it away. Marshall's conception of the same founding peoples, however, provides a set of reasons that point back in favor of federal authority. The theme he

280. 501 U.S. 452 (1991).

281. 505 U.S. 144 (1992).

282. *Printz v. United States*, 521 U.S. 898 (1999).

283. *Alden v. Maine*, 527 U.S. 706 (1999).

284. WHITE, *supra* note 96, at 486.

285. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 853-54 (1995) (Thomas, J., dissenting).

286. *Id.* at 854-55.

sounds, frustration with the state governments' interference with national matters even more powerfully cuts against the dissent's bland equation of a state government with its sovereign people merely because the constitution that a particular people established for their state created its government.²⁸⁷

In these ways *McCulloch* winds up a "nationalist,"—and certainly not some sort of closet "states' rights"—decision after all. At the end of the day it retains its traditional role even though its iconic recap of the Founding turns out to reflect state boundaries more profoundly than previously thought. If these unexpected twists are not enough, the question of founding popular sovereignty may have one more. Looking back, it may well be that the dominant understanding of ratification at the time reflected the interpretation Marshall later attributed to it. Marshall's reliance on Madison certainly provides strong initial support for such a view. Still, this view may also be incorrect. When Antifederalists such as Patrick Henry fumed that the Constitution should be formed by the state governments rather than "We the People of the United States,"²⁸⁸ some Federalists responded with a "We the Peoples" conception, Madison chief among them.²⁸⁹ Yet others, such as James Wilson, appeared to justify ratification as an appeal to the people of the nation.²⁹⁰ Many others, moreover, apparently confirmed

287. See *supra* notes 136-40 and accompanying text.

288. 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES 930 (John P. Kaminski & Gaspare Saladino eds., 1990) (Patrick Henry, Jun. 4, 1788) [hereinafter, DOCUMENTARY HISTORY].

289. THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

290. Wilson asserted, in terms more clearly nationalistic than "A Friend to the Union" or "A Friend of the Constitution":

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

Antifederalist fears by greeting accusations that they understood the Constitution to reflect something like Wilson's view with silence. The creation myth as understood at the time of creation, in short, may have been more nationalist than even John Marshall recalled. At the very least, the original understanding may well have been simply more complex, in a sense even contradictory, as Monaghan suggests.²⁹¹ Either possibility, however, must await further study in a surprisingly understudied area.

Looking beyond Marshall, subsequent eras of higher lawmaking almost certainly transformed the terms of constitutional creation in any event. As Eisgruber has argued, the Civil War and the Fourteenth Amendment effected changes that rendered "the most plausible basis for the contractual view of the Constitution . . . as (at least in part) the result of the 'voluntary acts' of state governments or state peoples . . . untenable."²⁹² If so, it may be that the nation recreated the Marshall it needed to keep pace with the more unified conception of sovereignty it subsequently developed. Lost, however, was a far more interesting figure no less useful or relevant.

3 DOCUMENTARY HISTORY, *supra* note 288, at 472-73 (James Wilson, Dec. 4, 1787); cf. Monaghan, *supra* note 13, at 152-53 (acknowledging that Wilson spoke nationalistically with reference to the original ratification, but pointing out that he never expressly extended this conception to Article V).

291. Monaghan, *supra* note 13, at 138-39.

292. Eisgruber, *supra* note 8, at 71. Eisgruber argues that this change came about through the Fourteenth Amendment's identification of personhood with United States citizenship and reduction of state citizenship to a mere incident of residency. Bruce Ackerman has alternatively argued that the Civil War and Reconstruction replaced the Founding's federalism-based model of higher lawmaking with a more nationalistic process keyed to federal separation of powers. BRUCE ACKERMAN, 2 WE THE PEOPLES: TRANSFORMATIONS 17-25 (1998).