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E Pluribus Unum? Book Review Of: States' Rights and the Union: Imperium in Imperio, 1776-1876.  
by Forrest McDonald

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## Book Reviews

### E PLURIBUS UNUM?

**STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876.** By Forrest McDonald.<sup>1</sup> University Press of Kansas. 2000. Pp. vii, 296. \$29.95.

*Much is said about the "sovereignty" of the States; but the word, even, is not in the national Constitution . . . .*

Abraham Lincoln<sup>2</sup>

*Daniel A. Farber*<sup>3</sup>

"[I]n the 1990s, as in the 1870s," Forrest McDonald observes, "states' rights had found a powerful friend but, given the five-to-four majority, still a fickle one." (p. 233) McDonald's new history of quarrels over federalism, then, comes at an opportune time. It is a useful introduction to the subject: a quick, lively read with well-chosen references. It lacks, however, the attention to detail and sensitivity toward political dynamics that characterized McDonald's earlier writings.

The rhetoric of federalism, from 1776 to today, has often invoked the concept of sovereignty. This review will focus on McDonald's treatment of this key concept, both because of its intrinsic significance and because it illustrates some of the weaknesses of the book as a whole.

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1. Distinguished Research Professor of History, University of Alabama.

2. Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, in *Lincoln: Selected Speeches and Writings* 310 (1992 ed, Vintage Books) ("*Selected Writings*").

3. McKnight Presidential Professor of Public Law, Associate Dean for Faculty and Research, and Henry J. Fletcher Professor of Law, University of Minnesota.

At least three major theories of sovereignty have figured in American thought. The most nationalistic view was Lincoln's. According to Lincoln, the colonies declared independence as a collective body, which thereby succeeded to the sovereignty formerly held by the King. This national sovereignty always remained with the federal government throughout a series of governmental reorganizations (first the Articles of Confederation, then the Constitution).<sup>4</sup> (p. 9) The Union, Lincoln said in his most frequently cited statement of his position, "is older than any of the States; and, in fact, it created them as States" — for before they formed the Union and collectively declared independence, they were mere "dependent colonies."<sup>5</sup> On this view, only the nation ever enjoyed sovereign status.

A second view is that the states retained their separate sovereignty until the adoption of the Constitution, which created a new national sovereign ("*E pluribus unum*").<sup>6</sup> Under this view, the Constitution was a new social compact among the American people. This view is supported by references in the Federalist Papers to "the People" as the source of national political authority. Thus, Federalist 22 speaks of the need to lay the "foundation[ ] of our national government" "on the solid basis of THE CONSENT OF THE PEOPLE," the "pure, original fountain of all legitimate authority."<sup>7</sup> Similarly, in discussing conflicts between the states and the federal government, Federalist 46 speaks of both as representing "the whole body of their common

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4. See James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 247-48 (Oxford U. Press, 1988); Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* 109 (Alfred A. Knopf, 1986) (reprinting a Civil War-era constitutional catechism); Kenneth M. Stampp, *The Era of Reconstruction, 1865-1877* at 25-27 (Alfred A. Knopf, 1965).

5. Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, in *Selected Writings* 310 (cited in note 2).

6. This theory was endorsed, for example, by the majority in the *Term Limits* case. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995). See also Charles Fried, *The Supreme Court 1994 Term - Foreword: Revolutions?*, 109 Harv. L. Rev. 13, 22 (1995) (stressing the "discontinuity" between the Constitution and previous governmental arrangements); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1460 (1987) (arguing that although Article VII said the Constitution would go into effect when ratified by nine states, it "confirmed the pre-existing sovereignty of the People of each state by proclaiming that the Constitution would only go into effect between the nine or more states ratifying," and that once the individual states ratified the Constitution they transferred their sovereignty to the people of the nation).

7. Federalist 22 (Hamilton) in Isaac Kramnick, ed., *The Federalist Papers* 177, 184 (Penguin Books, 1987).

constituents,"<sup>8</sup> and refers to the states as "subordinate governments."<sup>9</sup>

The final view was Calhoun's. According to Calhoun, the people of each state separately became sovereign when they became independent of England. When they adopted the Constitution, they retained their separate political existences, but delegated some of their powers to the national government and some to the state governments.<sup>10</sup> As McDonald points out, Federalist 39 seemingly supports this theory. (p. 19) Inquiring into the formation of the new Constitution, Federalist 39 explains that ratification takes place by the authority of the people — "not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong."<sup>11</sup> Leaving little doubt of his view of the ratification process, Madison goes on to call ratification a "federal and not a national act," that is, "the act of the people, as forming so many independent States, not as forming one aggregate nation."<sup>12</sup>

Note that under any of these three theories, neither the state nor federal governments (who are the only bodies exercising any direct regulatory power) are themselves sovereign. Rather, sovereignty resides either in the people of the United States as a whole, or in the separate peoples of the various states. In these debates, sovereignty does not refer to actual, day-to-day governing authority, but rather to ultimate sources of political authority.

Since it is obvious that the Constitution was adopted and amended by the people of the various states, discussions of the topic often have a metaphysical air about them. The question is whether the people acted as an undivided whole incarnated in separate states or as distinct state communities in a joint venture (which then may or may not have merged into a single entity)—

8. Federalist 46 (Madison) in id. at 330.

9. Id. at 331.

10. See Amar, 96 Yale L.J. at 1452 & nn.108-09 (cited in note 6); Stamp, *The Era of Reconstruction* at 25 (cited in note 4); McPherson, *Battle Cry of Freedom* at 240 (cited in note 4). During the period before the civil war southern states justified secession with the theory that the state populace in adopting the Constitution had appointed the federal government to act as their agent to undertake certain functions, but that such an agency relationship did not transfer sovereignty to the federal government. David M. Potter, *The Impending Crisis, 1848-1861* at 479 (Harper & Row, 1976). The people of each state, the theory went, retained the power to nullify the agency relationship by action of a state convention. Id.

11. Federalist 39 (Madison) in Isaac Kramnick, ed., *The Federalist Papers* 254, 257 (Penquin Books, 1987).

12. Id.

an issue reminiscent of medieval disputes about the true nature of the Trinity. Yet people were burned for mistaken views of the Trinity, and thousands died on Civil War battlefields while politicians debated the nature of sovereignty.

McDonald seems to think that this abstruse matter of sovereignty has a clear answer, and one that matters. In this he is not alone: as we will see below, at least four current Justices apparently share his perspective. Yet, the Framers themselves had no established orthodoxy on this point, and the muddled political developments of their times confound efforts to identify sovereignty after the fact. In Federalist 39, which refers to the origins of the Constitution in the “federal” action of the peoples of the various states, Madison concludes by speaking of the untidy mixed nature of the new government:

The proposed Constitution . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.<sup>13</sup>

Thus, if there was a simple answer about the location of sovereignty after ratification, the Framers themselves apparently didn’t know it. Whether the concept of sovereignty has any greater utility in constitutional analysis today is at least equally unclear. There is no denying, however, that it retains great rhetorical force.<sup>14</sup> As Rakove says, after 1789, “sovereignty itself would remain diffused—which is to say, it would exist everywhere and nowhere.”<sup>15</sup>

## I. THE REVIVAL OF THE STATE COMPACT THEORY

He views the Constitution as a compact among multiple sovereign peoples:

The Constitution would be a compact not among sovereign

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13. Id. at 259.

14. See Jack N. Rakove, *Making a Hash of Sovereignty, Part I*, 2 Green Bag 2d 35 (1998); Jack N. Rakove, *Making a Hash of Sovereignty, Part II*, 3 Green Bag 2d 51 (1999).

15. Rakove, 2 Green Bag 2d at 41 (cited in note 14).

states, as was the 1781 Articles of Confederation, nor a Lockean compact between ruler and ruled, nor even a compact of the whole people among themselves. It would be a compact among peoples of different political societies, in their capacities as people of the several states. (pp. 8-9)

For this reason, he argues, John Calhoun's theory of the Constitution "was historically on solid ground." (p.106) In contrast, according to McDonald, the nationalist view of history espoused by Daniel Webster, John Marshall, and Abraham Lincoln was groundless. (p. 9-11, 106)

The nature of sovereignty in the framing period is not merely a matter of dispute among academics, but is also currently dividing the Supreme Court. In 1995, the state compact theory propounded by McDonald made an unexpected reappearance in the Supreme Court in the *Term Limits* case. *Term Limits* involved a state's power to set term limits for members of Congress. The majority view was that this power pertained solely to the new government created by the Constitution rather than any preexisting state authority, and hence was not "reserved" by the Tenth Amendment. In the course of this discussion, Justice Stevens' majority opinion explains the conventional view of state and federal sovereignty. Under the Articles of Confederation, "the States retained most of their sovereignty, like independent nations bound together only by treaties." The new Constitution "reject[ed] the notion that the Nation was a collection of States, and instead creat[ed] a direct link between the National Government and the people of the United States."<sup>16</sup> A patchwork of local qualifications for federal office, Justice Stevens stated, would "sever the direct link that the Framers found so critical between the National Government and the people of the United States."<sup>17</sup>

Justice Thomas's dissent squarely rejected this vision of national sovereignty: "Because the majority fundamentally misunderstands the notion of 'reserved' powers, I start with some first principles."<sup>18</sup> The most basic of those first principles, according

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16. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (internal quotations and citations omitted).

17. *Id.* at 822.

18. *Id.* at 846 (Thomas, J., dissenting). As Kathleen Sullivan points out, Thomas's dissent embraced the "constitutional ontology" of the Southern nullificationists like Calhoun, though it "did not go so far as to advocate state nullification." Kathleen Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78, 98-99 (1995).

to Justice Thomas, was this: “The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”<sup>19</sup> Despite the adoption of the Constitution, “the people of each State retained their separate political identities.”<sup>20</sup> Even in language where others have found an affirmation of national unity, Justice Thomas found a reaffirmation of the fundamental status of the states as compared with the Nation:

The ringing initial words of the Constitution—“We the People of the United States”—convey something of the same idea. (In the Constitution, after all, “the United States” is consistently a plural noun.) The Preamble that the Philadelphia Convention approved before sending the Constitution to the Committee of Style is even clearer. It began: “We the people of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia. . . .” Scholars have suggested that the Committee of Style adopted the current language because it was not clear that all the States would actually ratify the Constitution.<sup>21</sup>

In short, Justice Thomas said, the concept of popular sovereignty underlying the Constitution “tracks” rather than erases state lines.<sup>22</sup> Indeed, he said, it would make no sense to interpret the Tenth Amendment as reserving powers to the “undifferentiated people of the Nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.”<sup>23</sup>

Justice Kennedy refused to go along with Thomas’s view of state sovereignty in *Term Limits*. In his view, the heart of the legitimacy of the federal government is “that it owes its existence to the act of the whole people who created it.”<sup>24</sup> Although the Framers, in his view, were “solicitous of the prerogatives of the

19. *U.S. Term Limits*, 514 at 849.

20. *Id.* at 849.

21. *Id.* at 846-47 n.1 (citations omitted). On Justice Thomas’s interpretation, a more accurate wording might have been, “We the Peoples of the United States.”

22. *Id.* at 849.

23. *Id.* at 847.

24. *Id.* at 839 (Kennedy, J., concurring). See also *id.* at 841.

States,” the states cannot be allowed to interfere with the exercise of federal powers or with “the most basic relation between the National Government and its citizens, the selection of legislative representatives.”<sup>25</sup> Kennedy denied that “the sole political identity of an American is with the State of his or her residence,” and he emphatically rejected the view that “the people of the United States do not have a political identity as well, one independent of, though consistent with, their identity as citizens of the State of their residence.”<sup>26</sup>

More recently, however, in *Alden v. Maine*,<sup>27</sup> Justice Kennedy joined the four *Term Limits* dissenters in proclaiming that the states retain “a residuary and inviolable sovereignty” or at least, as he quickly added, “the dignity, though not the full authority of sovereignty.”<sup>28</sup> Thus, the state sovereignty theory is close to having majority support on the Court. Because of the reemergence of state sovereignty, McDonald’s book should be of interest to constitutional scholars, as well as historians. But the historical record turns out to be more ambiguous than McDonald suggests—for once, it not just the judges but also the professional historian who is guilty of writing “law office history.”

## II. THE ORIGINAL AMBIGUITIES

We might begin by asking about the original understanding of the sovereignty issue. Did the Framers view the populations of the states as entirely separate peoples, or did they view them as part of a national people (either before or after the Constitution went into effect)?

The concept of sovereignty had great resonance for the Framing generation and has generated a corresponding amount of interest on the part of historians.<sup>29</sup> Unraveling the meaning of the historical records is quite difficult. The debate was driven by

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25. Id. at 841-42.

26. Id. at 840.

27. 527 U.S. 706 (1999).

28. Id. at 2247 (internal quotation and citation omitted).

29. For discussions by recent historians, see Richard B. Morris, *The Forging of the Union, 1781-1789* at 55-59 (Harper & Row, 1987); Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* 197-202, 236, 248-55, 314-15, 320-28 (Belknap Press, 1993); Gordon S. Wood, *The Creation of the American Republic 1776-1778* at 344-389, 524-36 (U. of North Carolina Press, 1969). The evolution of the concept of Union between the founding and the Civil War is traced in Paul C. Nagel, *One Nation Invisible: the Union in American Thought, 1776-1861* (1964).

immediate political interests, which gave the participants an incentive to distort whatever their true philosophical positions about sovereignty might have been.<sup>30</sup> Various senses of the word "sovereignty" were not carefully distinguished.<sup>31</sup> As McDonald himself observed in an earlier book, the Framers were "politically multilingual," using a variety of political theories whenever it suited their purposes.<sup>32</sup> In the end, it is difficult to identify a single dominant theoretical understanding. As the dispute in the *Term Limits* case illustrates, there is no consensus about which of these theories was the dominant understanding of the framing period.<sup>33</sup>

The documents of the period reflect uncertainty about whether the United States already existed as a nation so that in some sense the Americans were one people rather than thirteen. Indeed, this uncertainty could be seen in the views of the constitutional convention itself. At the end of the summer of 1787, the Philadelphia convention issued two official documents. One was the Constitution itself. As McDonald points out, some features of the Constitution (such as its grammatical treatment of "United States" as a plural) support the state compact theory. (pp. 20-22) On the other hand, the reference to "We, the People of the United States" clearly points in the other direction (even if, as McDonald points out, the phrasing may have had other purposes). (pp. 21-22)

Somewhat more light is shed on the views of the convention by the other document it unanimously adopted, an official letter to Congress, signed by George Washington on behalf of the Convention.<sup>34</sup> The letter invokes the language of social compact

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30. For example, one issue was whether the colonies declared independence collectively, so that sovereignty at least momentarily reposed in the Continental Congress, or severally, so that it resided in the states at the time of Independence. This seemingly esoteric question had legal implications regarding title to vast disputed areas of land. Under the former theory, Western land claimed by Virginia had instead reverted to the Continental Congress at the time of Independence. See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 146 (U. Press of Kansas, 1985).

31. For a discussion of the confusion during the Framing period, see H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. Rev. 949, 985-87 (1993).

32. McDonald, *Novus Ordo* at 235 (cited in note 30).

33. Compare Justice Thomas's views in his *Term Limits* dissent with those of Justice Kennedy's concurrence. As to the views of leading modern commentators, see Amar, 96 Yale L.J. at 1425, 1429-51 (cited in note 6); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633, 654-60 (1993).

34. For the complete text of the letter and a fuller discussion of its significance, see Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 Mich. L. Rev. 615 (1995) (citing letter of the

rather than that of treaty: "It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all: Individuals entering into society, must give up a share of liberty to preserve the rest." The implications of this analogy to the social compact would later be discussed in the Federalist Papers:

If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the power intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government.<sup>35</sup>

The letter also warns that the "consolidation" of the Union involves "our prosperity, felicity, safety, perhaps our national existence." The implication is seemingly that in some sense there was already a "national existence" capable of being at risk, which is to say that the United States under the Articles of Confederation was already a nation of sorts rather than a league.

Indeed, even during the Convention itself, the status of the states had been a matter of dispute. Luther Martin argued that separation from England had placed the former colonies "in a state of nature towards each other" and only then had the these "separate sovereign ties" formed a federal government. James Wilson responded that the states became independent only through their combined action: "they were independent, not *Individually* but *Unitedly*."<sup>36</sup>

As these materials indicate—and as others confirm—the understanding of sovereignty in the late Eighteenth Century was far from settled. For every Forrest McDonald who espouses the state compact theory of the record, there is a Samuel Beer with a nationalist reading.<sup>37</sup>

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President of the Federal Convention to the President of Congress (Sept. 17, 1787), in Charles C. Tansill, ed., *Formation of the Union of the American States* 1003 (Government Printing Office, 1927)).

35. Federalist 33 (Hamilton) in Isaac Kramnick, ed., *The Federalist Papers* 225 (Penguin Books, 1987).

36. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 163 (Alfred A. Knopf, 1996).

37. See Beer, *To Make A Nation* 1-12, 196-202, 314-25 (cited in note 29).

Given the undoubted importance of the concept of sovereignty in American political thought, (or at least rhetoric), why was there no clear consensus on this critical issue? The issue was both intellectually subtle and irrelevant for most practical purposes. The key issues facing the country involved the division of powers between the state and federal governments. The sovereignty issue involved the question of whether the population of America should be considered a single group forming a national government, thirteen separate groups agreeing on joint government but entirely maintaining their own separate group identities, or thirteen separate groups agreeing to merge their identities and form a unified group for at least some purposes. Whatever else might be said about this dispute, it provided little guidance in designing the national government. As Jack Rakove puts it, “no single vector neatly charted the course the framers took in allocating power between the Union and the states.”<sup>38</sup> Rather, as Madison stressed in *Federalist* 37, experience and practical exigencies rather than abstract theory shaped the Constitution.

This is probably just as well. As we will see in the next section, there were no easy answers to the questions of who was sovereign in 1776 when Independence was declared or in 1788 when the Constitution was ratified. If the Framers had made the mistake of trying to settle the sovereignty issue before proceeding, the Constitution probably would never come into being.

### III. THE “REALITY” OF SOVEREIGNTY

McDonald presents a coherent story about the evolution of sovereignty in America. He tells us that the colonies had “thirteen real compacts in the form of charters that gave them existence as political societies.” (p. 8) When they each declared their separate independence in a joint declaration, (p. 10) sovereignty reverted to each of the thirteen, (p. 8) or in the cases of Massachusetts and New Hampshire, to individual towns. (p. 236 n.3) As an agent for the states, the Continental Congress conducted the war, but the states retained the sovereign power. (p. 4) Then, the sovereign peoples of the thirteen states entered into a mutual agreement to create a federal government, retaining all the while their separate sovereignty. (p. 9)

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38. Rakove, *Original Meanings* at 168 (cited in note 36).

We can imagine a historical record in which this story could pass as plainly descriptive. Imagine that, when unhappiness with English rule reached a pitch, representatives in each colony had determined to pursue independence and had drafted a new constitution for that colony which was ratified by the people. Acting under the new constitutions, state governments then sent delegates to form a league with the similarly established new governments in the other former colonies. When the initial arrangement proved unsatisfactory, their delegates proposed giving greater power to the league's management. The new arrangements were approved by the peoples of each separate state, who retained a veto over any future changes in the arrangement. On these facts, we would say that McDonald's version of the state compact theory was no more than an accurate recounting of events.

On the other hand, we can imagine a historical record embodying the nationalist record. In this story, the unhappy colonists send representatives to decide on independence and form a national government. The new government in turn authorizes autonomous action by local subdivisions, which act as the equivalent of counties in today's states. When changes are proposed to strengthen the government, they go into effect nationwide after being approved by a majority of the population (meeting in local conventions). These events would have made Lincoln's nationalist version of the founding unimpeachable history.

The realities were much more messy and complex than either of these scenarios. Begin with Independence. As McDonald points out, the Declaration speaks in the plural, declaring the colonies to be "free and independent states" and says that "they" have the full powers of independent states. (p. 10) On the other hand, no colony declared independence on its own.<sup>39</sup> Even before Independence, the Continental Congress was already functioning as an effective government,<sup>40</sup> Moreover, rather than being lawfully selected by the existing legislatures within the colonies, the representatives at the First Continental Congress were chosen in a variety of extralegal ways, including revolutionary committees and impromptu elections.<sup>41</sup> Furthermore, no state gave itself a constitution before being invited to

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39. See Beer, *To Make a Nation* at 200 (cited in note 29).

40. *Id.* at 199.

41. *Id.* at 197.

do so by Congress.<sup>42</sup> Thus, as Rakove says, “[p]ower and legitimacy . . . flowed reciprocally” between national and local leaders.<sup>43</sup>

In practice, the states deferred to national decisions during the Revolution: “local revolutionaries always preferred to commit treason with the explicit sanction of Congress.”<sup>44</sup> From the start, the states accepted the primacy of Congress in foreign relations.<sup>45</sup> In addition, the states looked for national assistance in resolving boundary disputes and combating local separatist movements.<sup>46</sup> Still—confounding any purely nationalist account—the Articles of Confederation (while purportedly perpetual) explicitly recognized the sovereignty of each state. Thus, in form, the Articles were more like a present-day interstate compact than a constitution.<sup>47</sup> Yet in reality, Congress functioned as a government, not merely as a negotiating forum for a league of sovereign states.<sup>48</sup>

In 1789, the federal Constitution had at least as much claim to be a social compact, uniting the populace, as any of the state constitutions. Most state constitutions had less democratic legitimacy than the later federal Constitution. The initial state constitutions were ordinary acts of legislation.<sup>49</sup> Eventually it became common to hold new elections before their adoption,<sup>50</sup> but it was only in 1779 that the idea of popular ratification of the constitutions emerged.<sup>51</sup> (p. 8) This was of course the path followed by the federal constitution. Ratification of the Constitution took place at the state level and was only valid between the ratifying states—support for the compact view. Yet ratification also supported the idea of national popular rule. In states whose own constitution had weaker pedigrees, ratification of the federal constitution was the first true act of popular sovereignty. Also, the reality of ratification was more national than the form of state-by-state conventions. The requirement that nine states ratify was partly chosen because any group of nine states would

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42. Id. at 200-01.

43. Id. at 164.

44. Rakove, *Original Meanings* at 164 (cited in note 36).

45. Id. at 166.

46. Id. at 165.

47. See Beer, *To Make a Nation* at 202 (cited in note 37). See also Rakove, *Original Meanings* at 100 (cited in note 36).

48. See Beer, *To Make a Nation* at 196 (cited in note 37).

49. See Wood, *The Creation of the American Republic* at 307 (cited in note 29).

50. Id. at 332.

51. Id. at 341-42.

contain at least a majority of the national population.<sup>52</sup> In practice the momentum became unstoppable once nine states had ratified.<sup>53</sup>

After ratification, the amendment process of Article V gave the separate peoples of each state significantly less independent authority. The amendment process requires the cooperation of Congress and the states. With the concurrence (or at least assistance, under the convention mode) of Congress, three-quarters of the states have the power to do whatever they wish to the remaining one quarter except taking away their Senate representation. Thus, no single state or its people can have any remaining claim to sovereign power. If sovereignty means unchecked legal power, then, it now resides (if anywhere) in the "Amenders," consisting of various combinations of Congressional super-majorities (or majorities, in the case of calling a convention at the request of the states), plus super-majorities of either state legislatures or state conventions (at the choice of Congress).<sup>54</sup> Behind Congress, state legislatures, and state conventions lie the voting public, who have no direct formal role in the amending process but elect all of the formal participants. These voters combine in various configurations—state legislative districts, statewide conventions and Senate elections, and federal election districts, most of which have little conceivable claim to sovereignty.

Not only is the ultimate control of the amendment process divided among different institutions and configurations of voters, it is a very remote form of sovereignty. Indeed, this supposedly supreme sovereign power has acted fewer than thirty times in history, and has done little of significance in nearly a century. Nor did the allocation of the amending power have anything much to do with how other powers were divided between the state governments and the federal government. Under the new Constitution, although Amenders are the theoretical sovereign, they neither control issues of war and peace, nor the national economy, which were given to the federal government, nor local

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52. See Beer, *To Make a Nation* at 335 (cited in note 29).

53. *Id.* at 332. Even Rhode Island (or "rogue island," as it was often called) was forced to give in by 1790, only three years after the Constitution was proposed. (p. 20)

54. Actually, the federal role is if anything greater than Article V would suggest, for any disputes about the amendment process would ultimately be decided either by the federal courts or the national political branches. In addition, in the guise of ensuring a republican form of government, Congress can potentially control the identity of the state governments that participate in the process, as it did during Reconstruction.

matters such as property and family law, which were assumed to rest with the state governments. In short, the notion of sovereignty may have remained rhetorically potent, but it had little relevance to constitutional law.

Thus, although we can easily imagine a history of the framing period where ultimate sovereignty is easily identifiable—whether with a unitary national population or with separate state political communities—the actual history (and the resulting Constitution) was an impossible muddle. The Framers could have had very little idea of whether the people of the United States existed as a unified political community before the Constitution was enacted, or of whether the Constitution itself gave shape to such a community.

To the extent that these questions have answers today, it is not because they were settled by the history of the framing period, but rather because later events such as the Civil War destroyed any genuine vitality of the idea of state populations as truly independent sovereigns. Early in the Civil War, Lincoln defined a sovereign as a “political community, without a political superior.”<sup>55</sup> In this core sense, sovereignty is determined by the ultimate seat of political authority, not by history or texts. In terms of the language of today’s political scientists, this concept of a completely final political authority is called domestic sovereignty.<sup>56</sup> Sovereignty, in this sense, was only fixed once and for all on the fields of Antietam and Gettysburg. Only after the Civil War could it be said with assurance that the nation, rather than the states, enjoyed the final power of decision, that no fundamental political question could be decided against the will of the national polity. Only then did it become clear that as political communities the states were subordinate to the nation.

Holmes once said that, while the Framers had “created an organism” of some sort, “it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.”<sup>57</sup> (Holmes learned this lesson the hard way, as a veteran of the Twentieth Massachusetts who was almost killed at Antietam and Ball’s Bluff.<sup>58</sup>) After the war, it could no longer

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55. Abraham Lincoln, Message to Congress in Special Session, July 4, 1861, in *Selected Writings* 310 (cited in note 2).

56. See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 11 (Princeton U. Press, 1999).

57. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

58. See Richard A. Posner, ed., *The Essential Holmes* ix (U. of Chicago Press, 1992).

be doubted that the federal government's authority rested on some broader authority than the consent of the people of any individual state.

With political sovereignty, as with other, more critical matters such as slavery, the Framing generation's unfinished business could only be resolved in the agony of battle. Thus, if sovereignty was ever settled, it was only much later than 1789, and even then, it was determined more as a matter of political reality than constitutional theory.

In terms of the original understanding, the only clearly wrong answer about the concept of sovereignty is that there is a clearly right answer. How does McDonald go so badly wrong? The problem is as much his method as his use of historical materials. His analysis invokes a series of purported rules. For instance, he says, because the King had constituted the colonies as separate political communities, sovereignty must have reverted to those separate communities when the King was evicted. (p. 8) Similarly, Congress could not have formed the state governments, because it was an agent of the states as existing political societies, and "in the nature of things, agents cannot authorize their principals to do anything." (p. 9) Thus, McDonald seems to think that sovereignty is something real, not an intellectual construct, and that its creation is the subject of clear laws.

In this error, he perhaps shows the defects of his virtues. In the preface, he refers to "those of us who have spent most of our adult lives in the eighteenth century." (p. viii) One can only envy such immersion in that great period of history, which must be a major asset for a historian. In analyzing issues of political authority on basis of the "nature of things," however, McDonald seems to be guilty of a very Eighteenth Century mistake. Conceptual analysis can provide little assistance, when the subject is sovereignty.