Do the People Rule?

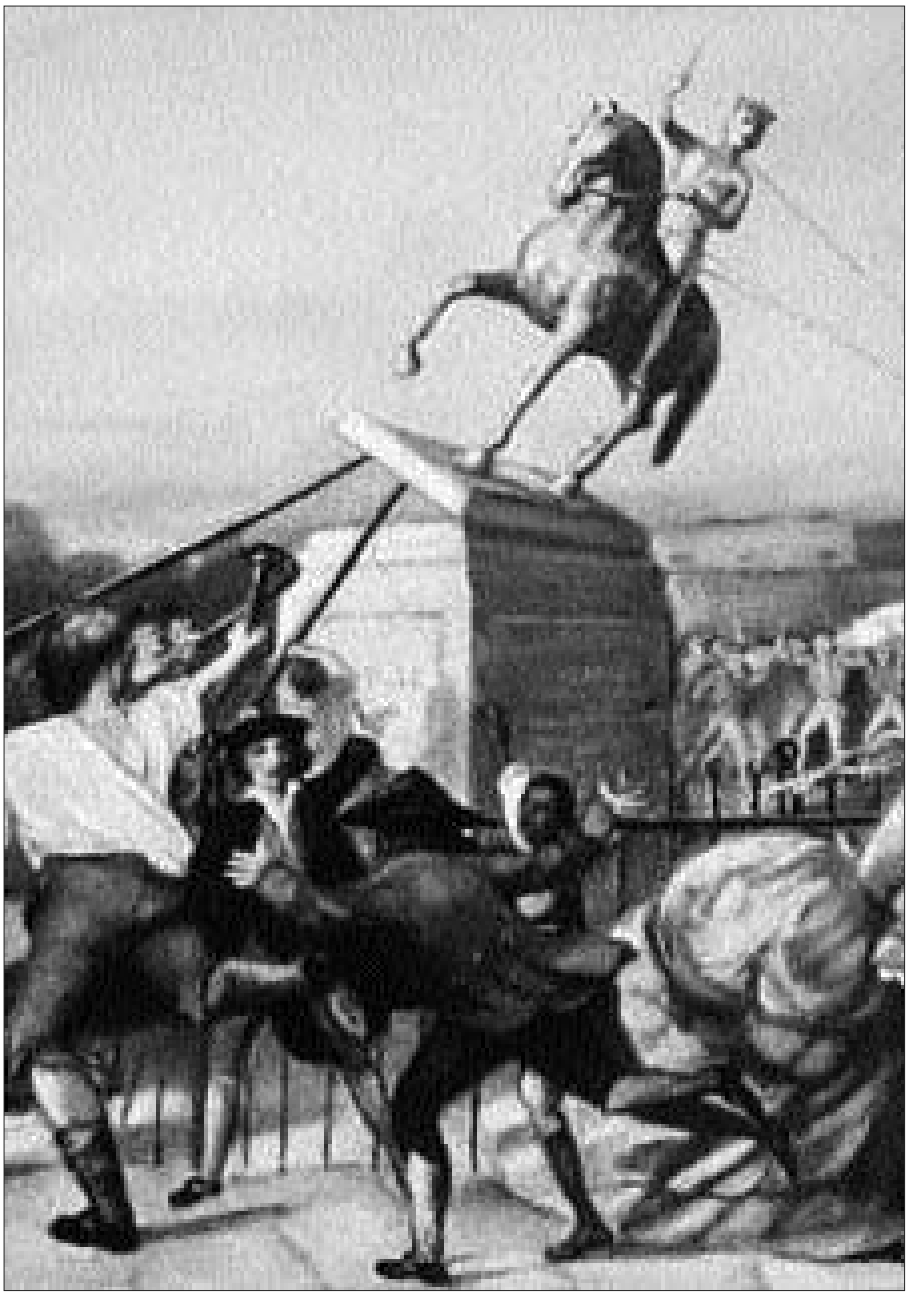
Presidents as diverse as William McKinley, Gerald Ford, and Jimmy Carter have spoken the simple words: "Here the people rule." But the meaning of the words is by no means as straightforward as it may seem. Who exactly are the people? The inhabitants of 50 different states, or the inhabitants of a single nation? One people, or 50 peoples joined by compact? The questions are as old as the nation, and perhaps best answered today by recognizing validity in each position.

by Michael Lind

If American government were a cake, what kind of cake would it be? Political science and law examinations at American universities frequently ask some version of that question. Is the best metaphor for the relationship between the federal and state governments in the U.S. Constitution a layer cake, in which each level retains its own identity? Or does the United States have a "marble cake federalism," in which, according to the political scientist Morton Grodzin, "ingredients of different colors are combined in an inseparable mixture, whose colors intermingle in vertical and horizontal veins and random swirls"? Layer cakes and marble cakes do not exhaust the metaphorical possibilities. The political scientists Aaron Wildavsky and David Walker have suggested, respectively, that a birthday cake and a fruitcake can symbolize American federalism. All the culinary constitutionalism seems appropriate for a nation that some claim was once a melting pot but is now a salad bowl.

This battle of metaphors reflects a deep and enduring disagreement among Americans about the nature of popular sovereignty in the United States. Is the United States a creation of the individual states—or are the states a creation of the Union? Is there a single American people—or are there as many "peoples" as there are states?

The debate began when the ink was hardly dry on the new federal constitution drafted in Philadelphia in the summer of 1787. That fall, delegates from across Pennsylvania convened in Philadelphia to ratify or reject the document. On October 6, 1787, the delegates heard from James Wilson, a Scots-born lawyer who had been one of the leading thinkers at the past summer's constitutional convention (President George Washington would appoint him to the Supreme Court in 1789). "There necessarily exists in every government," Wilson told the delegates, "a power



The Tearing Down of the Statue of George III *(1857), William Walcutt's painting of a revolutionary crowd in New York City, is a classic celebration of the people's sovereignty.*

from which there is no appeal; and which, for that reason, may be termed supreme, absolute and uncontrollable. Where does this power reside?"

Wilson rejected the British idea that the government—in the case of Britain, the crown-in-parliament—was sovereign: "The idea of a constitution limiting and superintending the operations of legislative authority seems not to have been accurately understood in Britain. To control the power and conduct of the legislature by an overruling constitution was an improvement in the science and practice of government reserved to the American states." However, Wilson continued, it

would be a mistake to assume that the constitution is sovereign: "This opinion approaches a step nearer to the truth, but does not reach it. The truth is that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions."

Although the idea of popular sovereignty reached its fullest development in the United States during the War of Independence and the early years of the American republic, it was an ancient concept. The Roman republic and, at least in theory, the subsequent Roman Empire were based on the *imperium populi*, the delegated sovereignty of the people. The idea of popular sovereignty was revived in the late Middle Ages and the Renaissance by Christian and humanist opponents of the divine right of kings.

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In 17th-century England, during decades of civil war and other political turmoil, English thinkers worked out the basics of the modern doctrine of popular sovereignty. Drawing on earlier writers, philosopher John Locke argued that every people has a right to change its government whenever the government becomes tyrannical. Although the theory of popular sovereignty remains controversial in Great Britain, all mainstream American constitutional thinkers have accepted the Lockean premise that, in the words of the Declaration of Independence, "to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government."

The paramount debate in American history has not been about the ultimate sovereignty of the people, but rather about the identity of the people (meaning a single entity, in the sense of *populus*). Is there a single American people? Or is the United States a federation of as many peoples as there are states?

The two rival interpretations of popular sovereignty in America have been the *nationalist theory* and the *compact theory*. The nationalist theory holds that from the beginning there has been a single American people, which has existed in the form of successive "unions." Lincoln summarized this view in his first inaugural address: "[W]e find the proposition that, in legal contemplation, the Union is perpetual confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of

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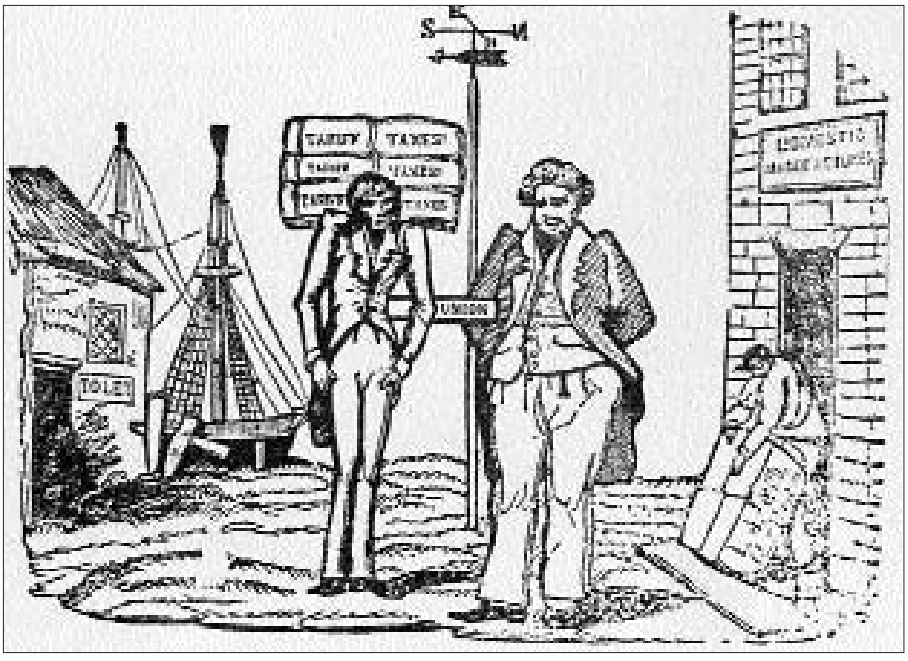
all the then thirteen states expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787 one of the declared objects for ordaining and establishing the Constitution was 'to form a more perfect union.'"

Lincoln's nationalist interpretation of history drew on the thinking of the Supreme Court justice Joseph Story in his *Commentaries on the Constitution of the United States* (1833). According to Story, the Continental Congress, formed by delegates from the then-British colonies, "exercised de facto and de jure sovereign authority, not as the delegated agents of the governments de facto of the colonies, but in virtue of original powers derived from the people." The Declaration of Independence was "implicitly the act of the whole people of the united colonies," not of separate state peoples that had independently seceded from the British Empire.

Though the compact theory, like its competitor the nationalist theory, comes in several versions, every version holds that the American union is a compact among the states—the state *peoples*, that is, not the state governments. The most familiar version, held by Thomas Jefferson, John C. Calhoun, and the Confederate secessionists, can be described as the *unilateral compact theory*. South Carolina senator John C. Calhoun, its most brilliant proponent, argued in the Senate in 1833 that "the people of the several States composing these United States are united as parties to a constitutional compact, to which the people of each State acceded as a separate sovereign community." Calhoun denied "assertions that the people of these United States, taken collectively as individuals," had ever "formed into one nation or people, or that they have ever been so united in any one stage of their political existence."

According to Calhoun's unilateral version of the compact theory, the people of each state, represented in a constitutional convention, could authorize the secession of the state. They could also "nullify" laws they regarded as unconstitutional, a case that was made in response to President John Adams's unpopular Alien and Sedition Acts by the Virginia and Kentucky Resolutions of 1798. (Thomas Jefferson was the secret author of the Resolutions.) In the Nullification Crisis of 1832–33, South Carolina claimed a right to nullify a federal tariff law, and backed down only when President Andrew Jackson threatened to use federal force against the state.

As an interpretation of the federal constitution that went into effect in 1789, the unilateral compact theory is unconvincing. The alleged right of states to declare federal laws unconstitutional is incompatible with the supremacy clause of the Constitution and the role of the Supreme Court in adjudicating conflicts between the state and federal governments. But the claim that there is a constitutional right of unilateral secession is not as easily settled, because the Constitution is silent on whether, or how, states that have ratified it can depart from the Union. The most reasonable inference is that states can leave the United States only by the legal route of a constitutional amendment or by the extralegal route of a new constitutional convention that dissolves the federal constitution and creates a new union with new members. Responding to the possibility that opposition to the War of 1812 would inspire some of the states of New England



Protective tariffs placed a heavy burden on cotton-growing southerners while aiding manufacturers in the North. The conflict fueled the Nullification Crisis of 1832.

to secede, Thomas Ritchie, editor of the *Richmond Enquirer*, wrote, "The same formality which forged the links of the Union is necessary to dissolve it. The majority of States which form the Union must consent to the withdrawal of any one branch of it. Until that consent has been obtained, any attempt to dissolve the Union, or obstruct the efficacy of its constitutional laws, is Treason—Treason to all intents and purposes."

The unilateral compact theory, then, is weaker than the nationalist theory of successive unions as an interpretation of the federal constitution of 1787. But as an explanation of American constitutional history right up through the ratification process of the federal constitution, the compact theory is more persuasive than the nationalist theory.

On July 4, 1861, President Lincoln said in a message to Congress, "The Union is older than any of the States, and, in fact it created them as States." Political scientist Samuel H. Beer restated this nationalist argument in *To Make a Nation: The Rediscovery of American Federalism* (1993), when he wrote that "the reallocation of power by the Constitution from state to federal government was simply a further exercise of the constituent sovereignty which the American people had exercised in the past, as when they brought the states themselves into existence."

The argument is flimsy. For one thing, it implies that without permission from the Continental Congress, the colonial populations would not have abolished their colonial governments and created new republican governments. To make matters worse for the nationalist theory, the phrasing of the Declaration of Independence supports the compact theory by referring to the formation of new state governments by the authority of the people of the colonies when it means the people of Massachusetts, the people of Virginia, and so on. And these colonial peoples, which became the peoples of the first states, had come into

existence generations earlier—when each colony had been established by royal charter, if not before.

Nationalists also emphasize the description of the United States as "one people" in the Declaration of Independence: "When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands, which have connected them with another. . . ." But elsewhere the Declaration refers to the colonies in the plural, and concludes that "these United Colonies are, and of Right ought to be, Free and Independent States." The author of the Declaration, Thomas Jefferson, was a fervent champion of the compact theory. Indeed, the Declaration claims that for generations the individual colonies had been separate states in a federal empire held together only by personal allegiance to the British monarch. During the Constitutional Convention, Maryland's Luther Martin summarized the view that was implicit in the Declaration: "At the separation from the British Empire, the people of America preferred the establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one."

The United States continued to look like a league of sovereign states under its first formal constitution, the Articles of Confederation (1781–89). In his *Defence of the Constitutions of Government of the United States of America* (1787–88), John Adams treated each state as a republic but rejected the applicability of the concept of republicanism to the United States as a whole, on the grounds that, under the Articles, Congress was "not a legislative assembly, nor a representative assembly, only a diplomatic assembly." In April 1787, James Madison observed that under the Articles of Confederation, "the federal system . . . is in fact nothing more than a treaty of amity of commerce and of alliance, between independent and sovereign states."

The history of the constitutional convention of 1787 and the process of ratification also supports the compact theory. The authors of *The Federalist*—Madison, Alexander Hamilton, and John Jay—informed their readers that the new federal constitution would replace a league of states with a federal (or as Madison called it, a "compound") republic. If the "Union" under the Articles of Confederation were already a nation-state, albeit a decentralized one, it would have made no sense for Madison, Hamilton, and Jay to warn against disunion if the federal constitution were not adopted.

The method by which the federal constitution was ratified also refutes the arguments of nationalists such as Lincoln and Story that a union based on a single people had existed since 1776 or 1774. Samuel H. Beer writes, "Nationalist theory required that ratification be both popular and national, a procedure which expressed the will of individuals, the ultimate authority in a republic, and which embraced a single nationwide constituency, acting on behalf of the people at large in the United States." During the Constitutional Convention, Pennsylvania's Gouverneur Morris indeed proposed that the Constitution be ratified by "one general Convention, chosen and authorized to consider, amend, and establish the same." His proposal was rejected. The Constitution was ratified not by a national convention or even by the state governments but by the peoples of the states.

One of the peculiarities of the ratification process is that the new constitu-

tion went into effect upon being ratified by nine of the 13 states. (A similar rule of nine had earlier been used under the Articles of Confederation to authorize the admission of new states to the United States.) Nationalists argue that the rule of nine meant that the Constitution was ratified by a numerical majority of the American people, considered as a single national community. According to Beer, "Calculated according to the index of representation in the House, as proposed by Madison, any nine states would have had not only a majority of the states but also a majority of the population." Beer himself admits that the rule of nine guaranteed this nationwide numerical majority "without saying so." But the argument that the ratifiers had to be hoodwinked into taking part in a majoritarian procedure that they did not understand weakens rather than strengthens the case for the nationalist interpretation.

If the understanding of the ratifiers of the Constitution and not of the drafters is the one that counts for the purposes of American constitutional law, then one must reject the promising variant of nationalist theory proposed in 1987 by Professor Akhil Amar of Yale Law School. Amar suggested in the *Yale Law Journal* that during the process of ratification of the Constitution, "previously separate state Peoples agreed to 'consolidate' themselves into a single continental people." In contrast with the Story-Lincoln version of nationalist doctrine, Amar's variant would grant that the compact theory is an accurate description of the United States up until 1789, when the United States became a federal republic.

The most interesting part of Amar's theory—the notion that previously distinct state peoples fused during 1787–88 to become a single national people—is contradicted by Madison's statement in *The Federalist* 39 that the federal constitution would be ratified "by the people not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." Amar's view is also incompatible with the way in which states were later added to the Union. The formation of a state "people" in a territory for only a few months or weeks would be pointless if the "people" were then dissolved into a unitary American people once the new state joined the Union. The compact theory makes more sense. A people in a state formed from a territory delegated a portion of its sovereign power to the federal government on joining the Union, but reserved the rest—and maintained its identity as a distinct population. Texas, the only state that began as an independent republic, would never have joined if its people thought they were dissolving "the people of Texas" and reducing Texas to a mere address.

The Tenth Amendment may be fatal to all versions of the nationalist theory of a single constituent American people: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Under a nationalist interpretation of the amendment, the single national people divided its sovereign power into three lumps and gave one to the federal government and one to all state governments, while reserving the third lump of sovereignty to itself. Thus, the Tenth Amendment created a zone of reserved popular power upon which neither the states nor the federal government could encroach.

That interpretation is appealing today, when, thanks to the Fourteenth

Amendment and the civil rights revolution, the Bill of Rights has been partially held to restrain the state governments as well as the federal government. But it is a way of thinking that was alien to all but a few extreme nationalists during the early Republic. The Supreme Court ruled in *Barron v. City of Baltimore* (1833) that the federal Bill of Rights applied only to the federal government; the peoples of the several states had to limit state governments by passing state bills of rights. The only restraints on the states were a few in the federal constitution, such as the prohibition of bills of attainder and titles of nobility, and the guarantee that every state would have a republican government. Only the Fourteenth and Fifteenth Amendments, which were not ratified until after the Civil War, in 1868 and 1870 respectively, nationalized part or all of the Bill of Rights. (The degree of nationalization is hotly disputed to this day.)

It follows, then, that the compact theory provides the only plausible interpretation of the Tenth Amendment. As odd as it may seem to contemporary Americans, in theory at least there are as many peoples as there are states. Each state people assigns the same portion of its popular sovereignty to the federal government. But each state people—that of Massachusetts or Virginia, for example—is then free to allocate powers to the state government, or reserve them for the people of the state, in different ways, as each sees fit.

It appears, therefore, that Lincoln was mistaken when he argued that "the Union is older than any of the States, and, in fact, created them as States"—and that President Ronald Reagan, in his first inaugural address, was correct: "The Federal government did not create the states; the states created the Federal government." The compact theory of popular sovereignty, which holds that there are as many sovereign peoples as there are states, explains far more of American constitutional history and law than the nationalist theory does with its positing of a single, unitary American people. This conclusion may seem surprising. After all, Americans are highly mobile and rarely feel an intense loyalty to the state in which they happen to live. They define their identities far more commonly by factors such as race, ethnicity, religion, and political ideology than by state patriotism; indeed, the very phrase "state patriotism" seems quaint. Nevertheless, the nationalization of American society has not been accompanied by a nationalization of America's constitutional structure. Even in the 21st century, there is no mechanism such as a national ballot initiative or referendum by which Americans nationwide can express their views. The United States Senate still represents state constituencies, and the only national officer, the president, is chosen by the Electoral College, in accordance with a formula that takes states as well as populations into account. The Electoral College made it possible for

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George W. Bush to defeat Al Gore, who received more of the popular vote.

In addition to seeming old-fashioned, the compact theory has long been tainted by its association with the Confederate secessionists and with later southern racists who used "states' rights" theory to defend institutionalized racial segregation. Fortunately, like the nationalist theory, the compact theory comes in more than one version. And even more fortunately, its most plausible variant—that of James Madison—undermines the arguments of both the Confederates and the segregationists and produces a view of the U.S. Constitution that most contemporary liberals as well as most conservatives can accept.

Madison, the "Father of the Constitution," has been accused of inconsistency. It is often said that he was a nationalist when he helped draw up the federal constitution and co-authored *The Federalist*; that he became a states rights theorist when he supported Jefferson's Virginia and Kentucky Resolutions in 1798 and when, as president, he favored limited government; and that he finally returned to his early nationalism late in life when he denounced nullification and the idea of secession. Though Madison, like any public figure, sometimes contradicted himself, he appears more consistent once he is identified as a member of the compact school—but a member with significant differences with other compact theorists, such as John C. Calhoun, his adversary in old age.

On March 15, 1833, the retired Madison wrote a letter to Massachusetts senator Daniel Webster, who, in his famous "Second Reply to Hayne," had defended the authority of the federal government and the desirability of perpetual union. "I return my thanks for the copy of your late very powerful speech in the Senate of the United States," Madison wrote Webster. "It crushes 'nullification' and must hasten the abandonment of 'secession.'" But having agreed with Webster's conclusions, Madison dissented from the logic of the nationalist theory Webster shared with Story (and that would later be taken up by Lincoln):

> It is fortunate when disputed theories can be decided by undisputed facts. And here the undisputed fact is that the Constitution was made by the people, but as embodied into the several states, who were parties to it and therefore made by the States in their highest authoritative capacity. They might, by the same authority and by the same process have converted the Confederacy [the United States under the Articles of Confederation] into a mere league or treaty; or continued it with enlarged or abridged powers; or have embodied the people of their respective states into one people, nation or sovereignty; or as they did by a mixed form make them one people, nation, or sovereignty, for certain purposes, and not so for others.

So far, Madison is merely restating the conventional theory of the Constitution as a compact among different state peoples. But he goes on to say that "whilst the Constitution, therefore, is admitted to be in force, its operation in every respect must be precisely the same"—whether the Constitution is thought to have been authorized by one national people (Webster's view) or by the separate state peoples (Madison's view). The compact can be revised or dis-

solved, but only with the agreement of all the parties, not just one or a few. In other words, according to Madison, the compact theory, properly understood, leads to the same conclusions as the nationalist theory: Unilateral secession by a state and unilateral nullification of federal laws are unconstitutional. Further, this Madisonian version of the compact theory would not support the later states' rights argument against federal civil rights legislation. After ratification of the Fourteenth Amendment in 1868, the only genuine argument was about what the federal civil rights regime would be—not about whether there would be one.

Madison's subtle version of the compact theory reconciles the actions of Lincoln in preserving the Union with the idea of plural sovereign states that shaped the logic of the Declaration of Independence as well as the form of the federal constitution and the method by which it was ratified. Madison's mutual compact theory is more convincing than Calhoun's unilateral compact theory (which is incompatible with the federal constitution) and Lincoln's nationalist theory (which does not take accurate account of the War of Independence, the Articles of Confederation, and the ratification process of the Constitution).

Even in Madison's pro-union version of the compact theory, a state people retained the moral right, though not the legal right, to rebel on its own against a tyrannical federal government. In his letter to Webster, he warns against confusing "the claim to secede at will, with the right of seceding from intolerable oppression. The former answers itself, being a violation, without cause, of a faith solemnly pledged. The latter is another name only for revolution, about which there is no theoretic controversy." Madison's theory could establish that unilateral secession was illegal and unconstitutional under the terms of the 1787 constitution, but it could not establish that an illegal secession was an illegitimate act of revolution. But no mere constitutional theory could. The justice or injustice of a revolution is a matter for political and ethical theory, not for constitutional law. Most contemporary Americans would agree that the revolution of the people of South Carolina against the British Empire was justified, but that the later revolution of the same people against the United States was not. In both cases, a majority of the South Carolina population supported the revolution; but the goal of the first was to preserve and increase republican government in North America, while the goal of the second, in fact if not in rhetoric, was to preserve and possibly extend the zone of chattel slavery in North America.

The conclusion must be that popular sovereignty in itself is not a sufficient basis for the moral legitimacy of governments or their acts. In a world in which peoples rather than kings are the sovereigns, the peoples, like kings, may use their sovereign power for evil as well as for good. As James Wilson told the Pennsylvania convention in 1787 when he described the theory of popular sovereignty, "There can be no disorder in the community but may here receive a radical cure. If the error be in the legislature, it may be corrected by the constitution; if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in the government, if the people are not wanting to themselves. For a people wanting to themselves, there is no remedy." ❑