

---

1968

## Who are the "People" in the Preamble to the Constitution

Morris D. Forkosch

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

---

### Recommended Citation

Morris D. Forkosch, *Who are the "People" in the Preamble to the Constitution*, 19 Case W. Rsrv. L. Rev. 644 (1968)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol19/iss3/8>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# Who Are the "People" in the Preamble to the Constitution?

Morris D. Forkosch

*Professor Forkosch asks the provocative question, "Who are 'We the People' in the Preamble to the Constitution?" He seeks to answer this question by examining the political climate existent at the time of the Constitution's drafting. This inquiry leads to a survey of the document's predecessors such as the Magna Carta, Mayflower Compact, and the Pennsylvania Charter of Privileges, as well as a comparison with similar documents such as the Articles of Confederation. Professor Forkosch argues, on the basis of the foregoing, that at the time the Constitution was drafted the term people included only the very small and select group of people who could vote. He then points out that the term was not then and is not now a static one, but through subsequent amendments and judicial interpretation has been ever increasing in scope. The Professor concludes that today the term has evolved from one including only voters to one construed to include almost all natural persons.*

**W**HAT DOES the phrase, "We the People<sup>1</sup> of the United States," as used in the Preamble<sup>2</sup> to the Federal Constitution, mean? Is Lincoln's paean, that we are "the Almighty['s] . . . almost chosen people,"<sup>3</sup> to be accepted, or should a mundane dictionary definition<sup>4</sup>

be satisfactory? Or, is the phrase merely an illusory, platonic abstraction so that politicians may politick,<sup>5</sup> philosophers may philosophize, and no one ever come substantively to grips with it?<sup>6</sup> Additionally, is it, or should it, be limited to

THE AUTHOR: MORRIS D. FORKOSCH (A.B., M.A., J.S.D., New York University; LL.B., LL.M., St. John's University; M.S.Sc., Ph. D., New School for Social Research) is a Professor of Law at the Brooklyn Law School.

political and legal considerations, or may others enter for pur-

<sup>1</sup> Save for one or two State constitutions, all others, except as noted below, at some point begin or insert "We, the people of . . .," and conclude with "do ordain this constitution," or "establish it," or "ordain and establish it." There are three individual other, but analogous, forms, "The people of . . .," or "The people inhabiting . . .," or "We, the delegates and representatives of the people of . . ." See COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS 777-81 (2d ed. 1959).

<sup>2</sup> In full the Preamble is:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The ends expressed are not discussed. For example, what is meant by "Justice"? However, it may be noted that to "secure" liberty does not mean to obtain, but to safeguard,

poses of explanation and understanding; may it also be understood in terms of economics, sociology, defense, et cetera? Was "the People" ever, or is it today, meant to be an inclusive or exclusive term,<sup>7</sup> and has it been broadened significantly in actual and constitutional interpretation and application? These are certainly profound and intriguing questions for the purposes of history,<sup>8</sup> politics, and law<sup>9</sup>

---

what the people have, as with the Declaration of Independence. See Z. CHAFEE, JR., *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 10-11 (1952).

<sup>3</sup> Address to New Jersey Senate, Feb. 21, 1861, in 4 *COLLECTED WORKS OF LINCOLN* 236 (O. Basler ed. 1953). See generally B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

<sup>4</sup> Webster initially defines the term in its plural sense, and then gives other subdivisions and definitions. *MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY* 1673 (3d ed. 1965).

<sup>5</sup> E.g., *THE FEDERALIST* NO. 22 (Hamilton), where Hamilton expatiates upon the defects of the Articles of Confederation and concludes with the contention that the foundations of our national government [should be laid] deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of *THE CONSENT OF THE PEOPLE*. The streams of national power ought to flow immediately from that pure, original fountain of all legislative authority. *Id.* at 143 (P. Ford ed. 1898).

Madison agrees. *Id.* NO. 46, at 310-11; *id.* NO. 49, at 334. In *id.* NO. 45, at 296 he declaims, "if, in a word, the Union be essential to the happiness of the people of America . . ." *But see* note 104 *infra*.

<sup>6</sup> See, e.g., Stalnaker, *Events, Periods, and Institutions in Historians' Language*, in 6 *HISTORY AND THEORY* 159, 164 (1967) (general analysis of holistic terms). On a parallel type of problem see Palmer, *Notes on the Use of the Word "Democracy" 1789-1799*, 68 *POL. SCI. Q.* 203 (1953), whose excellent survey for that period embraces the European nations and a short reference to the newly formed United States.

<sup>7</sup> For the purposes of this examination, political and legal considerations necessitate a bifurcation of the totality of human beings within the geographical area into those eligible to participate in the affairs of government and those not so eligible; the latter, again, is subdivided into those not eligible because of factors which apply equally to all, including those factually eligible, such as age, residence, alienage, etc., and those not eligible for reasons which involve purposeful discrimination and unequal treatment, and which today's approach would reject, e.g., property qualifications.

<sup>8</sup> The opening sentence of J. MCMASTER, *A HISTORY OF THE PEOPLE OF THE UNITED STATES* 1 (1883) is: "The subject of my narrative is the history of the people of the United States," and also, "the history of the people shall be the chief theme" of this study. The author later mentions the low state into which the Congress, under the Articles of Confederation, had fallen by 1784, and on this writes that "Much blame also lay with the people." *Id.* at 135. "Demagogues were constantly reminding the people that the United States were thirteen independent republics . . ." *Id.* at 137. Who these generality of "people" are, their specific composition and inclusions and exceptions, is never quite made clear — and, in effect, this may be said of practically all other histories and essays in this area. See, e.g., G. MYERS, *THE HISTORY OF AMERICAN IDEALISM* 13, 193, 332, 349 (1925).

<sup>9</sup> The Supreme Court, of course, has rejected the contention, recently revived in W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 374-79 (1953), that the Preamble is "the source of any [particular] substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted." *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905); *accord*, 6 *WRITINGS OF JAMES MADISON* 334 (Hunt ed.

which, in the light of present-day and future national (and international) considerations and social needs, require exploration.<sup>10</sup>

This exploration breaks down simply into: an examination of the language of the Constitution itself, including its amendments, and other relevant documents; preconstitutional and contemporary (1789) views, interpretations, and applications of the term(s); the statements made during the drafting of the Constitution to ascertain some degree of meaning; an analysis of language of the ninth and 10th amendments, as well as their subsequent judicial and governmental interpretations and applications, to disclose the meaning of "people" not only in them but also in the Preamble; and, finally, current approaches and needs.<sup>11</sup>

## I. THE CONSTITUTIONAL LANGUAGE

In the original, unamended Constitution the word "people" occurs one time in the Preamble, one time in article I, section 2, clause 1, and no place else in the document! There are, of course, numerous other references to particular individuals,<sup>12</sup> and the word "person(s)" appears 21 times, but of this latter use<sup>13</sup> at least 16 are so particular that they must be excluded from present consideration.<sup>14</sup>

---

1906) (1799 address to the Virginia General Assembly). Madison opposed the Alien and Sedition Laws "as palpable and alarming infractions of the Constitution." *Id.* at 406. See 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (2d ed. 1851).

<sup>10</sup> In 1953 Crosskey, before he discussed the document somewhat in extenso, undertook first "to provide the reader . . . with a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas, which are needed for a true understanding of the Constitution . . ." 1 W. CROSSKEY, *supra* note 9, at 5. No such ambitious undertaking is here assumed, even if pertinent to the subject matter. It may be remarked that Crosskey's analysis led him, at least for the Preamble, into rather farfetched conclusions, here rejected.

<sup>11</sup> In discussing "the People," however, it is somewhat necessary also to examine "person(s)" as a word which, at times, may be included in the concept. See, e.g., text accompanying notes 12-42 *infra*. To the extent, therefore, that these terms may be so interchangeable or relevant in a particular context, the analysis is slightly widened initially.

<sup>12</sup> E.g., the President, Vice President, Senators, Representatives, Speaker (of the House), Ambassadors, and so on, are mentioned, but in article III one finds no mention of a Chief Justice ("Judges . . . of the supreme and inferior Courts" are mentioned) so that one necessarily must go to article I, section 3, clause 6 to discover an indirect mention of such a person, albeit even here we are not explicitly told it is the Chief Justice of the Supreme Court. That clause gives the Senate the sole power to try all impeachments, save that when the President is so tried "the Chief Justice shall preside . . ."

<sup>13</sup> "Person" must be taken in context, for it may or may not include citizens, aliens, Indians, corporations, and the like. See M. FORKOSCH, CONSTITUTIONAL LAW 283 n.1 (1956).

<sup>14</sup> U.S. CONST. art. 1, § 2, cl. 2; *id.* § 3, cl. 3; *id.* § 6, cl. 2; *id.* § 7, cl. 2; *id.* § 9, cl. 8; *id.* art. II, § 1, cl. 1; *id.* cl. 2 (five times); *id.* cl. 4 (twice); *id.* art. III, § 3, cl. 1; *id.* cl. 2;

The fate of the remainder of these five uses of "persons" is interesting and, perhaps, illuminating. The first two of these uses, found in the first sentence of article I, section 2, clause 3, have since been replaced by the first sentence of section 2 of the 14th amendment. The next two such uses, found in article I, section 9, clause 1, have lapsed because of that clause's own built-in time limitation and, if necessary, because of the adoption of the 13th amendment. The fifth and last use, which is to be found in article IV, section 2, clause 3, has been superseded by the 13th amendment. In effect, therefore, since only the 14th amendment's first sentence contains one use of "persons," the original Constitution even as so amended cannot today be said to refer generally to "persons" except as just mentioned.

The amendments to the Constitution may also be so examined for "people" and "persons." The latter term appears in six of the amendments a total of 27 times, but in most of these instances the use is either sufficiently specialized or sufficiently irrelevant to the present inquiry as to be discarded.<sup>15</sup> It is only in the fourth and

---

*id.* art. IV, § 2, cl. 2. In all of these references a particular person is referred to, or the clause is extremely limited, *e.g.*, "No Person shall be convicted of Treason." *Id.* art. III, § 3, cl. 1.

<sup>15</sup> The amendments are the fourth, fifth, 12th, 14th, 20th, and 22d. In the fourth the word is used twice to illustrate one aspect of "people"; in the fifth the word is used twice, very generalized as "No person" and "any person," with a subsequent use of "himself" referring, of course, to "person"; in the 12th the word is used 10 times (a record to be compared with its use five times in article II, section 1, clause 2) in an exceedingly particularized fashion, *e.g.*, "the person voted for as President"; in the 14th's section 1 it is used thrice, in section 2 once, and in section 3 once, but it is only in the last such use, analogous to the 12th's, that rejection must occur; in the 20th's sections 3 and 4 the analogy is again to its use in the 12th; and in the 22d's five uses the same analogy is applicable.

Parenthetically, it may be observed that of the 15 amendments subsequent to the contemporary Bill of Rights, no fewer than 11 are concerned, directly or as interpreted, with the political aspects of government, and only five deal with economic power or concepts (the 14th is included in both categories). In effect, therefore, the thesis of Charles Beard, not that the Constitution was made by the delegates for their own personal benefit, but that the delegates represented distinct economic groups whose interests were (unconsciously) furthered, can here possibly be rejected for political reasons, *i.e.*, that the Constitution is basically a political document as also disclosed by the number and type of amendments subsequently "correcting" it. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 73 (1960); *see* 1 C. BEARD, THE RISE OF AMERICAN CIVILIZATION 306-07 (1927). *But see* C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 77-78 n.1 (new rev. & enlarged ed. 1935); C. WARREN, THE MAKING OF THE CONSTITUTION 69-70 & n.1 (1928) (attacking the thesis historically and economically); note 136 *infra*. Of course a counter may be expressed that of the amendments since the first 10, at least the 14th, have been so interpreted and applied as to reduce the power of property, production, and profit. *See, e.g.*, the discussion in *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952), and the substantive content given to the 14th beginning with dictum in *Gitlow v. New York*, 268 U.S. 652, 666 (1925); since this necessarily implies such a need because of

14th amendments that the six usages of "persons" hold interest for us. Briefly, the fourth's opening clause, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . ." discloses literally that "persons" refers to "people" through the use of the pronoun "their," and so translates into the physical individual who has this right; likewise for the second use of "person" in the last few words of this amendment. While this interpretation would superficially limit "people" to human beings, the decisions hold otherwise.<sup>16</sup> In the first sentence of section 1 of the 14th amendment, the term can refer only to humans, while the second sentence's two uses have long been held by the Supreme Court to include not only humans, regardless of status, *e.g.*, aliens, but also corporations.<sup>17</sup> As for the use of "people" in the amendments, there are only seven instances and, in two of these, a question of limitation and therefore relevance may arise.<sup>18</sup> In effect, therefore, a maximum of seven "people" and six "persons"

---

existing contrary views, it may now be concluded that the Constitution sought to support and continue, if not to increase, such power, *i.e.*, the economic tinge.

<sup>16</sup> See note 205 *infra*.

<sup>17</sup> *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394, 396 (1886). Justice Black, in 1938, rejected this last inclusion. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (dissenting opinion); *see Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion), with Justice Douglas joining, and Justices Murphy and Rutledge having "one reservation and one addition to make," not here important. *Id.* at 123. On the background of this amendment *see generally, e.g.*, H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956). In *Adamson*, Justice Black stated that "the original purpose of the Fourteenth Amendment [was] to extend to all the people of the nation the complete protection of the Bill of Rights." 332 U.S. at 89. Here "people" refers to every human being, regardless of status, and excludes corporations. But a non sequitur must occur if the Justice's views are followed, for if the entirety of the Bill of Rights is so incorporated without change, then its provisions regarding, for example, unreasonable searches and seizures, even in a limited degree, cannot apply to corporations — and yet Black has not objected to this inclusion. *See, e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946) (opinion by Rutledge, J.). *See also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 387 (1920), where the Government strongly contended that since a corporation could not plead the fifth amendment's immunity against self-incriminating testimony as to its books and papers "then it can not indirectly obtain the benefit of this Amendment by objecting" under the fourth. *Id.* at 389-90. Justice Holmes, in a 7-2 decision, said that "the rights of a corporation against unlawful search and seizure are to be protected . . ." *Id.* at 392. *See also* note 284 *infra*. And, of course, Justice Black has supported a corporation's rights of free speech. "I vote to reverse exclusively on the ground that the Times . . . had an absolute, unconditional constitutional right to publish . . . criticisms . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964); *see id.* at 295-97.

<sup>18</sup> The amendments are the first, second, fourth, ninth, 10th, and 17th. In the first two paragraphs of the last, the term appears, but is limited to the people of each State singly, rather than of the nation as a whole, and the reference is really to the "voters" of a State rather than to all of the people.

are in the amendments, and of these 13 uses a few must, as shown later, be limited or excluded.

In the Preamble and in the Constitution itself, therefore, the term "people" is found only twice, plus seven times in the amendments; in the Constitution there is no significant current use of "person" (although five preamendment uses may be referred to), while in the amendments proper there is a maximum use of only six such instances; and, finally, in the entirety of the Preamble, Constitution, and amendments, the maximum use of "people" and "persons" is therefore found in 15 instances. For a "government of the people, by the people, for the people," it seems almost sacrilegious that our fundamental document contains this term only twice, and only nine times if the subsequent amendments are added; and even if "persons" is thrown in, the significant total rises only to a maximum of 15.

For purposes of illumination and contrast, the Declaration of Independence and the Articles of Confederation, as well as the two Constitutions of the Confederate States of America, may be examined.<sup>19</sup> The first<sup>20</sup> of these documents contains 10 instances of

<sup>19</sup> Although not discussed in extenso, the United Nations and its documents are of interest. Two items merit examination, the Charter itself, and the Universal Declaration of Human Rights.

The Charter's preamble, like that of the United States Constitution, opens with "We the Peoples of the United Nations . . ." It then states why they are combining, *i.e.*, the ends, and then "to accomplish these aims" "our respective Governments" have "assembled" through "representatives" who "have agreed to the present Charter . . ." In L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS (1946), the opening language is referred to as follows: "While the Preamble to the Charter opens with the words 'We the peoples of the United Nations,' the concluding words of the Preamble, 'Accordingly our respective Governments . . .' make it clear that the Charter is not a constituent act of the peoples of the United Nations, but rather an agreement freely entered into between governments." *Id.* at 19.

The insertion of these words was proposed by the Delegation of the United States. The purpose was to emphasize that the Charter is an expression of the will of the peoples of the world and is primarily concerned with their welfare. The proposal was inspired by the opening words of the Constitution of the United States. *Id.* at 55.

However, the document is a compact between and among governments, not peoples, and, in any event, the question still remains, what peoples?

<sup>20</sup> The best accounts of the evolution of the Declaration of Independence are in C. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (1933); J. BOYD, DECLARATION OF INDEPENDENCE: THE EVOLUTION OF THE TEXT (1943); J. HAZELTON, THE DECLARATION OF INDEPENDENCE (1906). An outstanding summary is given in 1 THE PAPERS OF THOMAS JEFFERSON 413-33 (J. Boyd ed. 1950), and a good bibliography is presented in E. DUMBALD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 171-89 (1950). In D. HAWKE, A TRANSACTION OF FREE MEN 247-66 (1964), Becker's almost cynical attitude is given.

"people," and while in most of these the use is here irrelevant,<sup>21</sup> this is not so in all cases; the term "person" is not even found once in the Declaration of Independence. The Articles of Confederation<sup>22</sup> use "people" and "person" three and nine times, respectively. The Constitution's penurious use of "people" (two or one) may thus be contrasted with its extended use in the Declaration (10) and limited use in the Articles (three), while the Constitution's extended use of "persons" (21) may be contrasted with its absence in the Declaration and its moderate (nine) use in the Articles. However, not all such uses are relevant or important, as it is primarily a question of concept with which we are concerned.

The two Confederate Constitutions include that of February 8, 1861 for the provisional government, and the permanent document of March 11, 1861. The introductory paragraph to the first document mentions only "a Congress of the Sovereign and independent States," and the Preamble speaks of "We, the Deputies of the Sovereign and Independent States." The permanent document's Preamble, however, begins "We, the people of the Confederate States, each State acting in its sovereign and independent character,"<sup>23</sup> and, save for some differences,<sup>24</sup> follows the general form, style, and language of the Constitution of the United States. In the permanent

---

<sup>21</sup> *E.g.*, the opening sentence is, "When, in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another . . ." Here the term is generalized so that "nation," "country," or a similar concept may be substituted, although it can also be limited to those who trace their heritage to England. *See, e.g.*, 2 THE WORKS OF THOMAS JEFFERSON 42 (P. Ford ed. 1904), giving the first phrasing as "a People." Separately, the Declaration uses other terms, *e.g.*, "all men," for which "all people" may be substituted.

<sup>22</sup> See the excellent interpretation of the internal problems and background, as well as the drafting, in M. JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781 (1940) [hereinafter cited as THE ARTICLES]. *See generally* M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789 (1950) [hereinafter cited as THE NEW NATION].

<sup>23</sup> These documents may be found in 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, S. DOC. NO. 234, 58th Cong., 2d Sess. 899, 909 (1904).

<sup>24</sup> *E.g.*, Perm. Conf. Const., art. I, § 9, cl. 1 forbade the importation of Negroes, and clause 2 gave the Congress power so to prohibit from the other (Northern) States; clause 4 prevented the impairment of any property right in Negro slaves; additional restrictions upon Congress are found in section 9, and most of the Bill of Rights to the United States Constitution was repeated there. Article IV, section 2, clause 1 gave privileges and immunities to State citizens, and then gave them "the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired." *See also* Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), holding a Negro not to be a citizen under the Constitution so that his appeal could not be entertained and, gratuitously, stating Congress could not exclude slavery from the territories. Other differences are not further explored.



document, "people" occurs in the Preamble once and then, in a combined Constitution and Bill of Rights, occurs six more times; "persons" occurs 24 times.<sup>25</sup> The opening session of the Provisional Congress was presented with "divers ordinances and resolutions adopted by the several conventions of the peoples of the independent States" of the South, and those conventions of South Carolina, Georgia, Florida, and Louisiana all opened with "We the people of the State of," while Alabama's declaration was "by the people of," and Mississippi's "The people of."<sup>26</sup> Nevertheless, as shown above, the provisional Constitution rejected "people" for "States," although the permanent Constitution replaced this by "We, the people."<sup>27</sup> Subsequent accretions to the Confederacy were those of Arkansas, Kentucky, Missouri, North Carolina, Tennessee, Texas, and Virginia, and it was generally the States as such which acted.<sup>28</sup> This difficulty in determining whether the "people" or the "States" acted<sup>29</sup> is reflected in the duality of the theories upon which southerners relied for their conduct, *i.e.*, that the people had an inherent right of revolution, and that the States had a constitutional right to secede.<sup>30</sup> Regardless, an inconsistency is immediately apparent if

<sup>25</sup> Ten of these in article II, section 1 have to do with the election of the two chief officers.

<sup>26</sup> 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, *supra* note 23, at 7-9.

<sup>27</sup> Ratification of the permanent Constitution was speedy, and in several instances the resolutions were referred either to the people or to a new ratifying convention; for example, the Texas convention considered whether to submit the permanent Constitution to the people at the ballot boxes. *See generally* C. LEE, THE CONFEDERATE CONSTITUTIONS 128-40 (1963).

<sup>28</sup> *E.g.*, Missouri's resolution to withdraw from the Union was "enacted by the general assembly" although its accretion to the Confederacy was by "[t]he general assembly . . . for and in behalf of the people" of the State. *See generally* 2 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, *supra* note 23, at 481. In Virginia's case, a convention between the Confederacy and "The Commonwealth of Virginia" was first entered into, although "[w]e, the delegates of the people of Virginia" thereafter ratified the new Constitution. *Id.* at 190-97. Kentucky's regular legislature and government was repudiated by a convention which established a provisional government and, as Jefferson Davis claimed in his message to the Confederate Congress, in that State's communications "will be found a powerful exposition of the misrepresentation of the people by the government of Kentucky . . ." *Id.* at 536. The convention severed its connections with the Union "and, in the name of the people," declared the State to be free and independent. *Id.* at 537.

<sup>29</sup> As disclosed below, the 1787 Constitution was ratified by specially elected conventions, not States. *See* note 131 *infra*.

<sup>30</sup> *E.g.*, the Provisional Governor of Kentucky, in a letter to Jefferson Davis forwarded with the other items, wrote:

The action of the people of this State . . . for the protection of their rights of person and property, was based, as a necessity, upon the ultimate right of revolution . . . The constitutional right of secession by the State . . . was not possible, because . . . [it] was denied us by the enslaved members of the

"people" is limited, with exceptions and exclusions resulting in a small minority determining the conduct of the totality; and, without referring to others, this inconsistency is found expressed in the Confederacy's own constitutional provisions concerning the Negroes,<sup>31</sup> as well as its judicial treatment of them as chattels.<sup>32</sup>

The concept of "people" in the United States Constitution and the other documents varies in different contexts and places,<sup>33</sup> so that its uses, as heretofore described, required some preliminary examination to discard the obviously irrelevant; *e.g.*, corporations and partnerships are not within the Preamble's use of the term.<sup>34</sup> Even so, ambiguities and generalities abound in even supposedly relevant uses. For example, the opening sentence in the Declaration of Independence is, "When, in the course of human events, it becomes necessary for one people to" separate from another, "they should declare the" reasons why. Here the term appears symbolically to encompass the totality of humans in the colonies, and elsewhere "the people"<sup>35</sup> and "the good people of these colonies"<sup>36</sup> are like-

---

legislature . . . . There is no incompatibility between the right of secession by a State and the ultimate right of revolution by the people. The one is a civil right founded upon the Constitution; the other is a natural right resting upon the law of God. Letter from Governor George W. Johnson to Jefferson Davis, Nov. 21, 1861, in 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, *supra* note 23, at 541.

*See also* J. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY 1789-1861, at 196-99 (1930). The fortunes of the Confederacy in Kentucky ebbed with the defeat of its army, and the provisional government became a fugitive one; in the post-war era the State's court of appeals held the official acts of the provisional officers to be invalid. *Simpson's Ex'r v. Loving*, 66 Ky. (3 Bush) 458 (1867); *cf. Ward v. State*, 42 Tenn. 605 (1866).

<sup>31</sup> Of course the reply then was that Negroes were not included as "the people," as others were not. There is nothing strange in this overall approach. For example, although Zimmern writes that in fifth-century Athens "the people is the Government," A. ZIMMERN, THE GREEK COMMONWEALTH 129 (5th rev. ed. 1931), Plato and Aristotle and all others, then excluded slaves from inclusion is "people" or "citizens."

<sup>32</sup> *See, e.g.*, W. ROBINSON, JUSTICE IN GREY 245-46 (1941), for a discussion of Negroes being attached. The author states that the "testimony of slaves was admissible in certain cases, particularly in cases for or against other slaves . . ." *Id.* at 197 n.2. Two questions emerge: if Negroes are not "people," how can a court accept jurisdiction in a suit by *Slave v. Slave*, for would this not permit a suit by *Horse v. Jackass* (reviving Roman law concepts as well as in *rem* and forfeiture cases); and, if treated as animals (*i.e.*, chattels), how could a criminal prosecution be conducted (again unless Roman concepts were utilized)? Theories, of course, give way to practical necessities.

<sup>33</sup> In *Smiley v. Holm*, 285 U.S. 355 (1932), Hughes, C.J. stated: "The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function." *Id.* at 365-66.

<sup>34</sup> *See, e.g.*, note 291 *infra*.

<sup>35</sup> In paras. 2, 7, 8, 12 and 26 ("our people"), and 30 ("a free people"). *See also* para. 28 which refers to "our fellow-citizens" instead of "our people," but without change in concept.

<sup>36</sup> Para. 32. It is interesting to note that Jefferson's "Rough draught" of the Dec-

wise so referred to.<sup>37</sup> In one instance, however, the Declaration accuses King George of having "refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature . . ."<sup>38</sup> but while the reference is thus to a portion of the entirety, *e.g.*, one colony or city, and even more particularly to a voting or represented second portion of this first portion, the concept is here not to be overly differentiated from the generality. This does not necessarily mean that "the people" in the Declaration need therefore not be further analyzed; on the contrary, interesting depths may now be plumbed by quoting one historian's view on the authority of the Pennsylvania Convention<sup>39</sup> which, on July 25th, approved the Congressional declaration of the preceding 4th, namely, that "the Convention . . . took its power *direct* from the *people* . . ."<sup>40</sup> In the light of the analysis below on the voters as distinguished from the population, this statement is suspect — unless, of course, the term "people" does not include those so rejected. So, too, must one analyze Washington's reference, in his *Farewell Address*, to the amending procedure in the Constitution, *i.e.*, "If in the opinion of

---

laration referred to the "authority of the good people of these states," with the last word apparently a Congressional amendment. J. HAZELTON, *supra* note 20, at page facing 144.

<sup>37</sup> For comparison, see note 19 *supra*.

<sup>38</sup> The quote may be found at paragraph 5 of the Declaration of Independence.

<sup>39</sup> During the first half of 1776 various attempts to organize some form of local government had culminated in a Provincial Conference which proposed that a Provincial Convention be called "for the express purpose of forming a new Government in this province." J. HAZELTON, *supra* note 20, at 190. This is the Convention here referred to. It may not be amiss to note that on June 30, 1775, the Pennsylvania Assembly set up a "Committee of Safety," consisting of 25 persons, with Benjamin Franklin as President. IV PENNSYLVANIA ARCHIVES 636 n. (J. Hazard ed. 1853). This Committee thereafter functioned somewhat secretly, and on July 2, 1776, prepared a public address because they "perceive[d] lately that both Confidence and Authority [in them] are considerably shaken and impaired . . . [as] not resting on a foundation altogether popular . . ." *Minutes of the Council of Safety of the Province of Pennsylvania*, in 10 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 623 (1852) [hereinafter cited as MINUTES OF THE PROVINCIAL COUNCIL]. On July 6th they received the Declaration of Independence from Congress and, as per the forwarded request, caused it to be publicized. *Id.* at 635. The Provincial Convention was elected, with Franklin its President, and met. *Id.* at 654. During its deliberations it appointed a "Council of Safety" which replaced the Committee. *Id.* at 653.

<sup>40</sup> J. HAZELTON, *supra* note 20, at 192 (emphasis in original). In 1776 John Adams wrote: "When! before the present epocha, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?" Quoted in B. BAILYN, *supra* note 3, at 272-73. See also *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), which states that "The people of the United States erected their constitutions or forms of government . . ." *Id.* at 388-89.

the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates."<sup>41</sup> The people do not directly enter into the amending procedure under article V of the Constitution, except through representatives. This is so whether proposed by Congress and ratified by the State legislatures, or, in the alternative process, proposed by State conventions;<sup>42</sup> the "opinion of the People" is therefore not directly manifested, and this was especially true in Washington's time when only a minority of people could vote, as disclosed below.

## II. PRIOR AND CONTEMPORARY VIEWS

The composition of "the people" in 1776 may be examined from many points of view.<sup>43</sup> Limitations of space preclude all but

---

<sup>41</sup> George Washington's *Farewell Address*, Sept. 19, 1796, in 35 THE WRITINGS OF GEORGE WASHINGTON 214, 229 (J. Fitzpatrick ed. 1940). The same criticism holds true for Lincoln who, in his *First Inaugural Address* of March 4, 1861, said: "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember, or overthrow it . . ." 4 COLLECTED WORKS OF LINCOLN, *supra* note 3, at 269. It may be also noted that Lincoln's first use of "people" here is to the totality of inhabitants, not to the few who are voters; his first "they" superficially refers to this same totality but when connected with and to the second "they," and read in conjunction with "existing government" and the rest of the sentence, the original term has now been limited, changed, or replaced — in any event, the two sentences do not refer to the same "people."

<sup>42</sup> On this alternative method of amending, see Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053 (1967).

<sup>43</sup> *E.g.*, the overall distribution by continent as of 1750 and 1800 discloses that North and Central America increased from 6 to 15 million, compared with that of Europe from 140 to 188 million. W. WILLCOX, STUDIES IN AMERICAN DEMOGRAPHY 41, 43 (1940). The rural-urban proportion in the United States as of 1790 was 94.9:5.1, 22 ENCYCLOPEDIA AMERICANA 367-68 (1956), and the largest city had only some 50,000 inhabitants. However, 19 COLLIER'S ENCYCLOPEDIA 252 (L. Shores ed. 1962), gives the 1790 census population as 3,929,000, of whom four-fifths were white and the rest Negro (this proportion fell thereafter), and W. SOLBERG, THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF AMERICAN STATES 409 (1958), giving the 1790 federal census as 3,637,881, of whom 2,897,804 were free whites, 58,243 free others, and 681,854 slaves.

The preceding figures may be somewhat compared with those of Great Britain. With the growth of towns, a phenomenon of the first phase of the industrial revolution, the population grew from an estimate of 8 million in 1760, to 10½ million in 1801 when the first census was taken. P. GREGG, A SOCIAL AND ECONOMIC HISTORY OF BRITAIN 1760-1960, at 62,582 (5th ed. 1962). According to Adam Smith, "[s]ervants, labourers and workmen of different kinds, make up the far greater part of every great political society . . ." 1 A. SMITH, THE WEALTH OF NATIONS 80 (5th ed. 1930). It may be remarked that "the people" in England had, by the turn of the century, been subjected to a variety of injustices, *e.g.*, the Poor Law, the Law of Settlement, the Game Laws, and the Enclosure Acts. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 101, 107-08 (1930) (Game Laws); 2 *id.* at 460 (Poor Law); 6 *id.* at 351-53 (Law of Settlement); W. HOLDSWORTH, HISTORICAL INTRODUCTION TO THE LAND LAW 40

a few narrow choices, sufficient, nevertheless, to permit inferences and conclusions. The framework within which the examination is undertaken encompasses the colonies in their own social, political, and economic setting, and, separately, this totality in its relation to the mother country.<sup>44</sup> The early settlements were proprietary or charter ones, *i.e.*, privately and commercially<sup>45</sup> sponsored and owned,<sup>46</sup> so that little Crown supervision occurred; later, however, the King recognized them as assets worthy of his attention and, under the mercantilist economic philosophy of the day, these outlying possessions were to contribute to the wealth and prosperity of England.<sup>47</sup> The years which thus ordinarily only brought chronological changes now brought conceptual and corresponding social and political ones as well. The several aspects of "the people" to be surveyed therefore require a degree of analysis in some depth, how-

---

(1927) (Enclosure Acts). Not only had the peasantry been destroyed, but the condition of the new wage laborer was settled for the next century. See P. GREGG, *supra*, ch. 1. See generally J. HAMMOND, *THE VILLAGE LABOURER 1760-1832* (1911); 2 E. LIPSON, *THE ECONOMIC HISTORY OF ENGLAND* ch. 3 (4th ed. 1947). Professor Ogg writes of 17th-century Europe that "[i]n the apportionment of states the populace were regarded as little better than chattels, even humanitarian Grotius regarding subject populations in this light." D. OGG, *EUROPE IN THE SEVENTEENTH CENTURY 2* (8th ed. 1961).

<sup>44</sup> See generally 1 H. OSGOOD, *THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY* xxvii (1904).

<sup>45</sup> See C. ANDREWS, *THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION 3-9* (rev. ed. 1931); 1 C. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY 28-52* (1934).

<sup>46</sup> The very liberal Pennsylvania Charter of Privileges, granted by William Penn in 1701, deserves more than a cursory reference, but considerations of space militate against this. For our purposes it is seemingly a mass of either contradictions, broadenings, or misunderstandings. See, *e.g.*, its opening paragraphs and subsequent limiting words (given in eight listed items here omitted).

In the language so used the original "Freemen and Planters" of 1683 were first expanded to "Freeman, Planters and Adventurers," but by 1700 the earlier charter was not suitable to "the Inhabitants," although Penn now says that six of seven "Freemen" had, in effect, petitioned for a more liberal one. Nevertheless, a new charter of liberties, "better adapted" to the "said Inhabitants," was to be given to "all Freemen, Planters and Inhabitants," to be held and enjoyed by those again named forever. There is no limiting term in this, *i.e.*, Negroes, Indians, indentured, are all "Inhabitants," if not freemen — at least so it would appear. Nevertheless, only believers in Christ could serve in the government, and then, apparently, only "Freemen" could choose an assembly, albeit the composition of this body continually was spoken of as consisting of "Persons" — undoubtedly these latter were to be freemen, picked by freemen, but no such words of limitation appeared. For example, throughout the document "person" or "persons" appear, and in paragraphs VI through VIII these need not be freemen, assuming otherwise qualified. So, too, in the proviso, which in effect warns the freemen that unless they so act within 3 years "the Inhabitants" are then so authorized. The Charter of Privileges to the Province and Counties, in 1 *MINUTES OF THE PROVINCIAL COUNCIL*, *supra* note 39, at 56-62.

<sup>47</sup> See, *e.g.*, 4 C. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY ix*, 348 (1934); 2 E. LIPSON, *supra* note 43, at 154-206.

ever minimal. Initially an early aspect of the colonization of America is mentioned, and then the demographic and suffrage aspects are considered.

In Massachusetts, to treat only this colony and its early days, religion, and not trade, was its founding *raison d'être*,<sup>48</sup> and the Puritan ethic "overrode all opposition, legal and otherwise . . ."<sup>49</sup> The colony began as a sort of voluntary joint-stock agreement or organization amongst three groups of interests,<sup>50</sup> but ultimately the merchant adventurers' desire for profits<sup>51</sup> resulted in a charter transformation of "the New England Company into the Massachusetts Bay Company, an incorporated body or body politic, with 'ample power to govern and rule all his Majesty's subjects that reside within the limits of our plantation.'"<sup>52</sup> During the next 30 years the new group "had established itself so firmly on New England soil as to defy all attempts to dislodge it," and ultimately it changed into "a full-fledged, quasi-independent, self-governing religious community."<sup>53</sup> During this charter period and the increase in trade and population, however, a centralized leadership developed even though "[t]here was nothing in the charter to warrant such concentration of control."<sup>54</sup> That is, the early settlers had approved their officials

---

<sup>48</sup> E.g., the Mayflower Compact, signed by all 41 male passengers, the women being excluded, was entered into (as its opening sentence, after the preliminaries, states) "for the glory of God, and advancement of the Christian Faith." THE STORY OF THE PILGRIM FATHERS 409-10 (E. Arber ed. 1897).

It was because of his then-heretical view that God did not require religious uniformity (and conformity) but that all were entitled to worship as they pleased (as a natural right), that Roger Williams' religious tolerance irked the Massachusetts authorities and eventually caused him, in 1644, to write *The Bloody Tenent of Persecution* and go to England to obtain a charter for the Providence Plantations. Thomas Jefferson's Bill for Establishing Religious Freedom, introduced in the Virginia House of Delegates in June 1779, eventually was enacted in 1786 with James Madison's help. Both Williams and Jefferson, in their respective works, generalized about all individuals and all men, without making distinctions (although Jefferson's bill did, in its section 1, speak also of "citizens").

<sup>49</sup> 1 C. ANDREWS, *supra* note 47, at 430; *see id.* at 462. Noble feels that "the point of view of the modern American historian is directly related to the world view of the English Puritans who came to Massachusetts . . ." D. NOBLE, HISTORIANS AGAINST HISTORY 3 (1965). Parenthetically, even Noble uses generalizations (and justifiably) in writing of "the people, the sleeping giant [who] awoke to strike out in blind fury against its foreign corrupters." *Id.* at 137.

<sup>50</sup> 1 C. ANDREWS, *supra* note 47, at 264-65. In the settlement later founded the Pilgrims were "a minority as to numbers" but "were in the main a homogeneous group, both in social rating and in religious views and purpose." *Id.* at 275.

<sup>51</sup> *Id.* at 345.

<sup>52</sup> *Id.* at 365-66 (quoting from the Massachusetts Colonial Records). The merger was apparently on March 4, 1629. *Id.* at 373. "In its main features, the charter was manifestly modeled upon that of the Virginia Company of 1612 . . ." *Id.* at 369.

<sup>53</sup> *Id.* at 430.

<sup>54</sup> *Id.* at 432.

by a form of consent, and while the charter permitted some such arrangement, the geographical scattering of the increasing population did not comport with any government by a few.<sup>55</sup> Also, the charter

[a]dmitted a measure of popular control in providing for four general courts, meeting every quarter, at each of which "freemen" or members were to be present, constituting the generality, for the purpose of making laws and admitting other "freemen," and . . . electing the officials of the company. Thus far no such general courts had been held, for probably the only "freemen" in America were those that made up the court of assistants. If therefore the requirements of the charter were to be met, "freemen" must be created at once. . . . [A]t one such court . . . *the generality appear under the name "people,"* who are mentioned as in attendance, giving approval by "erection of hands." This was clearly irregular and what we have is not a general court but a mass meeting. *The "people" were not authorized by the charter to attend* — an irregularity which had to be remedied. Consequently an invitation was extended to all such as desired to become "freemen" to hand in their names.

. . . As no qualification for membership was imposed at this time, except that which the word itself implies, it would look as if in this first difficult year, when death and distress were rampant and many dangers threatened the colony, the leaders were willing to do anything to ensure stability. Some of the old-timers . . . refused to become freemen, and a few of them were eventually shipped back to England as undesirable persons. But before seven months had elapsed . . . the whole idea of freemanship changed. At a general court, held on May 18, 1631, Winthrop was continued as governor and the "freemen" or "commons," as they are called in the records, or "freemen of the commons" as they appear in Winthrop's journal, were confronted with an ironclad oath, and the momentous decision was reached that henceforth "noe man shalbe admitted to the freedom of this body polliticke, but such as are members of the churches within the limitts of the same."<sup>56</sup>

Professor Andrews castigates this "flagrant violation of the charter" but feels that it

was in accord with Winthrop's profound conviction that it was for the good of all that power should be kept in the hands of those whose Christian calling it was to govern and that their number should remain as small as possible. He always stood in dread of a plebeian tyranny — control by the inferior sort — and was con-

<sup>55</sup> See *id.*

<sup>56</sup> *Id.* at 434-35 (emphasis added). Professor Andrews writes: "The historian Hutchinson speaks of this as 'a most extraordinary order or law,' a deprivation of civil privileges which had it occurred in England by act of parliament 'might very well have been the first in a roll of grievances.' It was probably the most flagrant violation of the charter that had occurred up to this time." *Id.* at 436.

vinced that the "people" were not to be trusted with the election of so important an official as the governor.<sup>57</sup>

This continuing experience of proprietary charter governments now becoming colonies and self-governing bodies is reflected greatly in America as a whole.<sup>58</sup> "The people" in early Massachusetts were apparently not synonymous with those who could rule, regulate, and retain, for these latter were a restricted group; "the people" might thus be said to include all humans, *i.e.*, the general population, but these were now to be classified in terms of religion, freemanship and so on. While Negroes do not enter the early Massachusetts picture, Indians certainly did; nevertheless, it is not only significant that nowhere do these aborigines appear in relation to the right to vote, own land, worship, et cetera, but no mention of them is made even negatively in any early records examined — it was just assumed that Indians were not included even in "the people" of the colony!

Demographically, the population of the English continental colonies in 1750 was estimated at about 1,200,000, as compared with Europe's 140 million,<sup>59</sup> but by 1800 the population of the colonies had increased to 5,300,000 as compared with Europe's 188 million.<sup>60</sup> "The tremendous rise in population . . . made the colonies far less dependent on the mother country than they had been in the early days."<sup>61</sup> For 1750 one demographer accepts figures of 1,040,000 whites and 220,000 Negroes which, by 1787, had increased to 2,776,000 and 520,000 respectively.<sup>62</sup> The first federal

<sup>57</sup> *Id.* at 438-39. See also *id.* at 441-50 on the subsequent addition to the powers of freemen, *e.g.*, not only in elections and taxation, but also in legislation. And on the later division of the general court into two separate bodies, see *id.* at 450-53.

<sup>58</sup> See, *e.g.*, 2 C. ANDREWS, *supra* note 47, at 195-379.

<sup>59</sup> W. WILLCOX, *supra* note 43, at 41. See also J. SANDERS, EARLY AMERICAN HISTORY 381 (1938), where the author states: "By 1660 the population of the colonies was 88,000 or less, by 1700 probably 289,000, by 1750 over 1,200,000, and by 1775 more than 2,500,000." Indians, of course, are ordinarily omitted from all statistics.

<sup>60</sup> W. WILLCOX, *supra* note 43, at 43. The United States then did not include Louisiana or Florida, which respectively had 40,000 and 20,000 inhabitants. By 1850 the greater United States population was 23,200,000. *Id.* at 44.

<sup>61</sup> G. WILLIAMS, THE EXPANSION OF EUROPE IN THE EIGHTEENTH CENTURY 193 (1966). See C. ANDREWS, THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION 182-83 (rev. ed. 1931).

<sup>62</sup> E. GREENE & V. HARRINGTON, AMERICAN POPULATION BEFORE THE FEDERAL CENSUS OF 1790, at 5, 8 (1932). Local breakdowns for various years are here interesting. For example, in South Carolina there were a total of 7,150 inhabitants in 1703, divided as follows: freemen, 1,460; free women, 940; white men servants, 110; white women servants, 90; and white children, 1,200. The "Slaves" included: Negro men, 1,500; Negro women, 900; Indian men, 100; Indian women, 150; Negro children, 600; and Indian children, 100. *Id.* at 173. By 1751 there were 25,000 whites



census of 1790 disclosed the total number of people in the new nation,<sup>63</sup> in terms of free whites, other free persons, and slaves,<sup>64</sup> to be 3,893,635, broken down as follows: free white males below 16 years of age, 791,848; over 16, including heads of families, 1,541,263; all other free persons, 59,150; and slaves, 694,280.<sup>65</sup> The returns for the Southwest Territory were respectively as follows: 10,277; 6,271; 15,365; 361; and 3,417; for a total of 35,691.<sup>66</sup>

During this latter half of the 18th century the whites included<sup>67</sup> the apprentice and the indentured (or covenanted) servant, the latter being somewhat different from the corresponding black, as the indentured servant's status was a temporary one, *i.e.*, service was for a period of contractual or customary time sufficient to pay the cost of overseas transportation.<sup>68</sup> Labor's continuing scarcity<sup>69</sup> con-

---

and 40,000 Negroes, and the first Census of 1790 disclosed a total of free white males, females, and other free persons as 141,979, while "Slaves" numbered 107,094. *Id.* at 175-76. For national and religious compositions see J. SANDERS, *supra* note 59, ch. 22. The author also remarks that "[t]here were both free and unfree laboring classes in the colonies, the second designation covering servants of different kinds and slaves." *Id.* at 388-89.

<sup>63</sup> For Adam Smith's views on such population growth in colonies see 2 A. SMITH, *supra* note 43, bk. 4, ch. 7, pts. 2-3. For his views on the relative political power between England and the American colonists according to population, and then when "the produce of American taxation" was included, see *id.* pt. 3.

<sup>64</sup> See also note 43 *supra*. Under a British law, 4 Geo. 1, c. 11 (1717), certain classes of criminals could be transported to the colonies for terms of not less than 7 years. For the remainder of the colonial period after 1717, some 50,000 convicts were so condemned. E. GREENE, *PROVINCIAL AMERICA 1690-1740*, at 237 (1905). At the close of the 17th century slaves accounted for a small minority of the population except for South Carolina; the development of the African slave trade brought about 25,000 slaves annually to America between 1698 and 1707, and by 1750 there were about 300,000 slaves in the colonies, a rate of increase at least twice that of the whites. This increase brought legislation carefully defining status, and one Virginia law classed Negroes, for certain purposes, as realty. *Id.* at 238-39.

<sup>65</sup> RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 3 (W. Duane ed. 1802). Others, *e.g.*, Rossiter, accept the Census of 1790, without more, as disclosing "a population of 3,929,214, of whom 681,834 were Negro slaves." C. ROSSITER, 1787, *THE GRAND CONVENTION* 23 (1966).

<sup>66</sup> RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES, *supra* note 65, at 52 notes that "[t]here are several captains who have not as yet returned" figures for their districts.

<sup>67</sup> "Conspicuous among the causes for colonization, in that it probably influenced the largest number of those who settled in North America, was the desire for land and an opportunity to make a home for wife and children." 1 C. ANDREWS, *supra* note 47, at 54.

<sup>68</sup> The indentures were able to be sold, traded, disposed of by will, or otherwise treated as chattels, for the term of service remaining, so that redemptioners as a form of property were analogous to Negroes, *e.g.*, the fugitive servant problem was the subject of statutes and judicial decisions upholding the property right, and of aid to the runaway by sympathizers. The later constitutional provision in U.S. CONST. art. IV,

duced to the influx of indentured and convict labor, and also spawned the slave trade's phenomenal growth. However, though such whites could be recognized as fellow Christians, temporarily subjected to a contractual status, whereas a Negro slave was differentiated by race and treated as an inferior human being, their political rights<sup>70</sup> of suffrage were nil.<sup>71</sup> For example, the Virginia Company's constitution of 1621 permitted what amounted then to almost universal suffrage,<sup>72</sup> but by 1762 not only were freehold qualifications there in effect but also no "servant by indenture, covenant, or otherwise" was allowed to vote,<sup>73</sup> nor was any "feme, sole or covert, infant under the age of twenty-one, recusant, convict, or any person convicted in Great Britain or Ireland, during the time

---

§ 2, cl. 3 is traceable to this background, and the Northwest Ordinance Art. VI, in 3 NORTHWEST TERRITORY LAWS 1795, at III, XII, contained a like clause. See generally 1 L. HACKER, THE SHAPING OF THE AMERICAN TRADITION 97-102 (1947); 2 E. LIPSON, *supra* note 43, at 159; R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA ch. 9 (1946). Lipson states: "The stream of emigrants which flowed from England in the seventeenth century, comprised three main categories. Some went . . . [for religious reasons,] . . . others out of necessity, and lastly, some involuntarily as being delinquents." 2 E. LIPSON, *supra* note 43, at 159. This background of apprenticeship continued into the first part of the 19th century. See, e.g., J. KROUT & D. FOX, THE COMPLETION OF INDEPENDENCE 1790-1830, at 22-23 (1944). To some extent convicts might also be included in such a temporary status. Greene & Harrington's 1775 overall figures for Maryland disclose a total of whites (men, women, boys, and girls) as 107,209, of whom 98,357 were free, 6,871 servants, and 1,981 convicts; for Negroes, the total was 46,356. E. GREENE & V. HARRINGTON, *supra* note 62, at 126.

<sup>69</sup> "There is seldom any want relief; because labor is deare, vis., 2s., and sometimes 2s. 6d. a day for a day labourer, and provision cheap." Report by Governor Leete of Connecticut to the Committee for Trade and Plantations in 1680, quoted in R. MORRIS, *supra* note 68, at 45.

<sup>70</sup> Here differentiated from legal rights, e.g., their ability to sue for freedom (despite the heavy risks incurred) because of the expiration of contract service, attainment of majority, and so on, and their ability not only to testify against their master but to be a witness in their own behalf.

<sup>71</sup> This does not mean that England was any better. Professor Andrews comments that even after the "glorious" Revolution of 1689 in England, "Heavy disabilities and penalties lay upon Roman Catholics, Unitarians, and Jews. Even Dissenters were barred from the borough offices . . ." C. ANDREWS, *supra* note 61, at 189. The author calls the new ruling group a "capitalistic aristocracy, which for many generations had supplanted the older aristocracy of the feudal type, controlled the voting, made the laws, and determined the policies of the government." *Id.* at 190.

<sup>72</sup> 1 THE STATUTES AT LARGE OF VIRGINIA 112 (W.W. Hening comp. 1823). This ordinance of King James created "two supreme councils in Virginia," the General Assembly (or popularly elected one) to consist of the (appointed) Council of State plus "two burgesses out of every town, hundred, or other particular plantation, to be respectively chosen by the inhabitants . . . reserving to the governor always a negative voice." However, "inhabitants" certainly did not include women, or men bound to service. A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 21 (1905). Therefore this famous first representative assembly in the New World did not include all actual inhabitants in its voting "inhabitants."

<sup>73</sup> 5 STATUTES AT LARGE OF VIRGINIA, *supra* note 72, at 205.

for which he is transported, nor any free negro, mulatto or Indian, although such persons be freeholders . . . ."<sup>74</sup>

Other and earlier restrictions upon voting were likewise either universally continued, or almost so, among the Thirteen Colonies.<sup>75</sup> These included, for example, *sex*,<sup>76</sup> *age* (at least 21), *race*,<sup>77</sup> *reli-*

<sup>74</sup> *Id.* at 519. Bishop feels that "On account of the small number of inhabitants [in the early colonies], it was at first hardly necessary, and perhaps not advisable, to limit the elective franchise to any particular class of individuals . . ." Bishop, *History of Elections in the American Colonies*, in 3 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 46 (1893). H. OSGOOD, *THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY xxviii-xxix* (1924), feels that the early chartered colonies gave way to the system of royal provinces; this may therefore really account for the later restrictions, *i.e.*, the economic need and its transition to the political requirements.

<sup>75</sup> One writer feels "that English customs and precedents exercised a determining influence upon the qualifications of voters in the colonies . . . . It is probable, under the prevailing seventeenth and eighteenth century political ideals, that a restricted suffrage would have been adopted throughout the colonies even if the English government had not endeavored to obtain the same end." A. MCKINLEY, *supra* note 72, at 484-85. C. Bishop believes that such colonial restrictions were "due solely to the interference of the [English] Crown . . ." Bishop, *supra* note 74, at 72.

However, although pre-Revolutionary America was so restricted, so that "at the end of the Revolutionary period [it] fell far short of complete democracy," Jameson nevertheless writes that "the right of suffrage was much extended . . ." J. JAMESON, *THE AMERICAN REVOLUTION AS A SOCIAL MOVEMENT* 18 (Beacon ed. 1966).

<sup>76</sup> Women were universally excluded, even if freeholders, and it was not until the adoption of the 19th amendment in 1920 that sex was no longer a negative factor in the right to vote.

<sup>77</sup> Bishop, *supra* note 74, at 51, writes that "Race qualifications were not prescribed by statute, except in the southern colonies. I know of no law that would prevent an Indian or a negro, if otherwise qualified, from voting in the modern colonies." However, custom may sometimes be stronger than positive law, *see, e.g.*, C. ALLEN, *LAW IN THE MAKING* ch. 1 (7th ed. 1964); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 58-62 (1921), and the colonial wars of the 17th and 18th centuries always involved Indians — the outrages visited upon the settlers by the Indians did not favor political fraternization. *See, e.g.*, H. OSGOOD, *supra* note 74, at xxviii *passim*. Also the Conspiracy of Pontiac, a confederation of Indian tribes led by Pontiac to drive the colonists to the sea, must have had a similar effect. G. WILLIAMS, *supra* note 61, at 194. A. MCKINLEY, *supra* note 72, at 474, states that

A racial distinction arose naturally in the colonies possessing a large negro slave population. Apparently the first law upon the subject is that of North Carolina of 1715 which excluded negroes, mulattoes and Indians from the franchise. In 1716 South Carolina inserted the word "white" into her election law; while Virginia adopted the phraseology of North Carolina in 1723, and Georgia followed with the word "white" in 1761. The North Carolina statute was repealed in 1734-5 and the racial restriction does not again appear during the colonial period.

Mrs. Catterall's collection of cases reflects the poor social and legal condition of the slaves, *e.g.*, they could not cohabit or intermarry with the whites, could not testify where whites were involved, and could be tried for their crimes without benefit of jury. 2 H. CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* 11 (1926). Catterall also includes cases on Indians. *Id.* at 77. One Georgia case finds a Negro, Dickson, "Guilty of the Murder of a free Negroe . . ." 3 *id.* at 6. *See also* J. JAMESON, *supra* note 75, at 25-26 (post-Revolutionary actions by States to free Negroes).

gion,<sup>78</sup> morals or good character,<sup>79</sup> nationality,<sup>80</sup> property<sup>81</sup> qualifications,<sup>82</sup> freemanship,<sup>83</sup> and qualifications akin to the English bor-

<sup>78</sup> For colonial religious background in the 17th century see, e.g., 2 H. OSGOOD, *supra* note 44, ch. 13; H. OSGOOD, *supra* note 74, pt. 2, chs. 10-11, at 76-142; *id.* pt. 3, chs. 1-2, at 407-90. See also Cousins, "In God We Trust," in THE RELIGIOUS BELIEFS AND IDEAS OF THE FOUNDING FATHERS (1958).

Parliament forbade the naturalization of Catholic aliens in the colonies after 1740, which had been anticipated by New York and Massachusetts several years earlier, and the colonies generally enforced some degree of religious discrimination, e.g., Quakers were unable to vote (oath-taking was involved) except in Rhode Island, Baptists were likewise impugned, and Catholics were generally disfranchised (or voting was limited to Protestants) as were Jews (e.g., New York and South Carolina, and being too few in numbers to be elsewhere specified). See generally A. MCKINLEY, *supra* note 72; cf. Bishop, *supra* note 74, at 52-53. See also *id.* at 56-64.

The Puritans were apparently the dominating religious force in the colonies at that time. See, e.g., 1 C. ANDREWS, *supra* note 47, at 431. There seems to be a logical inconsistency between the Puritans' view that since "God actively works to transform all spheres of life, including 'life in the world' with all its ramifications," so that they are therefore compelled to an "involvement in the political and social life of the community of their time," R. MONK, JOHN WESLEY: HIS PURITAN HERITAGE 250 (1966), and their actual practice, e.g., as given by C. ANDREWS, *supra* note 61, at 431, especially in their disenfranchising so many of the Lord's people. The answer to this last, of course, is that only they were such people.

<sup>79</sup> "Moral qualifications," says Bishop, "were insisted on only in New England, though Virginia denied the franchise to" convicts even though freeholders. Bishop, *supra* note 74, at 53; see note 74 *supra*. On the continuing exclusion of felons, and the judicial upholding of the power by the States, see discussion in *Green v. Board of Elections*, 380 F.2d 445, 451-52 (2d Cir. 1967).

<sup>80</sup> Bishop, *supra* note 74, at 52-53, says such political qualifications "were rarely prescribed by statute." He instances a few requiring voters to be born in the mother country or naturalized here.

<sup>81</sup> This is not to be confused with, or limited to, realty, e.g., a freehold. Freeholders, of course, were property owners, but these were not interchangeable terms as non-freeholders could also generally vote. See, e.g., 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 215-16 (1911) [hereinafter cited as FARRAND RECORDS] where Gorham of Massachusetts said:

[H]e had never seen any inconvenience from allowing such as were not freeholders to vote, though it had long been tried. The elections in Phila. N. York & Boston where the Merchants, & Mechanics vote are at least as good as those made by freeholders only . . . Mr. Mercer [Md.] did not object so much to an election by the people at large including such as were not freeholders . . .

See also J. JAMESON, *supra* note 77, at 18-19; note 184 *infra*.

<sup>82</sup> See A. MCKINLEY, *supra* note 72, at 478-81, where the author indicates the rather extensive use of this requirement from 1665 to 1760, discussing it in terms of its various forms and requirements. See also Bishop, *supra* note 74, at 69-90; K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 12 (1918). On the use of property qualifications in the 18th century see C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION ch. 4 (1913) and sources cited therein. On the English background, see C. ANDREWS, *supra* note 61, at 191; text accompanying notes 86, 88 *infra*.

This requirement did not die with the Revolution, e.g., "Except in Boston, which . . . retained its town meeting until 1822, those who had property enough to vote elected . . . [officials], just as in England . . ." J. KROUT & D. FOX, *supra* note 68, at 22. It is suggested that even the Boston town meetings were restricted in that other types of qualifications or requirements were imposed, e.g., religion and age. See also debates in Congress on the proposed 15th amendment, in A. AVINS, THE RECONSTRUCTION

ough franchise.<sup>84</sup> The population, as given above in terms of various categories of people restricted for purposes of suffrage by the requirements just mentioned, enables one author to conclude as follows:

In Virginia in several elections between 1744 and 1772 there appeared to be about nine per cent. of the white population actually participating as electors. In New York City, in the elections of 1735, 1761 and 1769 the actual voters numbered about eight per cent. of the population. In Pennsylvania the tax-list figures give only potential voters, but they show about eight per cent. of the rural population qualified for the suffrage, and only two per cent. in the city of Philadelphia, a condition quite in contrast to that of New York City. In New England the actual voters appear to be less proportionately than in the middle and southern colonies. Massachusetts, for instance, shows only one person in fifty as taking part in elections, and Connecticut, in elections immediately preceding the Revolution, had about the same proportion. In Rhode Island the freemen or potential voters numbered only nine per cent. of the population. These figures are entirely too few, and too scattered in time and territory, to justify any accurate gen-

---

AMENDMENTS' DEBATES 390-91 (1967), that the disqualifications among the States to disfranchise then included, *e.g.*, "nativity, color, education, property, or creed." *Id.* at 391, col. 1 (Mr. Bingham).

Property qualifications have not yet disappeared from the American scene. *See, e.g.*, *Kramer v. Union Free School Dist. No. 15*, 379 F.2d 491 (2d Cir. 1967), and it is only since the 24th amendment that voting poll taxes (federal offices) were eliminated. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (State offices). Apart from voting, such requirements continue, *e.g.*, property qualifications for (blue ribbon) jury trial service, *People v. Fay*, 332 U.S. 261, 266 (1947), although in this case a factual loophole excused the Court from discussing the alleged unconstitutionality of this requirement. *Id.* at 276. The dissenters apparently approved of it, *id.* at 299, and one lower New York court has specifically upheld the statutory necessity "to have a minimal ownership in something real or personal to invest a person with the privilege of performing a vital public function, such as being a member of the Grand Jury or trial jury . . ." *People v. Ruppert*, 53 Misc. 2d 845, 848-49, 279 N.Y.S.2d 895, 898 (West County Ct. 1967), reference to "trial jury" in this case being obiter. *Cf. Landes v. Town of North Hempstead*, 20 N.Y.2d 417 (1967) (property qualification for public office). It may be noted also that by 1967, ch. 49, the N.Y. Judiciary Law § 596, subd. 3, was removed; that clause required jurors (or their spouses) in New York City counties to be worth at least \$250 in realty or personalty.

<sup>83</sup> *E.g.*, in corporations, as was Rhode Island, after 1762, 3 months' probation was required after proposal before acceptance as a freeman could occur. *See Bishop, supra* note 74, at 46-51, 92-97; the brief analysis of early Massachusetts given in text accompanying notes 48-57 *supra*. Professor Andrews writes that in Massachusetts "freemen, [were] always a minority in every town and in the colony as a whole, who alone voted for governor, magistrates, and deputies, and thus represented neither the towns nor the people but only themselves." 1 C. ANDREWS, *supra* note 47, at 437 (emphasis added).

<sup>84</sup> *See A. MCKINLEY, supra* note 74, at 482-83. It is not amiss here to comment that the rotten borough system has been rejected, at least judicially, in the United States. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *Lucas v. The Forty-Fourth General Assembly*, 377 U.S. 713 (1964). *But cf. Fortson v. Morris*, 385 U.S. 231 (1966). Bishop also discusses "Miscellaneous" qualifications, *e.g.*, persons under guardianship. Bishop, *supra* note 74, at 90-92.

eralization from them. The potential voters seem to vary from one-sixth to one-fiftieth of the population, and the actual voters show almost an equal variation; Massachusetts and Connecticut showing at times only two per cent. of actual voters among a population where perhaps sixteen per cent. were qualified electors, and New York City and Virginia showing a far larger proportion of eight per cent. of the population as actual voters. At best, however, the colonial elections called forth both relatively and absolutely only a small fraction of the present percentage of voters.<sup>85</sup>

One may quote Burke's views in the period after the Glorious Revolution of 1689 in England, and find these pathetically applicable before and after the American Revolution of 1776, that "our representation has been found perfectly adequate to all purposes for which a representation of the population can be desired or devised;" and, as one historian remarks, this English statesman "could boast further that the House of Lords was wholly and the House of Commons mainly composed for the defense of hereditary property."<sup>86</sup> In other words, "the people" of whom Burke spoke was a minority group selected from the entire population.<sup>87</sup> The middle class mind of England was then

not progressive. It was imbedded in tradition and dominated by fixed ideas of political and social relations. To this class alone belonged the right to rule; the poor had nothing to do but to obey. . . . Their notion of the liberty won in the great and glorious revolution was liberty for themselves, not a general franchise for all the people, which in their minds would have transformed liberty into a plebeian tyranny.<sup>88</sup>

---

<sup>85</sup> A. MCKINLEY, *supra* note 74, at 487-80. The universality of this restrictive feature (at least for Western Nations) is disclosed by the following:

In the France of Louis XVIII, fewer than 100,000 of a population of 30,000,000 could vote; the government of Louis Phillipe only doubled the electorate; the Republic of 1848 soon surrendered to Louis Bonaparte. In England the Reform Act of 1832 was more concerned with reapportionment than suffrage and, in its attempts to make the franchise more uniform, actually disfranchised some voters; by the time Marx wrote the *Communist Manifesto*, the Chartist movement had failed; and the first real extension of the suffrage in England did not come until 1867, the publication date of *Das Kapital*. Greenbaum, *John Dewey Views Karl Marx*, 42 SOCIAL SCI. 195, 200 (1967).

<sup>86</sup> C. ANDREWS, *supra* note 61, at 192.

<sup>87</sup> It should be noted that England at that time did not have Indians, slaves, and so on as a large minority of the total population, and it was not the host for convicts and indentured servants in the nature and profusion of those sailing to the new land.

<sup>88</sup> C. ANDREWS, *supra* note 61, at 191. This 17th and also 18th century view may, by parallelism of reasoning, be said to be a continuation of the 13th century approach. The earlier revolution which culminated in the Magna Carta of 1215 (and subsequent reconfirmations) had been occasioned by John's rebellious barons, a most definite minority of aristocrats. This contract, or bargain, excluded the vast majority of the English people, who were serfs. The nobles acted to protect their own interests albeit the principles now established were subsequently applied (twisted?) "into a statement

This reaction against such "plebeian tyranny" in England was reflected in the United States, although not in identical form, both in the North and the South. In the latter, an aristocratic and landed gentry, with entailed large estates, continued for generations to possess an assured economic, social, and political position, whereas in the former, trade was beginning its eventual dominance and there was vertical class movement with an overall middle class outlook. The difficulties in transportation and communication perpetuated this division.<sup>89</sup>

Even during the period while the Articles of Confederation were in use the restrictive features mentioned above were perpetuated even when the Congress obtained cessions of Western Territories from New York, Virginia, Massachusetts, and Connecticut and enacted its famous ordinance of 1787.<sup>90</sup> In effect Madison commented upon this division when, in *The Federalist No. 10* he wrote, in 1787, of the "diversity in the faculties of men," the protection of which "is the first object of government," and from which "ensues a division of the society" into "[t]hose who hold and those who are without property . . ." A "pure democracy" was no cure, he felt, "for the mischiefs of faction," and he therefore recommended a republican (representative) form of government so as to "secure the public good and private rights against the danger of such a faction," and also to render a majority "unable to concert and carry into effect schemes of oppression."<sup>91</sup>

---

of the liberties of the whole English people and the privileges of a parliament . . ." F. MONAGHAN, *HERITAGE OF FREEDOM* 6 (1947).

<sup>89</sup> See, e.g., 1 J.T. ADAMS, *THE MARCH OF DEMOCRACY* 90-99 (1932). Jefferson's comment that "The inhabitants of the commercial cities are as different in sentiment and character from the country people as any two distinct nations, and are clamorous against the order of [Republican] things established by the agricultural interest" may also be noted. *THE JEFFERSONIAN CYCLOPEDIA* 687 (J. Foley ed. 1900).

Jameson writes that when the Revolution began there were only five towns in the entirety of the colonies of more than 8,000 inhabitants, "and only two or three per cent of the people lived in them. From the pastures of Maine to the rice-fields of Georgia, America was almost absolutely rural, and her people were almost wholly devoted to agriculture." J. JAMESON, *supra* note 75, at 28.

<sup>90</sup> E.g., the 1785 statute provided that when "five thousand male inhabitants of full age" resided in each district, and so proved to the Governor, they were to receive authority to elect representatives, etc., provided, however, that an elector possess "a freehold in fifty acres of land in the district," and also be either "a citizen of one of the states and . . . resident in the district," or else have 2 years' such residence. The legislature (consisting of the representatives, separate legislative council, and the Governor) were to elect a nonvoting delegate to Congress. Additionally, there were appended a series of articles (on rights, and so on) to "be considered as Articles of compact between the Original States and the people and States in the said territory . . ." 32 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, at 337-38, 339-40 (Library of Congress ed. 1936).

<sup>91</sup> *THE FEDERALIST* NO. 23, at 55-58 (National Howe Library ed. 1937) (Madi-

The social, religious, and economic structure of these charter and later Crown Colonies was significantly altered in the century and a half preceding the Revolutionary War. Until the Great Awakening of the early 18th century<sup>92</sup> the original Puritan strictures had prevailed,<sup>93</sup> but became somewhat liberalized by the impact of economic prosperity and the consequent world outlook; the movement stimulated education and placed "greater stress upon righteous living and a corresponding reduction of emphasis upon creeds, doctrines, and ecclesiastical formalities. It appears also that humanitarianism and the view that life has an essential worth and dignity transcending the forms of artificial aristocracy were encouraged. Democracy was thus stimulated."<sup>94</sup> The English heritage of a degree of political liberty, achieved during the course of five centuries of continuing struggle, was not unknown to the Colonists; they brought with them a fierce pride in being Englishmen, entitled to all these freedoms and rights, and at first did not seek to cut their imperial ties.<sup>95</sup> But they also brought with them English folkways,

---

son). Schlesinger quotes the 1774 Boston Committee of Correspondence as suggesting that "[t]here must be both a political and commercial congress," *i.e.*, amongst the many suggestions which resulted in the First Continental Congress. The author discusses the first meetings of this Congress and points up "[t]he radicals [who] threw off their mask" and pushed through "an extensive plan of commercial opposition" to England, against the wishes of the majority of the commercial delegates. Schlesinger, *The Colonial Merchants and The American Revolution, 1763-1776*, in 78 COLUMBIA UNIVERSITY STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 412-19 (1918). It therefore "involved a defeat for the moderates and the mercantile interests." *Id.* at 432.

<sup>92</sup> See, e.g., W. GEWEHR, *THE GREAT AWAKENING IN VIRGINIA, 1740-1790*, at 5, 8-9, chs. 2-6 (1930), detailing the 1734 revival meeting of Jonathan Edwards in Massachusetts, Wesley and Whitefield in Georgia in 1736-1737, and the movement in Virginia. For the New York and other awakenings see C. MAXSON, *THE GREAT AWAKENING IN THE MIDDLE COLONIES* 69-116 (1920).

<sup>93</sup> See also note 78 *supra*.

<sup>94</sup> J. SANDERS, *supra* note 59, at 329. See also J. BASSETT, *THE HISTORIANS*, in 1 *THE CAMBRIDGE HISTORY OF AMERICAN LITERATURE* 27-30 (W. Trent, J. Erskin, S. Sherman, & C. Van Doren eds. 1933) (prose literature); *COLONIAL PROSE AND POETRY passim* (W. Trent & B. Wells eds. 1901) (poetry); 1 A. HORNBLow, *A HISTORY OF THE THEATRE IN AMERICA FROM ITS BEGINNINGS TO THE PRESENT TIME* (1919) (theatre); S. ISHMAN, *THE HISTORY OF AMERICAN PAINTING passim* (1927) (painting). Newspapers, periodicals, and reprints of overseas volumes became fairly common. 1 V. PARRINGTON, *THE COLONIAL MIND 1620-1800: MAIN CURRENTS IN AMERICAN THOUGHT* (1927), is, of course, indispensable for not only the preceding but also because of its analysis of political and religious thoughts and philosophies. Outdoor and indoor sports such as horse racing, running, shooting, cardplaying, and dancing were indulged in. Adams, *Provincial Society 1690-1763*, in 3 *A HISTORY OF AMERICAN LIFE* (A. Schlesinger & D. Fox eds. 1927).

<sup>95</sup> See, e.g., C. BECKER, *THE EVE OF THE REVOLUTION* 59, 66-67, 73 (1918). Compare the laudatory description in C. VAN TYNE, *THE CAUSES OF THE WAR OF INDEPENDENCE* ch. 18 (1922), with C. BECKER, *supra* at 59, 66-67, 73. The bias found in history textbooks (happily now on the road out) denigrates English kings,



albeit slightly altered by the non-English settlers and the new country to which all had to adapt,<sup>96</sup> and the religious convictions which had compelled many to flee Old World persecutions.<sup>97</sup> Nevertheless, when protests against the Mother Country were made in pre-Revolutionary days it is interesting to note their kind and type, and the "people" from whom they emanated.<sup>98</sup>

For example, on October 7, 1765, a Stamp Act Congress met in New York's City Hall, with 27 delegates from nine colonies participating.<sup>99</sup> These delegates had been chosen by their State legislatures to protest the Stamp Act passed by Parliament in March of that year. Although elected by a restricted group of the inhabitants, the legislators additionally further restricted the representation to this Congress, and yet the latter's famous resolutions of October 19th concerning "taxation without representation" inveighed against the Act on behalf of "a people" and "the people."<sup>100</sup> Even more to the point, although little publicized by history, is another illustration of the manner in which the generalized "people" was improperly used although particularized interests were involved. The 1676 "revolt" by Nathaniel Bacon against royal tyranny in Virginia, a century before the Stamp Act Congress met, ostensibly was a protest over the failure of the Royal Governor to protect the frontiers against the warring Indians. Bacon proclaimed himself "Generall, by the Consent of the People," issued "The Declaration of the People" against the Governor, and put the latter to flight before he was restored to authority. The "Declaration" inveighed against the failure of the Governor to protect the colonists but condemned him because of "unjust Taxes;" for not having "In any Measure advanced . . . Fortifications, Towns, or Trade;" for having advanced to judicial positions "ignorant Favourites;" and for "as-

---

background, and so on, and is analyzed in detail in R. BILLINGTON, *THE HISTORIAN'S CONTRIBUTION TO ANGLO-AMERICAN MISUNDERSTANDING* (1966).

<sup>96</sup> See, e.g., discussion by C. ANDREWS, *COLONIAL FOLKWAYS passim* (1919). On the adoption of the English common law to new American conditions, see Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 *TEXAS L. REV.* 303, 473 n.1 (1962).

<sup>97</sup> J. HATFIELD, *FOUR LECTURES* 65 (1936), concludes from an examination of our early Puritan background, that "Aristocracy naturally follows from the foregoing . . ."

<sup>98</sup> E.g., C. BECKER, *supra* note 91, at 73-97; A. SCHLESINGER, *supra* note 91, chs. 10-14.

<sup>99</sup> Georgia, North Carolina, Virginia, and New Hampshire were not represented because the early call rendered it impossible to choose delegates.

<sup>100</sup> "III. That it is inseparably essential to the freedom of a people . . . IV. That the people of these colonies . . . V. That the only representatives of the people of these colonies are persons chosen therein by themselves" and no taxes can be "constitutionally imposed on them, but by their respective legislatures."

suming the monopolie of the Bever Trade." Cast against the earlier discussion of the composition of "the people," and of their rights and privileges with respect to voting and holding office, trade and commerce, and so on, this "Declaration" smacks of hypocrisy when it speaks in the name of all.<sup>101</sup>

Another illustration involves the Declaration of Independence, drafted by 33-year-old Thomas Jefferson, which as has already been noted contains 10 uses of "people," most not relevant.<sup>102</sup> But even then the few which are pertinent are immediately cast into ambiguity when there is first considered the ringing self-evident truth, "that all men are created equal," et cetera. To whom does "men" here refer? And also in the next clause, "That to secure these rights,<sup>103</sup> Governments are instituted among Men, deriving their just powers from the consent of the governed"? In the context of the Declaration's opening paragraphs, there is questionably<sup>104</sup> a ref-

<sup>101</sup> See generally G. FISHER, *THE COLONIAL ERA* 53-55 (1901). Bacon "was connected with the celebrated English family of that name, and on coming over to Virginia, had been made one of the Council. He was a rich planter, courageous, and eloquent in speech. [He saw his overseer and a favorite servant killed by the Indians.] Being denied a military commission from Berkeley he put himself at the head of five hundred volunteers . . ." *Id.* A hundred years later (1768-1771) North Carolina saw a similar and also ineffective uprising by the Regulators.

<sup>102</sup> See notes 20-21 *supra*.

<sup>103</sup> While the Declaration of Independence voiced a natural ("inalienable") rights (and law) doctrine, and "that among these are Life, Liberty, and the pursuit of Happiness," in his 1774 *Summary View of the Rights of British America*, Jefferson also felt "[t]hat the exercise of a free trade with all parts of the world, possessed by the American colonists, as of natural rights," could not be encroached upon. 1 *THE WORKS OF THOMAS JEFFERSON* 432 (P. Ford ed. 1904).

<sup>104</sup> Historically, the Greek cities were restricted as to citizenship, due to their hierarchical structure, *i.e.*, family-phratry-tribe-city, J. DE COULANGES, *THE ANCIENT CITY* 168 (Small, transl. 1959), and the few ruled the many, A. ZIMMERN, *THE GREEK COMMONWEALTH* 140 (5th ed. 1931); even when Roman citizenship encompassed the known world the effective franchise was exercised primarily, if not only, by the minority of those residing in Rome. H. WOLFF, *ROMAN LAW* 28 (1951). The colonial politicians were familiar with all this, and also knew their English common law, that is, the status of which Maine later wrote, H. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* (1886); H. MAINE, *ANCIENT LAW* (1861); and the Norman Conquest and feudalism; thus a distinction between the rulers and the ruled was assumed to be part of the unfolding political structure centuries before this.

In this light *The Federalist* No. 57 may be read:

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.

*Id.* at 378 (D. Ford ed. 1898) (Hamilton).

This quotation discloses that "the great body of the people" is immediately restricted by "the same who exercise this right in every State," and on these latter the preceding analysis discloses how few these were.

erence to the totality of the population, but when his bill of particulars is fashioned the term "people" is definitely a restricted one.<sup>105</sup> We know that Jefferson had 2 years earlier expressed the views that "our ancestors . . . were the free inhabitants of the British dominions in Europe," and that "the emigrants thought proper to adopt that system of laws under which they had hitherto lived in the mother country . . . ." Therefore, he queried, "Can any one reason be assigned why 160,000 electors in the island of Great Britain should give law to four millions in the states of America, every individual of whom is equal to every individual of them . . . .?"<sup>106</sup> These figures immediately disclose that Jefferson's diatribes were in the nature of special pleading throughout; for the 1790 census of the United States gives the total number of all its inhabitants as just under 4 million,<sup>107</sup> and the somewhat comparable 1801 figure for Great Britain is 10½ million.<sup>108</sup> But, as we have also seen, in both nations the electorate was an exceedingly restricted one, and if Jefferson's 160,000 is not too farfetched then the comparable one for the United States in 1774 was undoubtedly about the same, if not less.<sup>109</sup> In any view of the matter, however, "every individual" in the colonies of 1774 certainly did not factually include the totality of "the people" although Jefferson's terminology sought to create this impression.

That this conclusion is correct is disclosed by two facts: In his *Summary View of the Rights of British America*, Jefferson referred to the King's rejection of colonial laws "of the most salutary tendency. The abolition of domestic slavery is the great object of desire in those colonies, where it was unhappily introduced in their infant state."<sup>110</sup> His "Declaration" as originally drafted likewise condemned the King who "prostituted his Negative for Suppressing

<sup>105</sup> In having these "[f]acts . . . submitted to a candid world," Jefferson also included the Crown's obstruction to immigration and naturalization, albeit without limiting this to the nonindentured, nonconvict, persons; he also condemned the slave trade in his draft, but the Congress deleted this. See note 111 *infra*.

<sup>106</sup> 1 THE WORKS OF THOMAS JEFFERSON, *supra* note 103, at 429, 431, 436. "Were this to be admitted," he concludes, "instead of being a free people . . . we should suddenly be found the slaves not of one but of 160,000 tyrants . . . ."

<sup>107</sup> See note 65 *supra* and authorities cited therein.

<sup>108</sup> P. GREGG, A SOCIAL AND ECONOMIC HISTORY OF BRITAIN 1760-1960, at 582 (5th ed. 1962).

<sup>109</sup> A. MCKINLEY, *supra* note 72, at 487-90, gives probable voting percentages, which are here arbitrarily weighted and also reduced in terms of population as of 1774. The benefit of every doubt has been given to the colonies, although this is questionable, and in view of the facts given earlier the conclusion of equality, in the text, is suspect.

<sup>110</sup> 1 THE WORKS OF THOMAS JEFFERSON, *supra* note 103, at 440.

every legislative Attempt" to prevent his importation of slaves, but the first three paragraphs of this reference, combined into two by the committee, were entirely omitted by the Continental Congress.<sup>111</sup> These facts, in conjunction with the inclusion in the United States Constitution of article I, section 9, clause 1's prohibition against the importation of slaves after 1803,<sup>112</sup> bear witness not only to Jefferson's dislike of slavery and his never-ending struggle against it, but also to the fact that prior to the adoption of the Constitution "the people" was a much restricted term, even to him.

### III. THE DRAFTING OF THE CONSTITUTION

The Articles of Confederation had not provided a workable form of cooperative<sup>113</sup> governments;<sup>114</sup> there was little security in property,<sup>115</sup> trade and commerce were rendered difficult,<sup>116</sup> and the

<sup>111</sup> *Id.* at 52-53. Jefferson felt that this passage was "struck out in compliance to S. Carolina & Georgia, who had never attempted to restrain the importation of slaves & who on the contrary still wished to continue it. Our northern brethren also, I believe, felt a little tender under these censures; for tho' their people have very few slaves themselves, yet they have been pretty considerable carriers of them to others." F. MONAGHAN, *supra* note 88, at 19.

<sup>112</sup> Jefferson's account of the bargain between the Southern and Northern States, *i.e.*, to admit slaves for a period of years in exchange for eliminating the two-thirds requirement for a legislative vote, is given in 9 THE WRITINGS OF THOMAS JEFFERSON 119 (H. Washington ed. 1854). For a general account by Jefferson see *id.* at 115-22.

<sup>113</sup> "Whoever wishes to describe the political life of the American people . . . must appreciate the yearning of the American heart after self-direction." H. MÜNSTERBERG, THE AMERICANS 3 (1907).

<sup>114</sup> See, *e.g.*, references and analyses in 1 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION 260 (1861); M. FORKOSCH, CONSTITUTIONAL LAW ch. 1 §§ 5-6 (1956); C. WARREN, THE MAKING OF THE CONSTITUTION 4 n.1 (1928). See also letter of John Adams to Rufus King, June 14, 1786: "The most alarming Circumstance that has happened is the Inattention to Congress." 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING 182 (C. King ed. 1894). For an extended discussion see 1 J. MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES ch. 2 (1883), and especially *id.* at 132-37, where the low esteem and even contempt for Congress is disclosed to have infected the legislators as well.

<sup>115</sup> The classic illustration is Shays' Rebellion in Massachusetts during 1786-1787, when he led a body of farmers against the courts and, apparently, intended also to compel the legislature to adopt their program; they were dispersed by a privately-financed militia. See note 117 *infra*. Concerning this incident General Henry Knox wrote to Washington on October 23, 1786, "What is to afford us security against the violence of lawless men? Our Government must be braced, changed or altered to secure our lives and property." Quoted in C. WARREN, *supra* note 114, at 31. Knox also wrote: "Their creed is 'That the property of the United States has been protected from the confiscations of Britain by the joint exertions of all, and therefore ought to be the common property of all.'" Quoted in 1 L. HACKER, *supra* note 68, at 235; see 1 G. CURTIS, *supra* note 114, at 269. Curtis states, speaking of Massachusetts: "A levelling, licentious spirit, a restless desire for change, and a disposition to throw down the barriers of private rights, at length broke forth in doctrines and purposes were embraced by many young, active, and desperate men in Rhode Island, Connecticut, and New Hampshire." *Id.* at 273.

conditions of the farmers<sup>117</sup> and the very poor<sup>118</sup> were not too good. Madison summed up the Congressional attitude: "All agreed and owned that the Federal Government in its existing shape was inefficient and could not last,"<sup>119</sup> and Washington eventually agreed to attend the Philadelphia Convention, despite "the disordered frame of my body" (*i.e.*, his rheumatism), because of "a conviction that our [country's] affairs are verging fast to ruin."<sup>120</sup> As Randolph later put it, "[t]he imbecility of the Confederation was proved and acknowledged."<sup>121</sup> There existed strong sentiment for a division into separate confederacies or republics,<sup>122</sup> and the supporters of a union were doubly alarmed by Shays' Rebellion, for here was concentrated momentarily the leveling spirit of the colonial past, together with the current feeling of these few that what had been saved by all belonged to all!<sup>123</sup> "The full significance of the threat[s] was understood by men of large means,"<sup>124</sup> but the im-

<sup>116</sup> See generally M. FORKOSCH, *ANTITRUST AND THE CONSUMER* ch. 3 (1956); E. GREENE, *THE FOUNDATIONS OF AMERICAN NATIONALITY* 419 (rev. ed. 1935).

<sup>117</sup> See, e.g., L. HACKER, *supra* note 68, at 233, pointing to the high prices for goods needed by farmers, while the prices they received fell sharply as a result of agricultural overexpansion. . . . Notably in 1785-86, agrarian distress was acute and farmers sought the customary reliefs. They passed legislatures for new fiat money issues and the passage of moratoriums, or stay laws, to prevent land mortgage foreclosures.

See M. FORKOSCH, *supra* note 116, at 242-52 detailing the farmers' pressures in the passage of the 1890 Sherman Antitrust Act. On the anti-leveling device of the contract clause mentioned in note 132 *infra*, see the ineffectual importunings of Justice Sutherland in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934) (dissenting opinion), against the alleged factual reversal by the majority; cf. Black's statement in *Wood v. Lovett*, 313 U.S. 362, 383 (1941) (dissenting opinion), that the "decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency."

<sup>118</sup> See, e.g., description by I. J. MCMASTER, *supra* note 114, at 96-102.

<sup>119</sup> Diary of James Madison, February 21, 1787, quoted by C. WARREN, *supra* note 114, at 28. See also Letter from Madison to Washington, February 21, 1787, in 2 *WRITINGS OF JAMES MADISON* 316 (Hunt ed. 1901): "Those who remain attached to the latter form [of Republic government] must soon perceive that it cannot be preserved at all under any modification which does not redress the ills experienced from our present establishments." See also note 114 *supra*.

<sup>120</sup> Letter from George Washington to Henry Knox, April 27, 1787, in 29 *THE WRITINGS OF GEORGE WASHINGTON* 209 (J. Fitzpatrick ed. 1939). He also wrote that he was thus departing from a resolution never to step outside the walks of private life.

<sup>121</sup> 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 188 (1901) [hereinafter cited as *ELLIOT'S DEBATES*].

<sup>122</sup> See quotations and references in C. WARREN, *supra* note 114, at 28-30.

<sup>123</sup> See J.T. ADAMS, *supra* note 89, at 219, recounting the fall in prices, the resulting depression, and the country's mood. See also note 115 *supra*.

<sup>124</sup> 1 L. HACKER, *THE SHAPING OF THE AMERICAN TRADITION*, 235 (1947).

mediate stimulus for an amending convention was the failure of the 1786 Annapolis meeting of Commissioners from five States to suggest "an uniform System in their commercial intercourse and regulations,"<sup>125</sup> although in their report to Congress they detailed the Confederacy's weaknesses and urged that a convention be held.<sup>126</sup> Congress formally received a copy of the Commissioners' Report and, on February 21, 1787, recommended to the States that a meeting of their delegates be held at Philadelphia that coming May "for the sole and express purpose"<sup>127</sup> of revising the Articles of

---

<sup>125</sup> U.S. DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 2 (1894). See 1 ELLIOT'S DEBATES, *supra* note 121, at 119 (taken from Report of Commissioners to their respective States, and also sent to Congress); M. FORKOSCH, CONSTITUTIONAL LAW 5 (1956). Madison discussed the commercial problem extensively in 1 J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 36-43 (Scott ed. 1898). One historian digests what Noah Webster and others then felt, namely, that "[t]he great vice or evil under the Constitution, as it then existed, which was generally admitted, was, that many of the laws of the Union applied only to the States, in their corporate capacity, and did not act directly upon the people or the subjects constitutionally embraced in them." A. STEPHENS, PICTORIAL HISTORY OF THE UNITED STATES 293 (1882).

<sup>126</sup> Prior requests for a revising convention had been ignored, e.g., New York's in 1782, and the later ones by Madison and the Massachusetts Legislature.

<sup>127</sup> The credentials presented by the delegates to the subsequent Convention were, of course, the State resolutions or statutes so authorizing them to act, and the particular language in each such credential did not necessarily contain these limiting words. For example, New Hampshire's and North Carolina's sole general reference to the Convention "proposed . . . for the purpose of revising the federal Constitution"; 1 U.S. DEP'T OF STATE, *supra* note 125 at 9, 35; Maryland's was for "the purpose of revising the Federal System," *id.* at 25; Massachusetts quoted the Congressional language and authorized its delegates to attend "for the purposes aforesaid," *id.* at 11; New York did not so quote but used the exact language in the body of its resolution, *id.* at 14; New Jersey authorized delegates "for the purpose of taking into Consideration the state of the Union, as to trade and other important objects, and of devising such other Provisions as shall appear to be necessary to render the Constitution . . . adequate to the exigencies thereof." *Id.* at 16-17. Pennsylvania's legislature was "fully convinced of the necessity of revising the federal Constitution for the purpose of making such Alterations and amendments as the exigencies of our Public Affairs require," *id.* at 19, and it authorized its delegates to "join with" other State delegates "in devising, deliberating on, and discussing all such alterations and further Provision, as may be necessary to render the Federal Constitution fully adequate to the exigencies of the Union," *id.* at 20; Delaware's introductory language was, "revising the Federal Constitution, and adding thereto such further Provisions, as may render the same more adequate to the Exigencies of . . . the Union," *id.* at 23, but its enacting clause granted the delegates power to join with the other delegates in doing exactly what the Pennsylvania legislature had authorized (except for deleting "all" and "fully," *id.* at 24). The Virginia statute, referred to by Pennsylvania's and Delaware's acts, was entitled "An Act for appointing Deputies . . . for the purpose of revising the federal Constitution," but its introductory paragraph referred only to the Annapolis Convention and then used flowery language of hope, and so on, before it authorized its delegates to meet with others "in devising" et cetera in words identical with the preceding except for omitting "deliberating on" and using "farther" instead of "further." *Id.* at 28. Georgia's statute, *id.* at 46, was identical with that of Virginia's in this enacting respect, while South Carolina's language was only slightly different, "in devising and discussing all such alterations, Clauses, articles, and Provisions, as may be thought necessary to render the Federal Con-

Confederation."<sup>128</sup> The credentials of the delegates (except for Rhode Island which did not participate) were all from, and authenticated by, officials of the 12 State legislatures.<sup>129</sup> The "people," therefore, even if restricted to the minority of voters, thus never acted in any direct manner initially or later to propose, or at any time until the eventual ratifications, to approve such an amending or other convention, nor even to elect or appoint these delegates; indirectly, of course, one may argue that "their" representatives so acted on their behalf and that even if jurisdictionally questionable at the inception, the later ratifications removed any infirmities.

But even after the Convention's self-undertaken task of creating a new form of government was completed, and it reported back to Congress, that body's unanimous resolution that the new Constitution "be submitted to a Convention of delegates chosen in each state, by the people thereof,"<sup>130</sup> is nevertheless subject to the same preceding criticism, and this even though some of the ultimate ratifications stated they were by deputies or delegates "of the people" of the State.<sup>131</sup> If Congress' requirement that the proposed

---

stitution entirely adequate to the actual Situation and future good Government of the confederated States." *Id.* at 38. Connecticut's act was a combination of phrases, empowering its delegates to attend "for the purposes mentioned in the said Act of Congress . . . and to discuss upon such Alterations and Provisions agreeable to the general Principles of Republican Government as they shall think proper to render the federal Constitution adequate to the exigencies of Government and the preservation of the Union . . . ." *Id.* at 13.

This miscellany of jurisdictional language ranged from the extremely narrow and restricted to the unusually broad and (practically) unlimited, so that the raising of the initial question of jurisdiction which the Convention had to resolve is understandable; its resolution, however, favored the unlimited view.

<sup>128</sup> 1 U.S. DEP'T OF STATE, *supra* note 125, at 8; 1 ELLIOT'S DEBATES, *supra* note 121, at 120. The Convention, of course, ignored this limitation and proposed a new form of government and a new constitution. See M. FORKOSCH, *supra* note 125, at 6. Washington, in a letter to Knox of February 3, 1787, referred to the Massachusetts situation and then spoke of the forthcoming Convention, stating, *inter alia*,

The legality of this Convention I do not mean to discuss, nor how problematical the issue of it may be. That powers [in the current national government] are wanting, none can deny. Through what medium they [the powers] are to be derived, will, like other matters, engage public attention. That which takes the shortest course to obtain them, will, in my opinion, under present circumstances, be found best. 29 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 125, at 152.

Patrick Henry, during the Virginia debates on ratification, "had doubts of the power of those who went to the Convention, but now we are possessed of it [the Constitution], let us examine it. . . . [W]e thought their deliberations would have been solely confined to that revision. Instead of this, a new system, totally different in its nature . . . is presented . . . ." 3 ELLIOT'S DEBATES, *supra* note 121, at 144.

<sup>129</sup> 3 ELLIOT'S DEBATES, *supra* note 121, at 126-39.

<sup>130</sup> *Id.* at 319.

<sup>131</sup> See, e.g., Delaware: "We, the deputies of the people . . .," Pennsylvania: "we, the delegates of the people . . ." *Id.* at 319. See also Connecticut, *id.* at 321, Massa-

Constitution be submitted for approval to conventions of delegates "chosen in each state by the people thereof" was meant to include all the people, then it may logically be urged that our Constitution was never properly ratified as "the people" did not include all; but this is ridiculous, as by "the people" the Convention delegates and the Congressional members understood whom they meant, the State legislatures and the populace likewise so understood the restricted application of the term, and the ratifying delegates never urged otherwise. For example, at the opening of the Virginia debates on ratification Edmund Pendelton, its elected President, opposed a motion by Patrick Henry during a session of the Committee of the Whole Convention, that the statute appointing delegates to the earlier Annapolis meeting<sup>132</sup> be read, saying this ratifying body should "not consider whether the federal Convention exceeded their powers. . . . This Constitution was transmitted to Congress by that Convention; by the Congress transmitted to our legislature; by them recommended to the people; the people have sent us hither to determine whether this government be a proper one or not."<sup>133</sup> In effect, therefore, not only did a minority of the totality of the "people" propose, formulate, and ratify the new Constitution, but even this minority itself acted throughout by minority-authorized delegates.<sup>134</sup> Professor Beard's view, early rejected by Professor War-

---

chusetts, *id.* at 322, Georgia, *id.* at 324, Maryland, *id.* at 324, South Carolina, *id.* at 325, New Hampshire, *id.* at 326, Virginia, *id.* at 327, New York, *id.* at 327, and Rhode Island, *id.* at 334. The ratifications of New Jersey and North Carolina are somewhat interesting. The former's third introductory paragraph refers to the legislature's prior resolution which "recommended to such of the inhabitants of this state as are entitled to vote for representatives in General Assembly, to meet" and vote for delegates to a ratifying convention, *id.* at 320; the latter's document merely resolves "That this Convention, in behalf of the freemen, citizens and inhabitants" so ratify. *Id.* at 333. (Vermont, in 1791, notified "the inhabitants, who, by law, are entitled to vote for representatives in General Assembly, . . . to meet" and vote for delegates, although the Convention's ratification is barren of any pertinent reference. *Id.* at 337-38.) Of course the mere fact that all ratifications other than these last two (three) gratuitously incorporated "people" as the base upon which their conventions acted did not broaden such foundation beyond their own (implied) limitations which the last expressed. See also notes 138, 143 *infra*, on aspects involved above.

<sup>132</sup> See note 122 *supra*.

<sup>133</sup> 3 ELLIOT'S DEBATES, *supra* note 121, at 6. Henry thereupon withdrew his motion.

<sup>134</sup> Professor Warren notes that the delegates were appointed by State Legislatures; and in most of the States, the small farmers, who formed a part of the debtor class at that time (if such a thing as a distinctively debtor class existed — which is doubtful), had a fully adequate representation in the Legislatures. This fact is frequently overlooked by historians — the fact that, since possession of freehold in land was then a property qualification for voting . . . , it was peculiarly the small



ren,<sup>135</sup> that the Constitution "was not the product of an abstraction known as 'the whole people,' but of a group of economic interests which must have expected beneficial results from its adoption," is also at odds with modern research<sup>136</sup> and the predominantly political needs of the nation then and later on,<sup>137</sup> although the inclusion in the ultimate Constitution of the clauses preventing States from

---

farmers who, in most States, were possessed of the requisite qualification to vote. C. WARREN, *supra* note 114, at 70-71.

See also Virginia's ratifying Debates where one delegate supported article I, section 2, clause 1 of the proposed Constitution as permitting each State to choose its national representatives by those qualified to choose its local ones, for

Uniformity of qualifications would greatly affect the yeomanry in the states, as it would either exclude from this inherent right some who are entitled to it by the laws of some states at present, or be extended so universally as to defeat the admirable end of the institution of representation. 3 ELLIOT'S DEBATES, *supra* note 121, at 8.

However, Brown, in his studies of the relationship between the politics and the social structure conducted in two States, concluded that the predominance of the upper classes, and their influence in politics did not depend upon this restricted franchise but that support had to come from men of all classes in order to gain office. R. BROWN, *MIDDLE-CLASS DEMOCRACY AND THE REVOLUTION IN MASSACHUSETTS, 1691-1780* (1955); R. BROWN, *VIRGINIA, 1705-1786: DEMOCRACY OR ARISTOCRACY?* (1964). On the paradox of exclusion from the polls and yet consent to the concepts of government, see Pole, *Historians and the Problem of Early American Democracy*, 67 AM. HISTORY REV. 626 (1962), and for a possible answer, in terms of what Bagehot called "a deferential society," see Buel, *Democracy and the American Revolt: A Frame of Reference*, 21 WM. & MARY Q. 165 (3d ser. 1964).

<sup>135</sup> C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* 17 (1913). For Beard's immediate precursors see J. SMITH, *SPIRIT OF AMERICAN GOVERNMENT, A STUDY OF THE CONSTITUTION* (1907), and A. SIMONS, *SOCIAL FORCES IN AMERICAN HISTORY* (1912). Warren also cites, in support of Beard's thesis, H. BARNES, *HISTORY AND SOCIAL INTELLIGENCE* (1926). Cf. however, Washington's views in a letter from George Washington to Henry Knox, Aug. 19, 1787 (during the Convention) of the "diversity of ideas as prevail"; letter from George Washington to Patrick Henry, Sept. 24, 1787, of the "attempts . . . made to reconcile such variety of interests and local prejudices as pervade the several States"; letter from George Washington to Henry Knox, Oct. 15, 1787, (concerning the opposition to ratification) which will "be governed by sinister and self important motives." The above letters may be found in 29 *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 120, at 261, 278, 289. See also Paul Ford's comment on the slave trade clause, U.S. CONST. art. I, § 9, cl. 1, prohibiting their importation after 1808, that the compromise had a background which disclosed that in 1784 Virginia voted against the exclusion of slavery from the Western Territory by "voting for what seemed their best interests, regardless of moral considerations." *THE FEDERALIST* NO. 42, at 274 n. (P. Ford ed. 1898) (Hamilton).

<sup>136</sup> See, e.g., B. BROWN, *CHARLES BEARD AND THE CONSTITUTION* (1956); F. McDONALD, *WE THE PEOPLE* (1958); Holcombe, *Sections, Classes, and the Federal Constitution*, in *THE GASPER G. BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES* 30 (1953), who concludes that the Constitution "was the supreme instance in history up to 1787 of the triumph of the average man." For additional comments and criticisms, see J. MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788* (1961), and for an excellent commentary on the reactionary fear of these men, and their obsession with the spectre of power wielded by others than themselves, see Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (3d ser. 1955).

<sup>137</sup> See, e.g., this writer's analysis of the amendments in note 15 *supra*.

issuing legal tender paper and denying them the right to impair the obligations of contracts was undoubtedly a conservative reaction against the leveling tendencies of the farmers (and others).<sup>138</sup> Additionally, too little credit is given to contemporary views of the characters of the delegates and their motives,<sup>139</sup> although one must be somewhat careful in translating their expressed concern for the "poor man" and the "people."<sup>140</sup> For example, during the Virginia

---

<sup>138</sup> See, e.g., notes 115, 117 *supra*, and Madison's introduction to his *Journal of the Federal Convention*: "In the internal administration of the States, a violation of contracts had become familiar, in the form of depreciated paper made a legal tender, of property substituted for money, of instalment laws, and of the occlusions of the courts of justice . . ." 1 J. MADISON, *supra* note 125, at 47. On the "leveling democracy" then in progress, which included the extension of the suffrage, see J. JAMESON, *THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT* (1926). Jameson points to the abolition of feudal indicia such as primogeniture and entail, the disestablishment of the Anglican church, the abolition of slavery, et cetera. Hacker writes:

There is no question that the Convention was a class assembly . . . Yet to regard [it as] . . . called for the exclusive purpose of protecting propertied interests is a mistake. . . . From the labors of the Convention emerged that national union that seemed the only effective reply to the uncertainties of the hour. The safeguarding of property against leveling assault was assured by two devices. . . . By positive measures the strength of the national government was equally provided for. . . . It is possible to argue that the alarms and excursions of the period . . . account for many of the anti-leveling devices written into the document. L. HACKER, *supra* note 124, at 237.

See also Jensen's analyses for the period 1774-1781, *THE ARTICLES*, *supra* note 22, and for the confederation period 1781-1789, *THE NEW NATION*, *supra* note 22, pointing to the "conservative counter-revolution" of 1787 whereby now, in the Constitution, these conservatives were able to erect a "nationalistic government whose purpose in part was to thwart the will of 'the people' in whose name they acted." *THE ARTICLES*, *supra* note 22, at 245. Jensen's two lists of nine leading Federalists and anti-Federalists, and his discussions concerning them and their efforts, is intriguing and here apropos.

<sup>139</sup> For example, it was felt that the Convention of 1787 "contained a larger proportion of members possessing high character, intellectual ability, political sagacity, and farsighted statesmanship" than others preceding it. Jefferson, for example, gave his "high opinion of the abilities and honesty" of the delegates, Franklin wrote they were "men of character," and even the document's opponents conceded the delegates "purest intentions and respectability, and that they included "the best, and the most enlightened of our citizens." Quoted in C. WARREN, *supra* note 114, at 67-68. *But see* the views of "Rusticus," *id.* at 691. Madison wrote, though in his declining years, "that there never was an assembly of men . . . who were more pure in their motives or more exclusively or anxiously devoted to . . . best secure the permanent liberty and happiness of their country." *Id.* at 68. Warren lists the future careers of some of the 55 men, e.g., eight as representatives to the First Congress and 10 as Senators, two became Presidents, and one a Vice President, two Chief Justices and three Associate Justices, one an Attorney-General and then Secretary of State, one Secretary of Treasury, six governors, and four ministers to foreign countries. He concludes "these men [therefore] possessed the confidence of the people of the country . . ." *Id.* at 69. Again we may repeat here the minority status of these "people."

<sup>140</sup> See, e.g., 3 ELLIOT'S DEBATES, *supra* note 121, at 293-305 (Pendleton, on June 12, 1788, during the Virginia Convention debates on ratification); *id.* at 137, 151, 164-65, 188 (numerous references to the generality of "people" by Henry and Randolph). Patrick Henry expressed his espousal of "[t]he middle and lower ranks of people [who] have not those illuminated ideas which the well-born are so happily pos-

debates on ratification Patrick Henry was compelled to apologize to Edmund Randolph because of his charges against the latter's consistency,<sup>141</sup> but shortly became himself the butt for an alleged error; this rejoinder, however, disclosed that the "people" who, as Washington believed, would always have the "power under the Constitution,"<sup>142</sup> here were to consist of "the industrious farmer and planter" who were the "honest citizens" whom the government was to protect in "person and property," whether or not at the moment temporarily a "poor man."<sup>143</sup> Even Madison, in a letter to Jefferson, divided "the people" in Virginia into "three parties," namely, those who desired to adopt the proposed Constitution without amendments, to adopt "a few additional guards in favor of the

---

sed of . . ." *Id.* at 140. See also his attack upon Randolph for the use of "herd" in referring to the people. *Id.* at 148; *see id.* at 293. John Marshall supported the proposed dual structure: "Are they not both the servants of the people? Are not Congress and the state legislatures the agents of the people . . . ?" *Id.* at 233. Pendleton alleged that "[t]he happiness of the people is the object of this government, and the people are therefore made the fountain of all power. They cannot act personally, and must delegate powers." *Id.* at 297. See also Luther Martin's "Genuine Information" to the Maryland ratifying Convention concerning the proceedings, and referring to "the state governments which are to watch over and protect the rights of the individual, whether rich or poor, or of moderate circumstances." 4 *id.* at 359.

<sup>141</sup> 3 ELLIOT'S DEBATES, *supra* note 121, at 188.

<sup>142</sup> Letter from George Washington to Bushrod Washington, Nov. 10, 1787, in 29 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 120, at 311. That Washington used this term ambiguously may be shown by reference to the only time he ever spoke "on the record" (at the 1787 Convention). Madison's Notes give the substance. The proposed Constitution then, in article I, section 2, clause 3, stated: "The number of Representatives shall not exceed one for every forty Thousand." This language, according to Gorham, "had produced . . . much discussion." He therefore moved to reduce this to 30,000, which was seconded. Washington then spoke on its favor, stating "many members" felt the higher figure "an insufficient security for the rights and interests of the people." See 2 FARRAND RECORDS, *supra* note 81, at 644. Warren gives a contemporary newspaper account, which has Washington saying that the reduction "would better suit my ideas, and, I believe, it will be more grateful to the wishes of the people . . ." C. WARREN, *supra* note 114, at 713. The delegates naturally consented to the new figures, and Farrand notes that at "thirty" there is "[a]n erasure in the [original] manuscript." 2 FARRAND RECORDS, *supra* note 81, at 652 n.2.

<sup>143</sup> Pendleton's remarks concerning Henry are apropos:

He professes himself an advocate for the middling and lower classes of men. I profess to be a friend to the equal liberty of all men, from the palace to the cottage, without any other distinction but that between good and bad men. . . . Why bring into the debate . . . the distinction of *well-born* from others? . . . I am an advocate for . . . giving to the poor man free liberty in his person and property. . . . I wish, sir, for a regular government, in order to secure and protect those honest citizens who have been distinguished — I mean the industrious farmer and planter. I wish them to be protected in the enjoyment of their honestly and industriously acquired property. I wish commerce to be fully protected and encouraged, that the people may have an opportunity of disposing of their crops at market. 3 ELLIOT'S DEBATES, *supra* note 121, at 295.

On "middling," *see id.* at 54.

Rights of the States and of the people," and "those of a third class, at the head of which is Mr. Henry," who concur with the second but do so in order to "strike at the essence of the System," *i.e.*, to obtain rejection. Madison then wrote that while the State's judiciary, bar, and others opposed the document, and elsewhere in the southern part of the country

the men of intelligence, patriotism, property, and independent circumstances are thus [also so] divided, all of this description, with a few exceptions, in the Eastern States, & most of the Middle States, are zealously attached to the proposed Constitution . . . . It is not less worthy of remark that in Virginia where the mass of the people have been so much accustomed to be guided by their rulers on all new and intricate questions, they should on the present which certainly surpasses the judgment of the greater part of them, not only go before, but contrary to their most popular leaders . . . . I will barely observe that the case in Virga. seems to prove that the body of sober & steady people, even of the lower order, are tired of the vicissitudes, injustice, and follies, which have so much characterized public measures, and are impatient for some change which promises stability and repose.<sup>144</sup>

The clause, "even of the lower order," must have had a referent quite well understood by Jefferson, for no other description is given. Patrick Henry's arguments and adoption included the latent dangers of the new system which "are out of the sight of the common people . . . . I dread the operation of it on the middling<sup>145</sup> and lower classes of people: it is for them I fear the adoption of this system."<sup>146</sup> Translated, the Madison-Jefferson-Henry language and understanding necessitates that "the lower order" or "lower classes" be differentiated from the "body of sober & steady" or "middling" (*i.e.*, middle class) people; and these two groups or classes are now to be differentiated from those on a higher plane, for example, the aristocrats, professionals, and leaders. The upper and lower groups need little further description;<sup>147</sup> the "middling" or middle class group included the farmers, artisans, shopkeepers, and those who were free, white, and otherwise eligible to, and did participate economically and politically (religiously?) in the affairs of the community. In other words, the lower order or classes were "people" generally, but not particularly, and even some of the middle group could well be so classed. Even Madison's famous essay in *The Fed-*

---

<sup>144</sup> 5 WRITINGS OF JAMES MADISON, *supra* note 119, at 66-67.

<sup>145</sup> See note 143 *supra*.

<sup>146</sup> 3 ELLIOT'S DEBATES, *supra* note 121, at 54; see note 143 *supra*.

<sup>147</sup> See, e.g., analyses given above with respect to background in text accompanying notes 43-112 *supra*.

*ederalist No. 10* setting forth his views on economic interests and factions, classes, and other groups exerting pressures upon governments, defines a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common . . . interest, adverse to the rights of other citizens, or to the . . . aggregate interests of the community."<sup>148</sup> Why "citizens," "whole," and "community" were here used and throughout the essay, as well as "men" and "society," but nowhere "people" save once, and that in a particular sense,<sup>149</sup> must have some meaning; and the only reason can be that Madison, as did the others, differentiated amongst the totality of the peoples in respect to "unequal faculties" and "unequal distribution of property,"<sup>150</sup> as well as inequalities in voting and other respects.<sup>151</sup>

But an even more interesting question may be raised when Madison's other pertinent language is considered, that is, his reference to Virginia "where the mass of the people have been so much accustomed to be guided by their rulers on all new and intricate questions . . . ." Madison's views concerning the power of the people eventually to exercise a degree of political control are given in *The Federalist Nos. 39, 46, 48, and 49*, and these essays do not disclose any limitations upon the totality, for example, "a government which derives all its powers . . . from the great body of the people," the "federal and State governments are in fact but different agents and trustees of the people," "the ultimate authority . . . resides in the people alone," "the people are the only legitimate fountain of power," "appeals to the people," the legislators "dwell among the people at large," "assemblies elected by the people." However, it is suggested that Madison and all of the other politi-

<sup>148</sup> THE FEDERALIST NO. 10, at 56 (P. Ford ed. 1898) (Madison).

<sup>149</sup> In discussing the "two great points of difference between a democracy and a republic" Madison first mentioned the representative form of government, under which "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves [as in a democracy], convened for the purpose." *Id.* at 60.

<sup>150</sup> *Id.* at 57.

<sup>151</sup> Even Hamilton's use of broad language did not necessarily signify broad coverage, e.g., "a people spread over an extensive region," THE FEDERALIST NO. 63, at 420 (P. Ford ed. 1898) (Hamilton). His references to ancient Greece included: "the people at large," "elected by the people," and "elected by the whole body of the people," *id.* at 422, but even Hamilton would be the first to concede that these "people" did not include the conquered and the slaves, i.e., the great mass of nonpeople. Madison, too, used such generalities, e.g., "In a single republic, all the power surrendered by the people is submitted to the administration of a single government . . ." *Id.* NO. 51, at 346 (Madison). And in No. 53 Hamilton speaks of a "want" of "due responsibility in the government to the people," and then shortly refers "to the representatives of the people." See *id.* NO. 84 (Hamilton).

cians and "people" in that period made a careful distinction between "a" people and "the" people, that is, the former would refer to the totality and the latter to a lesser portion. For example, the "assemblies elected by the people" cannot equate with "dwell among the people at large," for we have already seen how the electorate was limited, and why did Madison insert "at large"?<sup>152</sup> Similarly, "the people [who] are the only legitimate fountain of [political] power" must exclude the nonvoters, although "appeals to the people" may be utilized generally and particularly, *e.g.*, Washington's appeals to the people to support his army by providing replacements, food, and so on, as contrasted to Madison's present statement that "[t]he executive power might be in the hands of a peculiar favorite of the people." Even the first above quotation on "the mass of the people . . . guided by their rulers" may be likewise so understood generally or particularly, although in context it is the latter which must be accepted.<sup>153</sup>

The Convention delegates, therefore, met in a social, political, and economic climate which did not disregard the immediate<sup>154</sup>

<sup>152</sup> In *No. 45* Madison says:

We have heard of the impious doctrine in the Old World that the people were made for kings, not kings for the people, Is the same doctrine to be revived in the New, in another shape — that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? *Id.* *No. 45*, at 304.

To an extent Madison is confusing two aspects of the term, for in the Old World reference there never could be to voters under such a doctrine of absoluteness and "the people" therefore had to include all save the king; in the new United States, however, "the solid happiness of the people" could refer to all the people who were subject to laws and institutions created by a minority of the people who deputized an even smaller group so to act, or it could refer only to such minority. See Hamilton's ambivalent use in *id.* *No. 62*, at 416.

<sup>153</sup> See, *e.g.*, Jay's use in *No. 3*, that the first object "to which a wise and free people . . . direct their attention" is safety, *i.e.*, from abroad and at home. *Id.* *No. 3*, at 13. Here the limited voters and upper groups are considered, but in *No. 4* Jay refers to "the safety of the people of America against dangers from" abroad, and the distributive aspect of the term seems to be indicated, although a few paragraphs later he says "[t]he people of America are aware" of these dangers and "[w]isely, therefore, do they consider union . . . as necessary," which can refer only to the limited aspect of the term. *Id.* *No. 4*, at 18.

So, too, with Hamilton's use of "people," *e.g.*, that "in republics strength is always on the side of the people," which seems to indicate the generality, although two sentences later he remarks that "[e]verything beyond this must be left to . . . the people; who . . . will hold the [voting] scales in their own hands . . ." which discloses the limited persons so included. *Id.* *No. 31*, at 196-97.

On the use of "rulers" by Madison, compare his Convention language: "The respectability of this convention will give weight to their recommendation of" a plan "for the attainment of a proper government." 1 FARRAND RECORDS, *supra* note 81, at 215.

<sup>154</sup> The ancient past was a part of the thinking and vocabulary of practically every public official or aspirant; even *The Federalist*, written for newspaper readers, mentioned Greece and other nations throughout, *e.g.*, Hamilton's referring to Pericles, the

past but built<sup>155</sup> upon it.<sup>156</sup> They not only knew but lived the conditions for which they planned, and they daily saw the nature and type of population, *i.e.*, "the people," in their work and travels. The generality or "mass" of the people were not, to them, to be confused with the particularity of, for example, the electorate, the landed gentry, or the other groups with whom they came in contact. And when they used "people" in their debates, letters, and discussions they knew, without qualifying language, to whom they referred. For example, one of the objections to the Articles of Confederation was that it acted only through and upon the States which could and did with impunity disregard Congressional calls, requests, and aid;<sup>157</sup> but, as already quoted, the Congressional call was for the purpose solely of revising the Articles, so that an initial question of jurisdiction to do otherwise occupied the attention of the delegates.<sup>158</sup> The Virginia (Randolph) Plan proposed a new tripartite

---

city of Samians and Phidias in THE FEDERALIST No. 6, at 28 (P. Ford ed. 1898).

<sup>155</sup> R. NYE, THIS ALMOST CHOSEN PEOPLE 45-46 (1966), writes that the United States was the result of a willed,

creative act, by an identifiable set of people who deliberately set out to make a nation. The Founding Fathers . . . constructed the political machinery of a nation. . . without any of the traditional, cultural, psychological, economic, and social foundations to support it which in Europe took centuries to build.

This last sentence is too broad a statement and does not do justice to at least the English heritage.

<sup>156</sup> Very importantly, they actually lived under constitutions (and the Articles of Confederation) but, as a comparison of the eventual Federal Constitution with some of the State ones discloses, the language is identical in many instances. See, *e.g.*, C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 31-38 (1928) (giving references to earlier works by others). Of interest here is the Massachusetts Preamble which opens "We . . . the people of . . . do . . . ordain and establish . . ."

Analogically, just as the shooting revolution of 1776 had earlier been accomplished ideologically in the previous 15 years, so, too, the Constitution of 1789 had taken form and content in the years preceding it. See, *e.g.*, B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

<sup>157</sup> *E.g.*, Mason, the first week the Convention worked,

observed that the present confederation was not only deficient in not providing for coercion and punishment agst. delinquent States; but argued very cogently that punishment could not in the nature of things be executed on the States collectively, and therefore that such a Govt. was necessary as could directly operate on individuals, and would punish those only whose guilt required it. 1 FARRAND RECORDS, *supra* note 81, at 34.

(Madison's Notes are generally used); see *id.* at 133, 141, 406, 437, 447; 2 *id.* at 6-11 (additional reports of the disagreements among the members). The bone involved was therefore the method of choosing the national legislature, *i.e.*, if acting only upon the States then these would choose, but if acting upon the people then these would elect. Pierce therefore suggested "an election by the people as to the 1st. branch & by the States as to the 2d. branch; by which means the Citizens of the States wd. be represented both individually & collectively." *Id.* at 137 (italics omitted).

<sup>158</sup> See, *e.g.*, Letter from James Madison to Edmund Randolph, April 8, 1787; Letter from James Madison to George Washington, April 16, 1787 in *id.* at 338, 345

form of government, with one branch of the national legislature elected directly by the people and the other branch indirectly;<sup>159</sup> the later New Jersey (Patterson) Plan proposed that the existing Articles "be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government . . ."<sup>160</sup> The Convention debated both plans, with the jurisdictional question being urged, whereupon James Wilson (Pennsylvania) remarked:

With regard to the power of the Convention, he conceived himself authorized to conclude nothing, but to be at liberty to propose any thing. In this particular he felt himself perfectly indifferent to the two plans.

With regard to the sentiments of the people, he conceived it difficult to know precisely what they are. Those of the particular circle in which one moved, were commonly mistaken for the general voice. He could not persuade himself that the State Govts. & sovereignties were so much the idols of the people, nor a Natl. Govt. so obnoxious to them, as some supposed. Why sd. a Natl. Govt. be unpopular? Has it less dignity? Will each Citizen enjoy under it less liberty or protection? Will a Citizen of Delaware be degraded by becoming a Citizen of the United States? Where do the people look at present for relief from the evils of which they complain? Is it from an internal reform of their Govt.? No. Sir, It is from the Natl. Councils that relief is expected. For these reasons he did not fear, that the people would not follow us into a national Govt. and it will be a further recommendation of Mr. R.'s plan that it is to be submitted to them and not to the Legislatures for ratification.<sup>161</sup>

---

(Madison's pre-Convention views). *But see* note 127 *supra* (analysis of the States' responses to the call).

<sup>159</sup> 1 FARRAND RECORDS, *supra* note 81, at 20.

<sup>160</sup> *Id.* at 242.

<sup>161</sup> *Id.* at 253 (italics omitted). *See also* 3 *id.* at 138-43, giving Wilson's arguments in the Pennsylvania Convention on ratification, and mentioning "another reason . . . [which] increased the difficulties of the Federal Convention — the different tempers and dispositions of the people for whom they acted," *i.e.*, their electorate. Later he speaks of "[t]he general sentiment in that body [the Convention], and, I believe, the general sentiment of the citizens of America," *i.e.*, not of "the people of America" but of a special group, while in the same (and next) sentence he "presumes that Providence has designed us for an united people, under one great political compact . . . supported by the wishes of the people," *i.e.*, a united general people supported by the wishes of a particular people. For Madison's ("compact") views, favoring the new form of government, see 1 *id.* at 314-22.

Nine days after so speaking Wilson spoke again, referring to "the immense population which is to fill" the new country, the influence which the new government would have "not only on the present generation of our people & their multiplied posterity, but on the whole Globe," and he explained why he opposed election of the national legislature by the local ones because of

the twofold relation in which the people would stand. 1. as Citizens of the Gen'l Govt't. 2. as Citizens of their particular State. . . . Both Govts. were derived from the people — both meant for the people — both therefore ought to be regulated on the same principles. . . . The Genl. Govt. is not an assemblage of States, but of individuals for certain political purposes — it is



The importance of this initial Convention problem,<sup>162</sup> for our purposes, cannot be minimized. As later disclosed, its resolution in the Preamble may (or may not) be termed a "conspiracy," with Gouverneur Morris seen as the chief conspirator, but for the moment this conclusion is not suggested.<sup>163</sup> Nevertheless, it is not incorrect to call such a resolution a minor, if not a great, compromise.<sup>164</sup>

Other delegates also used the term "people" somewhat loosely,<sup>165</sup> while the contrary might be said as to various situations; and the controversies surrounding the method of obtaining a Chief Executive, and that concerning the apportionment of representatives and taxes, are good illustrations pro and con, as is the ultimate adoption of section 2 of article IV. As to the President, the question at issue was whether to have him "chosen by the National Legisl.," to which Gouverneur Morris (Pennsylvania) was opposed; he urged that that official "ought to be elected by the people at

not meant for the States, but for the individuals composing them: the individuals therefore not the States, ought to be represented in it . . . . *Id.* at 405-06 (italics omitted).

<sup>162</sup> See generally note 127 *supra*.

<sup>163</sup> Cf. M. FORKOSCH, *supra* note 114, at 342-43 & n.50 (similar problem regarding the adoption of the 14th amendment). But see C. WARREN, *supra* note 114, at 394-96 (discussed in text accompanying notes 210-14 *infra*).

<sup>164</sup> During the debates in the first House of Representatives on amendments proposed by Madison, Gerry of Massachusetts referred indirectly to this early problem and said the 1787 Convention

was not convened in consequence of any express will of the people, but an implied one, through their members in the State Legislatures. The Constitution derived no authority from the first convention; it was concurred in by conventions of the people, and that concurrence armed it with power and invested it with dignity. 1 ANNALS OF CONG. 716 (1834) [1789-1791] [hereinafter cited as ANNALS].

<sup>165</sup> E.g., Roger Sherman of Connecticut felt the States under the Articles could be forgiven for not complying with a request for taxes for "[t]hey were afraid of bearing too hard on the people," *i.e.*, all who paid taxes, and he later objected to the proposed second house "to be chosen by the people," *i.e.*, the electorate. "The people would not much interest themselves in the elections . . ." 1 FARRAND RECORDS, *supra* note 81, at 341, 342. George Mason of Virginia, speaking for the limiting of the President to one 7-year term and to be chosen by the national legislature, mentioned proposals that his "election should be made by the people at large," or "by Electors chosen by the people for that purpose," and spoke of another plan "requiring each freeholder to vote for several candidates." He felt that "the preservation of the rights of the people" required the President to "return to that mass [of people]." 2 *id.* at 119-20. Benjamin Franklin felt such a return "to the mass of the people" was not degrading but promoting, as "the rulers are the servants, and the people their superiors & sovereigns." *Id.* at 120. See also the views of Luther Martin of Maryland, 3 *id.* at 153, 159 (before the House of Representatives in explaining the debates), *id.* at 192, 229-30 (his "Genuine Information" to the ratifying convention), *id.* at 284, (a reply to a critic). See also the statements of Wilson, in the Pennsylvania ratifying convention, quoted in C. VAN DOREN, THE GREAT REHEARSAL 183-84 (1948).

large," and if that were all, one might suppose this was a total population view. However, Morris immediately stated that it was "by the people at large, by the freeholders of the Country."<sup>166</sup> In the ensuing debate Sherman (Connecticut) also used the phrase "people at large," as did Mason (Virginia), while Wilson (Pennsylvania), Morris in another remark, and Williamson (North Carolina) all referred to "people" but without otherwise qualifying the term, *i.e.*, in effect they understood both terms to mean the same.<sup>167</sup> Even the question put to the Convention for a vote, which resulted in its rejection, was "an election by the people instead of the Legislature . . ."<sup>168</sup> As to the apportionment problem, that relating to representation and taxation,<sup>169</sup> the Committee of Detail reported, on August 6th, a proposed clause as follows:

The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths<sup>170</sup> of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) . . .<sup>171</sup>

Here is apparently unquestionable proof that the delegates knew what "people" they were talking about, and that it and "persons" had to be qualified at all times (save when politicking was engaged in). The eventual language placed in the Constitution apportioned representatives and direct taxes<sup>172</sup> among the States "according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service<sup>173</sup> for a Term of Years, and excluding Indians not taxed, three

<sup>166</sup> 2 FARRAND RECORDS, *supra* note 81, at 29.

<sup>167</sup> *Id.* at 29-31.

<sup>168</sup> *Id.* at 32.

<sup>169</sup> See note 216 *infra*.

<sup>170</sup> On June 30th, during a discussion involving the big-little representation and which eventually resulted in the Great Compromise (*see* note 182 *infra*), Madison suggested an "expedient" which had "occurred" to him, namely,

that instead of proportioning the votes of the States in both branches, to their respective numbers of inhabitants computing the slaves in the ratio of 5 to 3. that they should be represented in one branch according to the number of free inhabitants only; and in the other according to the whole no. counting the slaves as <if> free.

<sup>1</sup> FARRAND RECORDS, *supra* note 81, at 486. Farrand, for July 11th, notes: "This begins the debate on the 'three-fifths rule' which was finally adopted on July 13. The question had previously been broached on June 11 and July 9." *Id.* at 580 n.5.

<sup>171</sup> *Id.* at 183.

<sup>172</sup> See note 209 *infra*, on this term.

<sup>173</sup> The Committee of Style drafted this exact language save that "servitude" instead of "Service" was used by it. 2 FARRAND RECORDS, *supra* note 81, at 590. See

fifths of all other Persons." In other words, the Committee spoke of "white and other free citizens," which could refer only to emancipated nonwhites, and also included within "inhabitants" the totality of the population (save as excepted). The delegates also here used "persons" in a total sense, for they were now classifying this totality into Indians not paying taxes and those who were, whites who were free (citizens or inhabitants), whites bound to servitude, nonwhites who were free (citizens or inhabitants), and all others regardless of age, sex, or condition. The constitutional term "free Persons" was thus understood ordinarily to exclude those bound to servitude, so that these latter had to be expressly included by specific language; now also could "Persons" in its generality, *i.e.*, "the whole Number" or entirety of inhabitants, be used to replace the specifics of "inhabitants of every age, sex and condition," for here the term was not to be used for those who entered into a compact, or who owned or transferred property, or who voted or held office, but, rather, for wealth and the totality of population.<sup>174</sup> And when "three fifths of all other persons not comprehended in the foregoing description" is reduced by deleting the last six quoted words, the reason is that "the foregoing description" was superfluous.<sup>175</sup>

---

also C. ANDREWS, *COLONIAL FOLKWAYS* 182 (1919), that indentured service "continued for many years even after the Revolution."

<sup>174</sup> See, *e.g.*, Gouverneur Morris' extended remarks in support of his motion to insert "free" before "inhabitants" in a provision reported by the Committee of Detail and eventually, as combined with others, now found in article I, section 2, clause 3 of the Constitution. *Inter alia*, Morris was opposed to slavery as "a nefarious institution," and asked "[u]pon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?" Morris' motion was defeated, 10-1. 2 FARRAND RECORDS, *supra* note 81, at 221-23. For analogous comments by others see *id.* at 541, 562, 586 (King); *id.* at 542, 580, 592, 593, 596 (Pinckney); *id.* at 559, 580, 587 (Gorham); *id.* at 561 (Patterson); *id.* at 581 (Mason); *id.* at 581 (Williamson); *id.* at 581-83, 602, 604 (Morris); *id.* at 585 (Madison); *id.* at 586 (Sherman); *id.* at 587 (Wilson); *id.* at 593 (Davie); *id.* (Johnson); *id.* at 594, 603 (Randolph).

In *The Federalist* No. 54, Hamilton discussed the method of apportionment and distinguished between counting slaves for taxation and for representation, saying, *inter alia*: "But we must deny the fact that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property . . ." *THE FEDERALIST* NO. 54, at 361 (P. Ford ed. 1898) (Hamilton).

<sup>175</sup> Gerry of Massachusetts refused to sign the eventual document and, among his objections, said that such proportion of Negroes "are to be represented as if they were freemen," *i.e.*, the preceding description was applicable (solely) to the then slaves. 2 FARRAND RECORDS, *supra* note 81, at 633. Massachusetts, of course, had no slaves in any quantity and so was being discriminated against as the Southern whites now would cast more votes than those based solely upon themselves, as in the Northern States. See Morris' remarks, *supra* note 174, and also the vigorous debate involving these principles, although on another proposed section, in 2 FARRAND RECORDS, *supra* note 81, at 219-23.

The final illustration as to the use of language by the delegates, but disclosing designed differentiations, concerns section 2 of article IV. This section originally contained three clauses, the third of which has been superseded by the 13th amendment. The first clause entitles "The Citizens of each State" to the privileges and immunities of "Citizens in the several States"; the second involves extradition and (hopefully) requires that "A Person charged" criminally in one State be delivered up by another; and the third stated that "No person held to Service or Labour in one State" who escapes into another can now be discharged therefrom "but shall be delivered up on Claim of the Party to whom . . . due." In these clauses the references are to "Citizens," "Person," and "person," as well as "Party." The first and last such terms are obviously different from the other two and also from each other, but, it is suggested, the two like words are not the same terms. In the third clause the reference is unquestionably to slaves (and indentured servants), and this was acted upon and enforced;<sup>177</sup> but in the second clause any person, regardless of color or status, could be a fugitive from justice, e.g., a slave might kill a master.<sup>178</sup> Regardless of its reversal by the Civil War and the 13th amendment, Taney's lengthy opinion in *Scott v. Sandford* is generally not incorrect historically and legally, and his analogous references to the Articles of Confederation are apt,<sup>179</sup> while his analysis of prior and contemporary clauses, statutes, and decisions supports the present discussion for the purposes here undertaken.

The observation may parenthetically be made that at this period in the history of America a leveling spirit had begun to permeate

---

It may be remarked that Washington spoke once in the Convention, and then on the question of representatives, with the delegates immediately following his lead. Note 142 *supra*. In *The Federalist* there was, of course, a spirited general defense. THE FEDERALIST NOS. 52-55 (Hamilton).

<sup>176</sup> Article IV, section 2 was held to impose only a moral duty to surrender up the fugitive. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861). Congress has somewhat circumvented this by a 1934 statute making it a federal offense, in a limited number of cases, to flee interstate to avoid prosecution. Fugitives from Justice Act, 18 U.S.C. § 1073 (1964).

<sup>177</sup> 1 Stat. 302 (1793). See *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); *Jones v. Van Zandt*, 46 U.S. (5 How.) 215, 229 (1847); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 536 (1842).

<sup>178</sup> See, e.g., Hamilton's bifurcation, *supra* note 174. See also note 231 *infra*.

<sup>179</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (quoting from the privileges and immunities clause in the former Articles of Confederation which referred to "the free inhabitants of each of the States," and then from its article IX, section 5, which gave the former Congress power to raise land forces, et cetera "in proportion to the number of white inhabitants." See Warren's lengthy analysis of this case in 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY ch. 26 (rev. ed. 1947).

the subconsciousness of the country, but that it had not quite broken through the conservatism of the Convention delegates. It was but a century and a half before that the Long Parliament had defied the King, Cromwell had fashioned his army and become the Protector of the many, and the English Levelers and republicans had earlier decried the yoke and bondage of Magna Carta and the common law and desired to fashion a new and "written constitution which would then become fundamental law for the land."<sup>180</sup> The mounting reaction against slavery<sup>181</sup> was but one illustration of a changed and changing view of "people,"<sup>182</sup> presaging not only the abolitionism of the Civil War but also the populism of the Jackson Era of the 1820's, the Granger Movement of the 1870's and the Bryan-Wilson-LaFollette period in this century.<sup>183</sup> The Founding Fathers<sup>184</sup> reflected all this in their debates, especially with respect to the Preamble and its introduced and changed versions. It is to these that we now turn.

---

<sup>180</sup> J. EUSDEN, PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH-CENTURY ENGLAND 47 (1958). See also E. BERNSTEIN, CROMWELL AND COMMUNISM (Stenning transl. 1930); H. BRAILSFORD, THE LEVELLERS AND THE ENGLISH REVOLUTION (1961); T. PBASE, THE LEVELLER MOVEMENT (1916).

<sup>181</sup> See, e.g., notes 77, 175 *supra*.

<sup>182</sup> The Great Compromise in the Convention was based upon the method of representation, *i.e.*, if upon population only, then the small States feared the avalanche of people from such States as Pennsylvania and New York would engulf them. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964). The Compromise, of course, resulted in Senate equality and House representation on population. During the debates Wilson (Pennsylvania) exclaimed, "Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary beings called *States*? Will our honest Constituents be satisfied with metaphysical distinctions? . . . We talk of States, till we forget what they are composed of." 1 FARRAND RECORDS, *supra* note 81, at 483. See also note 170 *supra*. Hamilton's view was that "it is a contest for power, not for liberty." 1 FARRAND RECORDS, *supra* note 81, at 466. Gerry (Massachusetts) "lamented that instead of coming here like a band of brothers, belonging to the same family, we seemed to have brought with us the spirit of political negotiators." *Id.* at 467.

<sup>183</sup> See, e.g., S. BUCK, THE GRANGER MOVEMENT (1913); E. DOAN, THE LA FOLLETES AND THE WISCONSIN IDEA (1947); D. MILLER, JACKSONIAN ARISTOCRACY: CLASS AND DEMOCRACY IN NEW YORK, 1830-60 (1967); A. SCHLESINGER, THE AGE OF JACKSON (1946).

<sup>184</sup> Jefferson may not, technically, be so termed, but there is no doubt of his views and influence. For example, consider the following quotes from Jefferson: "I consider the people who constitute a society or nation as the source of all authority in that nation . . ."; "All authority belongs to the people"; "Unless the mass retains sufficient control over those intrusted with the powers of their government, these will be perverted to their own oppression . . . Whether our Constitution has hit on the exact degree of control necessary is yet under experiment"; "The people are the only censors of their governors"; "Every government degenerates when trusted to the rulers of the people alone. The people themselves, therefore, are its only safe depositories"; and, "Independence can be trusted nowhere but with the people in mass . . ." Finally, while the "people are not qualified to legislate [or execute]," "they are qualified to name the person[s] who shall exercise" this power. THE JEFFERSONIAN CYCLOPEDIA 686-90 (J. Foley ed. 1900).

Madison's records of the Convention debates<sup>185</sup> disclose that almost immediately after the delegates convened Randolph (Virginia) "opened the main business." He first discussed what "such a governme[nt] [*sic*] ought to secure," and mentioned as one "to p[ro]cure to the several States various blessings." The Resolutions (Virginia Plan) he proposed suggested the Articles of Confederation "be so corrected & enlarged as to accomplish the objects proposed by their institution," although the very next day he urged that "a Union of the States merely federal" would not be able to accomplish those objects. Pinckney (South Carolina) submitted the draft of a plan immediately after Randolph had discussed his own, and this was to be "between the free and independent States of America." This second proposal was also referred to the Committee of the Whole House, which was to consider the first plan.<sup>186</sup> For the next 2 weeks, the proposals, without the language in the eventual preamble, occupied the time of the delegates, but on June 15th Patterson (New Jersey) presented his own plan "to be substituted in place of that proposed by Mr. Randolph." The new proposals did not refer to the above language and it seems that the Preamble was completely ignored in the ensuing debates.<sup>187</sup>

---

<sup>185</sup> Found in 1-4 FARRAND RECORDS, *supra* note 81.

<sup>186</sup> 1 *id.* at 18-33. The Pinckney Plan was apparently mislaid by the official secretary of the Convention (he was one William Jackson, who was nominated by Hamilton, and won over Wilson's nominee by a 5-2 vote, *id.* at 4), but a supposed copy was later supplied by the author; this had a preamble and 16 articles, the former opening, "We the People of the States of . . . do ordain, declare & establish the following Constitution." 3 *id.* at 595. Prof. Farrand appends a lengthy analysis based upon a variety of facts concerning the authenticity of this language, as well as the other items, and concludes that "[c]ombining all of these sources of information it is possible to obtain a fairly good idea of the Pinckney Plan in its original form." *Id.* at 604. His reconstruction discloses the Preamble to open: "A Confederation between the free and independent States of New Hampshire & is hereby solemnly made . . ." *Id.* at 604; *see* 2 *id.* at 134. We adopt Farrand's views. 1 *id.* at 242.

<sup>187</sup> Hamilton's Convention views originally did not include a preamble; his final draft did, and is of interest because he nowhere offers any reason for his apparently radical change, *i.e.*, aristocratic to democratic. Madison describes Hamilton's first lengthy discussion in the Convention on June 18th, at the conclusion of which he offered "the paper he had sketched" as "a more correct view of his ideas, and to suggest the amendments which he should probably propose to the plan of Mr. Randolph . . ." He reads his sketch in the words following: to wit. 'I: The supreme Legislative Power . . .'" 1 J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 185 (Scott ed. 1894). A footnote, *id.* at 187, informs that this speech was "taken down and written out, [and] was seen by Mr. Hamilton, who approved its correctness, with one or two verbal changes, which were made as he suggested." 1 FARRAND RECORDS, *supra* note 81, at 293. *Elliot's Debates* as well as Koch's 1966 reprinting of Tansill's edition, all give the preceding identical language (with minor punctuation differences), and the government's *Documentary History* is similarly almost identical *sans* the footnote explanation. *Compare id.*, with 5 ELLIOT'S DEBATES, *supra* note 121, at 204-05, and 3 U.S. DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION 149 (1874). 3 FARRAND

On July 26th all plans, resolutions, et cetera were referred to the Committee of Detail, and the Convention adjourned until August 6th to permit it to prepare a draft of a constitution. This Committee was composed of Rutledge as Chairman, Randolph, Gorham, Ellsworth, and Wilson.<sup>188</sup> Randolph had proposed the Virginia Plan, Wilson, as we shall see, made drafts of his own<sup>189</sup> and, perhaps, cooperated with Gouverneur Morris on the final language;<sup>190</sup> Rutledge checked all documents and worked on them; and Ellsworth favored "the necessity of maintaining the existence & agency of the States."<sup>191</sup> Professor Farrand lists the documents considered by or in that Committee, amongst which is one "in the handwriting of Edmund Randolph with emendations by John Rutledge."<sup>192</sup> This document seems to be Randolph's notes and views, and indicates that he felt that "A preamble seems proper. Not for the purpose of designating the ends of government and human politics" or for "mutually pledging the faith of the parties for the observance of the articles," but to "declare, that the present foederal government is insufficient to the general happiness . . ."<sup>193</sup> *Inter alia* Randolph also referred to the fact that the Convention was "not working on the natural rights of men not gathered into society, but upon those rights, modified by society, and . . . *interwoven* with what we call . . . the rights of states . . ."<sup>194</sup> Another document is in "Wilson's handwriting [and] was found among the

---

RECORDS, *supra* note 81, at 619 sets forth a "Copy of a paper Communicated to J.M. by Col. Hamilton, about the close of the Convention," but it is here added "which he said delineated the Constitution which we would have wished to be proposed by the Convention: He had stated the principles of it in the course of deliberations." Now, for the first time, a preamble is found, but in view of the preceding it appears that Hamilton's later thoughts were not necessarily his original ones. This is especially so when his later full Constitution and his original "sketch" are compared, for the Constitution is now given at length and in detail and is apparently a somewhat complete document. Nevertheless, Hamilton's preamble is: "The people of the United States of America do ordain & establish this Constitution for the government of themselves and their posterity." *Id.*

<sup>188</sup> 2 *id.* at 106. On the chairmanship, see *id.* at xxii. Ellsworth's son claimed that his father said the Constitution "was drawn by himself and five others, viz — General Alexander Hamilton, Gorham of Mass, deceased, James Wilson of Pennsylvania, Rutledge of South Carolina and Madison of Virginia." 3 *id.* at 397.

<sup>189</sup> Farrand terms him "an important member." 1 *id.* at xxii.

<sup>190</sup> Notes 196-98 *infra*.

<sup>191</sup> 1 FARRAND RECORDS, *supra* note 81, at 406. According to Pierce of Georgia, Gorham was "of very good sense, but not much improved in his education . . ." 3 *id.* at 87. Apparently, as to content or draftsmanship, Gorham contributed nothing of major importance here.

<sup>192</sup> 2 *id.* at 137 n.6. See also 4 *id.* at 37 n.6; 1 *id.* at xxxiii n.36.

<sup>193</sup> 2 *id.* at 137-38. The changes are given in 4 *id.* at 38.

<sup>194</sup> 2 *id.* at 137-38.

Wilson Papers. It appears to be the beginning of a draft with an outline of the continuation."<sup>195</sup> The second column of this draft, as given by Farrand, opens: "We The People of the States of . . . do . . . ordain and establish the following . . . Frame of Govt. as the Constitution . . . of the said United States."<sup>196</sup> The views of Randolph as given above, the composition of the Committee and the internal evidence of the documents before them, bolstered by the fact that Rutledge, who worked on both Randolph's and Wilson's documents,<sup>197</sup> now, on behalf of the Committee, delivered its report to the Convention, permits the conclusion that the exact language in the Preamble at this stage was a stepchild, and that this Committee gave it birth or, at least, was the midwife,<sup>198</sup> although influenced by the Virginia delegation's presentation of an unconscious accommodation between the statists and the populists. Regardless, the Committee reported on August 6th that it was "We the people of the States of . . . [who] do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity."<sup>199</sup>

The path traversed by this Preamble indicates a degree of Convention indifference to its language and, perhaps, implications.<sup>200</sup>

<sup>195</sup> *Id.* at 150 n.13.

<sup>196</sup> *Id.* at 150. Another document so found in Wilson's papers and in his handwriting opens: "We the People of (*and*) the States of . . . do ordain," and so on. A parenthesized word, according to Farrand, was "crossed out" while "[i]talics represent later insertions." *Id.* at n.14. In this case both apparently occurred. *Cf.* still another such document by Wilson (emendations by Rutledge) but now without the "and." *Id.* at 163. And see text next following on the Report of the Committee of Detail.

<sup>197</sup> See authorities cited notes 192-96 *supra*.

<sup>198</sup> Warren states that "an entirely new Preamble had been drafted." C. WARREN, *THE MAKING OF THE CONSTITUTION* 687 (1928). Technically this may be correct, but in principle it is not; the Preamble vacillated between the opposing State-people views expressed in the Convention and attempted to create a mean acceptable to both, *i.e.*, that it was the people, but of the States, who were now creating the Constitution.

<sup>199</sup> 2 FARRAND RECORDS, *supra* note 81, at 177. All 13 states were named. The Government's records disclose that the printed (tentative) draft of the Constitution received from the President March 19, 1796 opens, "We the People of the States" enumerated, "do ordain and establish . . . [this] government of Ourselves and our Posterity." 1 U.S. DEP'T OF STATE, *supra* note 187, at 285. The preposition "of," not "for," is meaningful. Pinckney, in 1818, forwarded to the Department of State his own Convention draft, the opening language being almost identical with the preceding, as is Brearley's opening language. *Id.* at 312, 338; See note 187 *supra*, (Hamilton's apparent language).

<sup>200</sup> *But see* C. ROSSITER, 1787: THE GRAND CONVENTION 229 (1966); C. VAN DOREN, *supra* note 165, at 161; text accompanying note 211 *infra*. Rossiter feels "We ought not attach too much significance to this change [discussed below], for it" was required by the inability to foretell which nine States would ratify. See note 212 *infra*. However, and apparently in disagreement with his preceding comment he concludes "Thus, somewhat fortuitously, 'We the people of the United States' became the



The day after the report the Preamble "was agreed to nem. con."<sup>201</sup> For the next full month each proposed article and clause was discussed, new compromises fashioned, and finally, on September 8th, a Committee of Style was appointed "to revise the stile of and arrange the articles which had been agreed to . . ." The Committee was composed of Johnson (Connecticut) as Chairman, Hamilton (New York), Gouverneur Morris (Pennsylvania), Madison (Virginia), and King (Massachusetts).<sup>202</sup> Undoubtedly Morris gave the "finish," as Madison put it, to "the style and arrangement of the Constitution"<sup>203</sup> but, regardless of authorship at this moment, the new Committee reported out a Constitution on September 12th, the completely new Preamble beginning "We, the People of the United States . . ."<sup>204</sup> One writer feels that this change

did not have for the delegates who noted it when it was read, quite the implications which are now sometimes found in it. . . . The change was primarily in the interests of accuracy. But what had been done for the sake of accuracy had the effect of making it appear that the Constitution was by and for the united people, not by and for the confederated states.<sup>205</sup>

---

nominal as well as real sovereign source of the Constitution." C. ROSSITER, *supra* at 229.

<sup>201</sup> 2 FARRAND RECORDS, *supra* note 81, at 196. The convention record states "it passed unan: in the affirmative." *Id.* at 193.

<sup>202</sup> 2 *id.* at 553. On the chairmanship, see 1 *id.* at xxiii. Professor Farrand terms Morris one of "the most important members." *Id.* That gentlemen in 1814 wrote that "[t]hat instrument [the Constitution] was written by the fingers, which write this letter." *Id.* at 420. Morris wrote in 1811 that "General Hamilton had little share in forming the Constitution." *Id.* at 418.

<sup>203</sup> *Id.* at 499. In a letter written April 8, 1831, to Jared Sparks who was engaged in writing a life of Morris and who had asked for information as to the latter's participation in the Convention. Wilson's influence is also suggested. 2 *id.* at 150 n.13; see C. WARREN, *supra* note 156, at 8 n.1; C. WARREN, *supra* note 198, at 637-38. The diary of Ezra Stiles for Dec. 21, 1787, giving delegate Baldwin's (Georgia) account, states that "Messrs Morris & Wilson had the chief hand in the last Arrangt & Composition." 3 *id.* at 170.

<sup>204</sup> *Id.* at 590. Save for minor punctuation and spelling differences the language so reported is identical with that finally adopted and eventually ratified. Warren traces the genesis of this phraseology to several existing State constitutions. C. WARREN, *supra* note 156, at 393 n.1.

<sup>205</sup> Van Doren continues:

In a sense, the Constitution went back rather to a Declaration of Independence than to the Articles of Confederation. The Articles nowhere referred to the people of the United States but always to the "United States in Congress assembled." The Declaration had spoken of "one people" and "our people" and had acted "by the authority of the good people of these Colonies."

There is no record of any objection to the Preamble, which was adopted without a change. C. VAN DOREN, *supra* note 165, at 161.

The "sense" in which the author discusses the preceding is, to this writer, not acceptable.

For the next 5 days and until Franklin observed, while the Constitution was finally being signed, that it was a rising and not a setting sun painted at the back of Washington's chair, the delegates continued to debate various of the proposed articles; nowhere, however, is the Preamble mentioned or referred to.<sup>206</sup> Thirty-seven years later Madison referred to the "general terms or phrases used in the introductory propositions . . . [which] were never meant to be inserted in their loose form in the text of the Constitution."<sup>207</sup> This, however, never occurred for the Preamble, *i.e.*, the State-people "compromise," was broadened into the looser phraseology finally adopted.

This compromise did not go unnoticed in the later ratifying<sup>208</sup> conventions. For example, in Virginia Patrick Henry demanded "Who authorized them [the delegates] to speak the language of, *We, the people*, instead of, *We, the states*? . . . If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states." To this Randolph asked,

Why not? The government is for the people; and the misfortune was, that the people had no [direct] agency in the government before. The Congress had power [from the States] . . . . If the government is to be binding on the people, are not the people the proper persons to examine its merits or defects?

And Mason also replied to Henry, that "the present clause clearly discovers that it is a national government, and no longer a Confederation [of States] . . . ." But, countered Henry, "The style of the

---

<sup>206</sup> Franklin's motion, on September 17th, that the Constitution be signed, was carried. Note 81 *supra*. However, his "convenient form" (suggested "by Mr. G.M. in order to gain the dissenting members"), "Done in Convention, by the unanimous consent of *the States* present," *id.* at 643 (italics in the original), was apparently ignored. Madison's notes also state that this ambiguous form had been "put into the hands of Doctr. Franklin that it might have the better chance of success." Warren puts it even more strongly. C. WARREN, *supra* note 198, at 711. The clause did have some effect, *e.g.*, Blount (N.C.) reversed himself because "he was relieved by the form proposed," although Pinckney felt "[w]e are not likely to gain many converts by the ambiguity of the proposed form of signing . . . ." 2 FARRAND RECORDS, *supra* note 81, at 646, 647. He and Butler, therefore, rejected "the equivocal form of the signing, and on that account voted in the negative" on the motion to sign, although both later did actually sign the document. *Id.* at 647, 665.

<sup>207</sup> 9 WRITINGS OF JAMES MADISON 176-77 (Hunt. ed. 1901). Madison was speaking of the various plans and resolutions eventually "to be reduced by proper limitations and specifications, into the form in which they were to be final and operative; as was actually done in the progress of the session."

<sup>208</sup> The questions whether the Constitution was factually ratified, as well as whether it could have been ratified, by their delegates or by the "people," have been controversial ones. See, *e.g.*, L. HACKER, *THE SHAPING OF THE AMERICAN TRADITION* 237-38 (1947).

government (*We, the people*) was introduced perhaps to recommend it to the people at large . . . ."<sup>209</sup>

Whether or not a "conspiracy" was present during these days<sup>210</sup> is, of course, conjectural. Professor Warren correctly says that "this change was not intended by the Convention to be anything more than a matter of form,"<sup>211</sup> since the Preamble's first literal naming of the 13 States separately was because it was originally intended that all of them would have to ratify, but, when unanimity for ratification was dropped, with only nine of the 13 States required, "such action made it necessary to eliminate from the preamble the names of the specific States; for it could not be known, at the date of the signing of the Preamble and the rest of the Constitution by the delegates, just which of the thirteen States would ratify."<sup>212</sup> There is no question but that all these considerations did enter into the change, and while Warren and the others so accounting therefor do not otherwise support their view, we may call attention here to

<sup>209</sup> 3 ELLIOT'S DEBATES, *supra* note 121, at 22, 28, 29, 148 respectively (emphasis in original). Elliot contains Mason's "clause" referring to the power of "laying direct taxes," for which he desired amendments. Pendleton also entered the discussion, asking of Henry:

who but the people can delegate powers? Who but the people have a right to form government? The expression is a common one, and a favorite one with me. The representatives of the people, by their authority, is a mode wholly unessential. If the objection be, that the Union ought to be not of the people, but of the state governments, then I think the choice of the former very happy and proper. What have the state governments to do with it? Were they to determine, the people would not, in that case, be the judges upon what terms it was adopted. *Id.* at 37.

Lee felt that "[t]his expression was introduced . . . with great propriety." *Id.* at 42. For additional discussions see *id.* at 44 (Henry); *id.* at 94 (Madison); *id.* at 98 (Nicholas); *id.* at 104 (Corbin); *id.* at 180 (Lee).

<sup>210</sup> See authorities cited note 163 *supra*.

<sup>211</sup> C. WARREN, *supra* note 798, at 394; see note 200 *supra*.

<sup>212</sup> Hence, the language, "We, the people of the United States," was used, the meaning being, "We, the people of the States united," *i.e.*, the people of those States which should agree to unite, by ratifying the new Constitution. "No other intent was suggested or contemplated" by this change of language. [Referring to 1 R. FOSTER, COMMENTARIES OF THE CONSTITUTION 43, 94 (1895). In 1882 Stephens, made exactly the same analysis, with a second point being discussed at note 216 *infra*. A. STEPHENS, PICTORIAL HISTORY OF THE UNITED STATES 312-13 (1882).] The idea that "We, the people of the United States" was intended to mean the people, as a whole, of the country known as the United States of America, irrespective of the States of which the people were citizens, was an idea which did not enter the heads of the delegates at the time. C. WARREN, *supra* note 198, at 395.

Warren then instances Daniel Webster's later development of this theory, and of Patrick Henry's like remonstrances against such language, quoting the latter's refutation by Henry Lee and, in effect, the following quotation of Madison is the basis for Warren's views. On Henry and Lee see 3 ELLIOT'S DEBATES, *supra* note 121, 44, 180, and on Madison see 1 J. MADISON, *supra* note 187, at 48.

the first sentence of clause 3, in article I, section 2 of the Constitution which originally<sup>213</sup> spoke of the apportionment of representatives and direct taxes "among the several States which may be included within this Union . . . ."

However, certain questions may still be propounded: why could not the original naming of the 13 States have been remedied by simply inserting, in their place, "ratifying this Constitution;" so as to read, "We, the People of the States ratifying this Constitution;" or how could the initial Convention problem of jurisdiction based upon States or people<sup>214</sup> otherwise be resolved; or why in every article of the Constitution are the States mentioned and discussed but not so for the "people;" or why do the above references to the part played in drafting the Constitution by Gouverneur Morris (and James Wilson) give the implications they do; and why were deliberate ambiguities allowed to remain in the final document<sup>215</sup> — all these questions still remain unanswered.<sup>216</sup> This "expression

<sup>213</sup> See notes 170-75 *supra* and accompanying text; note 215 *infra*.

<sup>214</sup> Cf. M. FORKOSCH, CONSTITUTIONAL LAW 342-43 & n.50 (1956). But see C. WARREN, *supra* note 198, at 394-96.

<sup>215</sup> E.g., "Mr. King asked what was the precise meaning of *direct* (sic) taxation? No one answd." 2 FARRAND RECORDS, *supra* note 81, at 350. The "direct Taxes" were eventually included in the first sentence of article I, section 2, clause 3, although later removed by section 2 of the 14th amendment, and also the 16th amendment. In what eventually became article I, section 1, clause 6, where the President's removal from office, et cetera is treated, the phrase also appears, "or of his death, Resignation, or Inability to discharge his functions." The Committee of Detail's Report to the Convention on August 6, 2 FARRAND RECORDS, *supra* note 81, at 186, contained the word "disability," and on the later discussion of this portion of the report Dickinson seconded a motion for its postponement, which was unanimously agreed to, "remarking that it was too vague. What is the extent of the term 'disability' & who is to be the judge of it?" *Id.* at 427. That he was correct is disclosed by the eventual 25th amendment.

<sup>216</sup> Another question, not further discussed, is suggested by Stephens when he claims that the original language reported by the Committee of Detail (note 199 *supra*), and even as later redrafted by the Committee of Style for today's Constitution (note 204 *supra*), still does not reject the conclusion that nevertheless the Convention's finished product "was intended to be a Constitution made by States and for States . . ." He argues that the original establishment by "We, the people . . . for the Government of Ourselves and our Posterity" of the new nation permits the inference "that it was intended, as has been construed, that it was a Constitution for the people of the United States in mass, as one consolidated Republic. But the substituted words preclude that inference" because, he suggests, the new language is that "We, the People of the United States . . . do ordain and establish this Constitution for the United States of America" and not "for the Government of Ourselves and our Posterity," *i.e.*, it is for the United States as a grouping of States and not for ourselves as a mass of people. A. STEPHENS, *supra* note 212, at 313-14. On a pre-Convention aspect see Madison's views in the introduction of his *Journal*: "As a sketch on paper, the earliest, perhaps, of a Constitutional Government for the Union . . . to be sanctioned by *the people of the States*, acting in their original and sovereign character, was contained in the letters of James Madison to Thomas Jefferson." 1 J. MADISON, *supra* note 187, at 48.

[which] is a common one"<sup>217</sup> did not originate, full blown, in the Convention, therefore, but seemingly was able to be seized upon and used — that is, if any conspiracy existed. Furthermore, Warren's language does not limit "people of the States united," so that in effect his term is still ambiguously broad, *i.e.*, is it the "voting people of the States united," or is it the "entire people of the States united"? Even conceding the correctness of his interpretation it does not follow that his "people" is a limited one; and the entire tenor of this article discloses such a limitation, with which conclusion he does not disagree. Even the language used in other places in the Constitution not only does not negate these conclusions but, in effect, bolsters them. For example, article I, section 4 vests all national legislative powers in a Congress, with section 2, clause 1 requiring Representatives to be chosen "by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"; so does, or did, clause 3 apportioning representatives and direct taxes among the States, as quoted above;<sup>218</sup> and section 3, clause 1 requires that Senators be "chosen by the Legislature" of each State.<sup>219</sup> For even conceding a populist desire to broaden "people" in the Preamble into a totality, the Federal Legislature here is restricted in its source of power not only to each State's determination of electoral qualifications but, for the Senate, these same and qualified electors have no direct voice in such choosing. The Preamble's "People," therefore, cannot be aught but a restricted term<sup>220</sup> in the light of its formulation and adoption in the Convention, as well as in the light of its understanding and use by the delegates<sup>221</sup> and its subsequent ratification.<sup>222</sup>

<sup>217</sup> See note 206 *supra*.

<sup>218</sup> Text accompanying note 167 *supra*.

<sup>219</sup> The first sentence of clause 1 of the 17th amendment, of course, requires that Senators be "elected by the people" of the States, with the second sentence continuing: "The electors in each State shall have the qualifications" and so on as quoted in the article, the only difference being a plural "s" added to the Constitutional "Legislature."

<sup>220</sup> To clarify, meanings and understandings the term "people" is qualified by using "political" as an adjective; this creates a new term and brings to mind the analogy by Justice Black, dissenting in *Griswold v. Connecticut*, 381 U.S. 497, 509 (1965): "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words more or less flexible and more or less restricted in meaning." See also *United States v. International UAW-CIO*, 352 U.S. 567, 593 (1957) (dissenting opinion).

<sup>221</sup> *The Federalist*, of course, is undoubtedly the most important contemporary interpretation of the Constitutional language; all of its essays were, of course, predicated on the assumption that the ultimate security of the rights of the people lay in the fact that power was in the hands of their representatives. See, *e.g.*, *THE FEDERALIST* NO. 17, at 178 n. (Cook ed. 1961) (Hamilton).

The confusions and ambiguities surrounding the understanding and use of the term "people" in the Convention did not cease with the termination of that body. Most of the delegates continued in public life in one capacity or another, and many were returned to the First Congress.<sup>223</sup> That group found awaiting them demands for amendments, whether expressed in the State conventions<sup>224</sup> or even set forth in some detail in the formal notices of ratification.<sup>225</sup>

---

<sup>222</sup> See, e.g., C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION ch. 9 (1913). Beard details the popular vote on ratification and, concerning the Convention itself, stating that whether or not it "should be held was not submitted to a popular vote, and that it was not specially passed upon by the electors in choosing the members of the legislature which selected the delegates." *Id.* at 239; see *id.* at 71-72. On "Popular ratification," he states that while the "referendum was not unknown at that time, . . . it was not a fixed principle of American politics" and does not seem to have been thought of by the delegates. Beard also notes, among other things, the disenfranchisement of adult males by qualifications, already discussed heretofore, and the apathy and lack of understanding (which seems a trifle strange), and cites one author's conclusions on Massachusetts that while about 16 to 17 percent of the population was entitled to vote, only 3 percent participated in 1780. This dropped to 2 percent by 1784 and even lower until Shay's Rebellion brought it up to 5 to 6 percent in 1787; then it dropped to between 3 to 4 percent until 1794. C. BEARD, *supra* at 242-43. He then goes into other figures elsewhere, but his overall conclusion is that "it seems a safe guess to say that not more than 5 per cent of the population in general, or in round numbers, 160,000 voters, expressed an opinion one way or another on the Constitution. . . . If anything, this estimate is high." *Id.* at 250. See A. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 487-90 (1905).

<sup>223</sup> See note 139 *supra*.

<sup>224</sup> Some States merely ratified without more, e.g., Delaware, Pennsylvania, Connecticut, Maryland, South Carolina; others were a bit more lengthy but in effect also merely ratified, e.g., New Jersey, Georgia; others first ratified and then either continued with suggested or requested amendments or else appended these to a ratifying document, e.g., Massachusetts, New Hampshire, while one insisted that such "ought to be laid before Congress, and the Convention . . . for . . . Amending the said Constitution, for their consideration, previous to the Ratification . . . on the part of the State of North Carolina," and then nevertheless concluded with an adoption and ratification paragraph; Virginia set forth certain "impressions" in the form of statements of rights, and so on, and "with a hope of obtaining Amendments previous to the Ratification," did "assent to and ratify the Constitution," as did Rhode Island, which had boycotted the Convention, while New York's ratification went even slightly beyond such hortatory language. On these ratifications see 2 U.S. DEPT OF STATE, *supra* note 187, at 24, 25, 46, 65, 87, 93, 121, 138, 141, 145, 190, 266, 310. See also L. TRENHOLME, THE RATIFICATION OF THE FEDERAL CONSTITUTION IN NORTH CAROLINA 237-46 (1932); PENNSYLVANIA AND THE FEDERAL CONSTITUTION 248-50 (J. McMaster & W. Stone eds. 1888); note 225 *infra*.

<sup>225</sup> See, e.g., Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 314-18 (1936). The formal Massachusetts ratifying document first ratified in paragraph 1, and then was followed in paragraph 2 by "the opinion of this Convention that certain amendments & alterations in the said Constitution would remove fears & quiet the apprehensions of many of the good people of this Commonwealth & more effectually guard against an undue administration of the Federal Government. The Convention do therefore recommend that the following" become amendments. The first such was: "That it be explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised." 2 U.S. DEPT OF STATE, *supra* note 187, at 93-94. New Hampshire's phraseology was almost

#### IV. THE BILL OF RIGHTS AND THE NINTH AND 10TH AMENDMENTS

The absence<sup>226</sup> of a Bill of Rights<sup>227</sup> had been a political issue jeopardizing ratification;<sup>228</sup> it was not that the people in the original

identical in both respects, with only "& particularly" preceding "delegated." *Id.* at 141-42. For analogous phraseology, see that of North Carolina, *id.* at 270, and of Rhode Island, *id.* at 316. New York's ratification was preceded by a lengthy statement of "impressions" which included:

That all Power is originally vested in and consequently derived from the People . . . that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution . . .

*Id.* at 190-91.

Virginia's "impressions" included the statement "that the powers granted under the Constitution being derived from the People . . . may be resumed" when perverted, "and that every power not granted thereby remains with them and at their will . . ." *Id.* at 145.

In other words, the amendment desired by Massachusetts reserved the powers to the States, that of Virginia to the People, and New York's combined both. See also Madison's proposed amendment note 265 *infra*.

<sup>226</sup> A proposal in the Convention "for a Committee to prepare a Bill of Rights" was rejected 10 to 0, with one State absent. 2 FARRAND RECORDS, *supra* note 81, at 588.

<sup>227</sup> For purposes of clarification this distinguishes at length the various types and kinds of "rights" possible in areas other than legal. M. FORKOSCH, *supra* note 214, at 325. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (holding invalid a miscegenation statute preventing intermarriage because marriage is one of the "basic civil rights of man . . ."; note 19 *supra* (human rights)). Insofar as constitutional rights, including those in the amendments, have not been extended to all persons, see note 271 *infra*. Mr. Justice Fortas' suggestion of a category of "nonpersons" is, for this purpose, valid. Fortas, *Equal Rights — For Whom?*, 42 N.Y.U.L. REV. 401, 405 (1967). Chafee feels that "all rights in the Constitution are really human rights, since they are exercised by human beings against human beings," and that "the most important human rights provision in the Constitution" is found in article I, section 9, the privilege of the writ of habeas corpus. He states, however, that "we can pretty much ignore great parts of the Constitution which deal with political rights . . .," *i.e.*, there are different kinds of rights in the Constitution, including property rights. Z. CHAFEE, JR., *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 1, 2, 51 (1952).

What amendments are covered by a "Bill of Rights," and even whether such term is so limited and does not include constitutional clauses, are also questions not further discussed, e.g., Learned Hand includes the first eight amendments plus the 14th within the term. L. HAND, *THE BILL OF RIGHTS* 1 (1958). Roscoe Pound, on the other hand, prefers only the first nine. R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES AND LIBERTY* 199 (1957). See also *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963), quoting from a 1936 case, in effect holding the Bill of Rights to be the first eight amendments "also safeguarded" by the 14th, *i.e.*, accepting Hand's view.

<sup>228</sup> See, e.g., C. WARREN, *supra* note 127, at 769. Warren states that the first of our four "basic fears" in regard to the Constitution was

the omission of a Bill of Rights and the lack of a definite provision that all powers not expressly granted to the National Government were reserved to the States. The demand for a Bill of Rights was regarded very generally, even by supporters of the Constitution, as justified.

States were not living under their own bills of rights,<sup>229</sup> but if there were now to be a separate government operating directly upon them and with powers other and different from (and greater than) those of the States, was not such a guarantee of rights all the more required?<sup>230</sup> Why the people in a territory should be so nationally, *i.e.*, federally, favored<sup>231</sup> and not those in the original States could not be explained away, even by Hamilton's ingenious phrases.<sup>232</sup>

See also C. WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 79-85 (1928).

It may be noted that Connecticut, Georgia, and Massachusetts finally ratified the Bill of Rights in 1939.

<sup>229</sup> *E.g.*, eight of the States so expressly provided a bill of rights, and three others which had no such formal bill had, in their constitutions, similar provisions. Mason, who in 1776 had authored Virginia's bill, the first such in the State constitutions, was naturally for such a Bill in the Convention, and "[h]e wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose — It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours." 2 FARRAND RECORDS, *supra* note 81, at 587-88. Randolph, Mason, and Gerry refused to sign the eventual document, one of their reasons being the lack of a Bill of Rights. See *id.* at 633, 637. Madison's views concerning the efficacy of these State safeguards is found in his speech in the House of Representatives on behalf of his proposed amendments, June 8, 1789. "Besides, some States have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper . . ." 1 ANNALS *supra* note 164, at 439.

<sup>230</sup> In the first Congress Madison's introductory remarks to the proposed Bill of Rights included the statement that "[t]he people of many States have thought it necessary to raise barriers against power in all forms and departments of Government . . ." *Id.* at 436.

<sup>231</sup> The Northwest Ordinance of 1787 contained a requirement that "the following Articles shall be considered as Articles of compact, between the Original States and the people and States in the said territory . . ." Amongst these were freedom of worship and religious sentiments (article I), habeas corpus, jury, a formulation of due process (article II), and a rejection of slavery (except for one "from whom labor or service is lawfully claimed in any one of the original States . . .") (article VI). 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 at 339-40, 343 (R. Hill ed. 1787); see note 176 *supra* (extradition). The first Congress under the Constitution, on August 7, 1789, enacted chapter VIII which recited a desire to have the 1787 Ordinance "continue to have full effect," and so "it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution . . ." 1 Stat. 51. The enacting sections 1 and 2 dealt briefly with other specific matters in the Ordinance and, in effect, if the Northwest Ordinance did not survive the inception of the new government then technically this first statute did not reenact or continue it. Neither did the Act of May 8, 1792, 1 Stat. 285, nor the Act of April 30, 1802, 2 Stat. 173, although all three statutes assumed the continuation of the provisions and restrictions.

<sup>232</sup> THE FEDERALIST NO. 81 (Hamilton); *id.* NO. 84, at 569 (P. Ford ed. 1898) (Hamilton). He argued that "bills of rights are, in their origina, stipulations between kings and their subjects," whereas "[h]ere, in strictness, the people surrender nothing; and, as they retain everything, they have no need of particular reservations." *Id.* at 572, 573. In *Griswold v. Connecticut*, 381 U.S. 479, 489 n.4 (concurring opinion), Justice Goldberg quotes additionally and, referring to the ninth and 10th amendments, says that these "were apparently also designed in part to meet the above-quoted argument of Hamilton."



Promises to amend the Constitution thus became due bills<sup>233</sup> for presentation to the opening session of the First Congress.<sup>234</sup> This body therefore proposed 12 amendments,<sup>235</sup> although only 10 became fundamental law.

The internal Congressional procedures and debates on these proposals are illuminating. The initial attempt to amend was exactly 1 month after a Congressional quorum met. On May 4, 1789, Madison gave notice to the House "that he intended to bring on the subject of amendments to the Constitution,"<sup>236</sup> but the following day Bland (Virginia) presented an application by that State's legislature for amendments, thereby following the alternative amending procedures of article V.<sup>237</sup> The application referred to the Constitution's "defects . . . as involving the great and unalienable rights of freemen," but there were objections to its considerations until the proper number of States "concurred in similar applications . . ."<sup>238</sup> On June 8th Madison reminded the House of his earlier desire to propose amendments and moved the body resolve itself into a Committee of the Whole;<sup>239</sup> he encountered opposition to this procedure but nevertheless gave his reasons for amendments and then set forth his<sup>240</sup> proposals, the first of which was that

<sup>233</sup> Mr. Justice Roberts, after leaving the bench, spoke of the "moral commitment" of Congress to propose amendments. Roberts, *American Constitutional Government*, in THE GASPHER G. BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES 391 (1953).

<sup>234</sup> C. WARREN, *supra* note 228, at 99, calls this "almost an adjourned session of the Federal Convention of 1787. In this First Congress, ten of the eighteen Senators, and eight members of the House had been among the fifty-five members of that Convention," and five Senators and 26 Representatives were members of State ratifying conventions.

<sup>235</sup> These were preceded by an explanatory paragraph:

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best ensure the beneficent ends of its institution . . . . 2 U.S. DEP'T OF STATE, *supra* note 187, at 321.

<sup>236</sup> 1 ANNALS, *supra* note 164, at 247.

<sup>237</sup> See generally Forkosch, *The Alternative Amending Clause in Article V: Suggestions on Powers and Procedures*, 51 MINN. L. REV. 1053 (1967).

<sup>238</sup> Madison also "doubted the propriety of" the procedures, and these are discussed more fully in the preceding reference. *Id.*

<sup>239</sup> 1 ANNALS, *supra* note 164, at 424.

<sup>240</sup> Madison had opposed adding a bill of rights during the ratification period, as he feared delay in ratification, but, as put by him, he "thought a bill of rights has a certain value . . ." E. BURNS, *JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION* 80 (1934). Rutland discusses Madison's almost enthusiastic conversion and his "promise" to the voters to propose amendments. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 195-97 (1955). As the present debates show, he was undoubt-

there be "prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people."<sup>241</sup> Additionally he desired that in article I, section 9, certain clauses (most later incorporated in the Bill of Rights) be inserted, two of which are given in full below.<sup>242</sup> The first such was not mentioned in his treatment of the group of clauses, and the second was supported as follows:

I find, from looking into the amendments proposed by the State [ratifying] conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration . . . .<sup>243</sup>

He thereupon moved to appoint a committee so that eventually Congress might propose amendments, whereupon opposition and extended debate occurred but the motion of another member, to refer Madison's motion to the Committee of the Whole, was carried.<sup>244</sup> The following July 21st Madison succeeded in bringing the matter up again, but a select committee (one member from each State) of the Committee of the Whole was now appointed to take up the subject generally and report back.<sup>245</sup> On August 13th the House resolved itself into a Committee of the Whole to discuss the report of the select group and at once ran into the problem of form — Madison's proposals were to insert a variety of clauses within the Constitution, whereas now it was suggested and moved that the Constitution be left intact and amendments follow at its end.<sup>246</sup> Madison felt that "Form, sir, is always of less importance than the substance; but on this occasion I admit that form is of some consequence . . . ." <sup>247</sup> After discussion the motion was lost and the

---

edly utilizing the ratifying documents of the States to weed out duplications, irrelevancies, and those proposals with which he disagreed. See generally I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800, at 264-75 (1950), for a treatment of Madison's congressional difficulties in bringing up the proposals, and his feeling "that so great a charter of liberties should have come from a man who had no spontaneous urge to provide it." *Id.* at 275.

<sup>241</sup> 1 ANNALS, *supra* note 164, at 433.

<sup>242</sup> Text accompanying note 265 *infra*.

<sup>243</sup> 1 ANNALS 441.

<sup>244</sup> *Id.* at 450.

<sup>245</sup> *Id.* at 665.

<sup>246</sup> *Id.* at 707.

<sup>247</sup> *Id.* at 708.

House adjourned (although on August 20th the same member again so moved and this time successfully).<sup>248</sup> The following day Madison's first proposal, given above, on prefixing a declaration to the Constitution that all power, and so on, stem from the people, was taken up. One member objected as this could not be an amendment to the Constitution for its introductory paragraph "is no part of the Constitution. It is, to say the best, a useless amendment . . . . [B]ut if the principle is of importance, it may be introduced into the bill of rights."<sup>249</sup> After a brief discussion the House agreed (voting 27-23) to adopt the select committee's report that before "We the people" there be added: "Government being intended for the benefit of the people, and the rightful establishment thereof being derived from their authority alone."<sup>250</sup>

On Madison's proposal concerning rights and exceptions<sup>251</sup> the select committee proposed "The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," and practically without debate this was adopted by the Committee of the Whole,<sup>252</sup> thereafter, and on August 21st, it was this eighth proposition which was "agreed to" by the full House, and now without any debate whatsoever.<sup>253</sup> On his proposal concerning the nondelegation of powers and reservation to the States,<sup>254</sup> the select committee's report was identical in lan-

<sup>248</sup> *Id.* at 766.

<sup>249</sup> *Id.* at 718.

<sup>250</sup> *Id.* at 707.

<sup>251</sup> Madison's proposals are given at note 265 *infra*.

<sup>252</sup> 1 ANNALS 754. Patterson gives this report in full but incorrectly uses "the Constitution" instead of "this Constitution," and says that this "exact language was never changed thereafter . . ." B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 14 (1955). In this he is in error. See also the change from "this" to "the" in the 10th amendment, note 255 *infra*. The reason for these changes is correctly given by Patterson with respect to other items, and this is that at the outset Madison desired to interweave his amendments with, and into, the actual text of the Constitution; with the later rejection of this proposal, "this" had to be changed, as now the language was outside, not inside, the actual Constitution, and was supplementary to it.

<sup>253</sup> 1 ANNALS 767. The reasons given by Madison for desiring this original amendment were:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution. *Id.* at 439.

<sup>254</sup> Note 265 *infra*.

guage<sup>255</sup> and the only change in the Committee of the Whole was in this fashion, with no debate or explanation: "Mr. Carroll proposed to add to the end of the proposition, 'or to the people;' this was agreed to." Thereafter, in the House itself, there was now inserted "to the United States" after "delegated," so that its language became identical with the 10th amendment finally ratified, and this was also "adopted without debate."<sup>256</sup> The following day the committee appointed to arrange the amendments reported to the House which adopted them and sent them to the Senate for concurrence.<sup>257</sup>

On August 25th, 1 day later, the Senate received the House's 17 proposed amendments, and on September 2d began an extremely short consideration and even shorter discussion. For example, the entire period to September 9th discloses "consideration" given to the proposed amendments only on September 2d, 4th, 7th, 8th, and 9th, with other items also being discussed and debated. On this last day the entirety of the proceedings are summed up in the statement that the Senate "agreed to a part of them, and disagreed to others; of which they informed the House."<sup>258</sup> The following day the House received this message, discussed the Senate's proposals on the 19th,<sup>259</sup> and on the 21st agreed to some and requested a conference to iron out the remaining disagreements.<sup>260</sup> On the 24th the House discussed the report of its Committee of Conference and receded from its disagreements in all respects save two (plus a minor third);<sup>261</sup> the Senate, on September 25th,<sup>262</sup> now concurred.<sup>263</sup>

Of the 12 proposals so finally agreed<sup>264</sup> upon 10 were ratified, and the ninth and 10th amendments respectively are: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the 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

<sup>255</sup> Only "this" Constitution was changed to "the." On the ninth amendment, see note 252 *supra*. A proposed amendment was lost and is not here discussed.

<sup>256</sup> 1 ANNALS 768. A motion to insert "expressly" before "delegated" was defeated.

<sup>257</sup> *Id.* at 779.

<sup>258</sup> *Id.* at 77.

<sup>259</sup> *Id.* at 889, 903.

<sup>260</sup> *Id.* at 905.

<sup>261</sup> *Id.* at 913.

<sup>262</sup> The *Annals* gives it as "February 25."

<sup>263</sup> *Id.* at 88.

<sup>264</sup> See also note 229 *supra*.

the people."<sup>265</sup> The 10th, of course, has been followed in some detail through the Congress, but the ninth is singularly lacking in clarifying debate. As already pointed up, the direct genesis of the latter is Madison's language concerning rights and exceptions, amended into its present form and ratified, with explicit congressional reasons for introducing, amending, and proposing sorely absent.<sup>266</sup> Nevertheless, "the people" in the ninth amendment still retain (other) rights even though only certain ones are enumerated in the Constitution, for example, article III, section 2, clause 3's requirement of a jury in criminal cases, article IV, section 2, clause 1's entitlement of privileges and immunities to State citizens,<sup>267</sup> while in the 10th amendment all powers not so delegated or prohibited are now so reserved. In effect the first such retention language is somewhat loose but not inconsequential for, as we have already seen, the (political) people are definitely entitled to have and to exercise, at the very least, their political rights. But the entirety of the discussion to now indicates that in the ninth amendment such political rights are not the only ones involved, else why speak of "rights" in the plural, oppose "certain" by "others retained," and not limit the entirety by inserting "political"? Also, the constitutional enumeration is not limited to political rights so that the referent of "certain" is broader than may judicially have been indicated.<sup>268</sup> Logically, therefore, the reference in the ninth

<sup>265</sup> 1 Stat. 97, 98 (1789). In the first Congress Madison's proposed amendments contained the following:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution. 1 ANNALS 435.

Another proposal was to insert a new article VII of two paragraphs, the first stating the doctrine of the separation of powers, and the second as follows: "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively." *Id.* at 436. Another proposal is set forth at note 225 *supra*. See notes 243 & 244 *supra* on the disposition of the amendment and the reasons for Madison's proposal.

<sup>266</sup> Judicial adumbration is similarly lacking. See B. PATTERSON, *supra* note 252, ch. 5.

<sup>267</sup> In *Ashwander v. T.V.A.*, 297 U.S. 288, 330-31 (1936), the Government, under clause 2 of article IV, section 3 disposed of generated electric power from its dams, one argument being that the people retained such a right; said the (questionable) majority, this amendment "does not withdraw the rights which are expressly granted to the Federal Government."

<sup>268</sup> See, e.g., *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94 (1947). Two Justices abstained, Justice Black dissented but did not touch the ninth or 10th amendments, and Justice Douglas dissented "on two of the four matters decided." The bare majority opinion contained this language:

We accept appellants' contention that the nature of political rights reserved

amendment to the rights so retained must include substantive ones other than political,<sup>269</sup> and because these other rights are necessarily vague there is language in one Supreme Court decision terming them "penumbral."<sup>270</sup>

That decision is *Griswold v. Connecticut*<sup>271</sup> where Justice Douglas at one point referred to the first, third, fourth, and fifth amendments, and then casually ended the paragraph by quoting the ninth — this, and nothing more. Justice Goldberg mentioned this bare reference but "I add these words to emphasize the relevance of that Amendment to the Court's holding."<sup>272</sup> The thrust of his language was that in the ninth amendment "the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people,"<sup>273</sup> and that Justice Black "misses the import of what I am saying," for the entire Bill of Rights is not incorporated in, nor is the ninth and its penumbral rights to be applied through, the 14th against the States.

---

to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views . . . *Id.* at 94.

In *Roth v. United States*, 354 U.S. 476 (1957), Justice Brennan wrote for six Justices, with Justice Harlan and Justice Douglas dissenting and Justice Black joining Justice Douglas. *Inter alia* the ninth and 10th amendments were referred to briefly, but Justice Brennan quoted from the *Mitchell* case:

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. *Id.* at 493 (quoting from *United Pub. Workers v. Mitchell*, *supra* at 95-96).

<sup>269</sup> They do not embrace the alleged right to acquire property and thereafter employ it in a lawful business. See *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 143-44 (1939).

<sup>270</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965); note 220 *supra* (use of substitute words to alter constitutional guarantees).

<sup>271</sup> 381 U.S. 479 (1965); see *id.* at 483, 485 (Douglas, J.); *id.* at 487 (Goldberg, J.); *id.* at 499 (Harlan, J.), for references to "penumbral rights." The 7-2 decision found Justices Black and Stewart concurring in each other's separate dissents, and Justices Harlan and White separately writing opinions concurring with Justice Douglas' "majority" opinion, while Justice Goldberg also joined in the Court's opinion and judgment, he concurred separately, with the Chief Justice and Justice Brennan joining him; this, in effect, means that Justice Douglas wrote primarily for himself and Justice Clark, even though Justice Goldberg's opinion joined.

<sup>272</sup> *Id.* at 487.

<sup>273</sup> *Id.* at 490. A footnote to this sentence states: "The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government."

Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments<sup>274</sup> and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States . . . . The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.<sup>275</sup>

Regardless of the merits of the Goldberg-Black disagreement concerning any rights found in the ninth amendment,<sup>276</sup> it points up the question whether "the people" in that amendment are limited ones, as in the Preamble, or else encompass others. The latter conclusion is here reached, which additionally emphasizes the restricted use of "people" in the Preamble. The reasons why the ninth amendment's "people" is broader than that in the Preamble follow upon the preceding analysis. Since there are substantive rights referred to in the ninth amendment which are nonpolitical, these rights may be of such a nature that not only do the political people referred to in the Preamble have them, but they are also had by nonvoting, nonpolitical people such as aliens and minors. Despite Justice Black's views that the 14th's due process clause incorporated the Bill of Rights but was thereby limited in its content by these latter,<sup>277</sup> he has remained in a minority,<sup>278</sup> the High

<sup>274</sup> What the Justice should have said is that fundamental rights exist that are not expressly enumerated in *the Constitution* or the first eight amendments.

<sup>275</sup> 381 U.S. at 492 (footnotes omitted). Justice Black's dissent contained this language:

That [ninth] Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government. . . . Use of any such broad, undoubted judicial authority [to strike down state laws] would make of this Court's members a day-to-day constitutional convention. *Id.* at 520.

To answer these comments Justice Goldberg referred to "any student of this Court's opinions," and then added to the quotation given: "I do not see how this broadens the authority of this Court; rather, it serves to support what this Court has been doing in protecting fundamental rights." *Id.* at 492-93.

<sup>276</sup> This writer is generally in accord with the quoted language of Justice Goldberg, although preferring that "fundamental" be deleted. See Black's cautionary admonition concerning the misuse of words. *Id.* at 509-13 & 513 n.5.

<sup>277</sup> See, e.g., *id.* at 526 n.21; *id.* at 500-01 (concurring opinion by Justice Harlan rejecting "penumbral rights" as a constitutional doctrine).

Court is therefore able continually<sup>279</sup> to interpret it judicially so as to include other rights, *e.g.*, the penumbral aspect, and those who have obtained judicial recognition for possessing a variety of rights have included aliens<sup>280</sup> and minors.<sup>281</sup> These latter, of course, cannot vote, so that by obtaining such rights other than enumerated ones (whether in the Constitution or the first eight amendments), they disclose that the ninth amendment's "people" includes others than the electorate of the Preamble.

The 10th amendment's "powers . . . reserved . . . to the people" stands upon a different historical and conceptual basis than does the ninth's "rights . . . retained by the people." The immediate language difference is between "powers" and "rights," for "the people" are superficially identical. The scheme of government assumed in the Constitution begins with the people in each Colony or State who are there supposedly all-powerful; they have entered into compacts amongst themselves and have created State governments, delegating powers, providing limitations, and so on. Additionally, these same people later, acting collectively on a national scale, have created this federal government and have distributed a variety of powers between it and the existing State governments. They have taken State powers away and have also created others such as the power over interstate commerce. All powers however are subject to certain limitations as evidenced, for example, by the full faith and credit and privileges and immunities clauses, and the list of specific restrictions upon the State and national governments found in article I, sections 9 and 10. In actuality the people did not simultaneously create two separate governments and divide all powers on a 50-50, 60-40 or other basis, or retain 10 and divide the remaining 90 as they saw fit. The fact was that originally they created States,<sup>282</sup> and later took from these existing and continuing

<sup>278</sup> See M. FORKOSCH, CONSTITUTIONAL LAW 386-90 (1956).

<sup>279</sup> See note 275 *supra*, on Justice Black's "day-to-day constitutional convention."

<sup>280</sup> See, *e.g.*, *Truax v. Raich*, 239 U.S. 33, 36, 39 (1915). *Truax* was "a native of Austria, and an inhabitant of the State of Arizona but not a qualified elector," who had "been admitted to the United States under the Federal law." (The Court also referred to earlier [Japanese] cases. *Id.* at 39-40). The Court upheld his "right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments . . ." *Id.* at 38.

<sup>281</sup> See, *e.g.*, *In re Gault*, 387 U.S. 1 (1967) (a 15-year-old boy was held to have been denied several aspects of procedural due process in a (closed) delinquency proceeding).

<sup>282</sup> Even this statement requires analysis, for while a Mayflower Compact may have been a preliminary, disparate, and deliberate such "creation," and a Roger Williams (as with the Mormons) may have led a band of settlers who later so agreed, most settlements were Topsy-like, *i.e.*, "they jest grewed."



States a variety of powers, and, in the Constitution, gave them to the national government.<sup>283</sup> The 10th amendment reflects these theoretical concepts and historical facts. It reserves to the States or people the powers undelegated by the Constitution<sup>284</sup> and those which are neither denied to the national government by, for example, section 9 of article I, nor denied to the States, for example by section 10 of article I. Put differently, the 10th amendment is declaratory of what has been given above as the overall conceptual and historical scheme of government,<sup>285</sup> but it is almost axiomatic at this point that any such plan could be formulated only by that portion of the people who could enter into compacts, *i.e.*, the electorate, and otherwise participate politically, *i.e.*, "the People" in the Preamble. The entirety of the people therefore never could be encompassed by the 10th amendment's political motivation and use; "the people" there are thus a limited and restricted portion of the whole and, if any identity may be drawn, coextensive with "the People" in the Preamble.<sup>286</sup>

---

<sup>283</sup> Pinckney (South Carolina) proposed his own plan to the Convention of 1787 immediately after Randolph had presented Virginia's. 1 FARRAND RECORDS, *supra* note 81, at 16 (Pinckney's is given in 3 *id.* at 595, 604-09), and it contained, in article XVIII, a miniature bill of rights. *But see id.* at 609 n.3; 2 *id.* at 340-41. In discussing his proposals Pinckney referred to the fact that "[t]here have been frequent but unsuccessful attempts by Congress to obtain from the States the grant of additional powers . . ." 3 *id.* at 122. *But see id.* at 106 n.1. "The people," therefore, now did what the States had refused to do. *See also* quotation from *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947), in note 268 *supra*. *Cf.* *New York v. United States*, 326 U.S. 572, 594-95 (1946) (dissenting opinion).

<sup>284</sup> Although the States are not granted powers in the Constitution, it may be noted that every one of the seven articles in the Constitution mentions States, and that if the term were removed from that document it would, as a form of government, collapse. Throughout, the States are assumed to have certain powers, obligations, and so on, and the federal government builds upon these. *See, e.g.*, M. FORKOSCH, *supra* note 278, § 8.

<sup>285</sup> *See* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324-25 (1816), where Story's language is most apropos. He concludes that his "deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by" the 10th amendment. *Id.* at 325.

<sup>286</sup> The same term in other places may likewise partake of this ambivalence, *e.g.*, the first amendment's "right of the people" to assemble and petition, that in the second "to keep and bear Arms," and in the fourth "to be secure in their persons . . . against unreasonable searches and seizures." *Camara v. Municipal Court* (San Francisco), 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), indicate that in the fourth amendment area the term encompasses the totality, as does *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), for the first amendment's rights, although the second amendment's "people" logically may well be limited. For example, in the first clause of article IV, section 2, the entitlement of privileges and immunities is to "citizens of each State," and in the 14th amendment's second sentence of section 1, the reference is to "citizens of the United States." These are express terms of limitation, *e.g.*, excluding aliens, but in the first sentence of section 1 of the 14th amendment, "persons" refers to all humans only, whereas in the second sentence "person" includes not only

## V. CONCLUSION

The leveling tendencies during the pre-Convention period have been mentioned,<sup>287</sup> and while the subsequent adoption of the Constitution may have temporarily been a setback it did not stop, or even dam, this tide. The immediate request for and passage of a Bill of Rights, in effect demanded by and promised to the ratifying conventions, as well as the egalitarianism of the first quarter of the 19th century which culminated in Jacksonian democracy, signified, to an extent, the arrival of a new and broader base for "We, the People." The "middling" or middle class people who had influenced the constitutional language also influenced the Vermont guarantee of universal suffrage in 1791;<sup>288</sup> and in the next few years most of the States, original and new, followed suit.<sup>289</sup> When politicians now spoke of "the people," therefore, they no longer appealed to the selected few of a minority of the population; their constituents had increased to most, if not all, of those not otherwise disenfranchised, *e.g.*, the Negro, so that a somewhat popular sovereignty, if not an all-inclusive one, was emerging. That the first judiciary was not uninfluenced by all this is disclosed by flowery and broad language in the early reports, for example, that "the mighty hand of the people" established a Constitution, which therefore "contains the permanent will of the people . . . .",<sup>290</sup> that, according to Marshall,

the instrument was submitted to the *people*. . . . The government proceeds directly from the people. . . . The government of the Union, then . . . , is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its

---

aliens but also corporations. See M. FORKOSCH, *supra* note 278, §§ 80, 370-75, 386.

For judicial aspects of and holdings concerning the 10th amendment, see THE CONSTITUTION OF THE UNITED STATES 1035-42 (Small & Jayson, eds. 1964). On the ninth amendment see *id.* at 1031.

<sup>287</sup> Text accompanying notes 179-84 *supra*.

<sup>288</sup> 1 L. HACKER, THE SHAPING OF THE AMERICAN TRADITION 338 (1947). A Vermont statute of Oct. 27, 1790 directed that "the first constable in each town shall warn the inhabitants who by law are entitled to vote for representatives in general assembly, in the same manner as they warn freemen's meetings," to meet and elect delegates to the State ratifying convention. 2 U.S. DEP'T OF STATE, DOCUMENTARY HISTORY OF THE UNITED STATES 371 (1894).

<sup>289</sup> 1 L. HACKER, *supra* note 288, at 338. Save for the Southern States which lagged behind "[i]t was not until the fifties that most of them had enfranchised all their male adult whites."

<sup>290</sup> Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795). Paterson and Peters sitting in the United States Circuit Court for the Pennsylvania District, the charge to the jury being here given, with a footnote disclosing that a writ of error to the Supreme Court was probably abandoned. *Id.* at 326 n.3.

powers are granted by them, and are to be exercised directly on them, and for their benefit.<sup>291</sup>

But if Marshall's language here is ambiguous, that is, whom does the "people" include, 2 years later he sought to clarify it as "the whole body of the people; not . . . any subdivision of them."<sup>292</sup> But by "the whole body" Marshall refers to the collective people — the total, national electorate — not merely those in one (or more) State(s); and, as we have seen, even this collectivity is a restricted and therefore limited one insofar as it authorized and ratified a Constitution. Thus that a minority<sup>293</sup> created a document which was to be exercised (solely) "for their benefit," thereby excluding all others (*i.e.*, the totality of the people) is manifestly a *reductio ad absurdum!*

The original term "People" in the Preamble is therefore not, as popular mythology has dignified it, a broad and inclusive term. It is limited to a political, not economical or sociological, use, although it may nevertheless be used separately as an all-inclusive term for all humans in the country. But it is then further limited in the Preamble by being restricted to voters, and this second restriction immediately excludes a host of people, such as minors and aliens. In this sense, therefore, the original "We, the People" is not to be confused with the people included in a census, or discussed in terms of the military or economic needs of the nation, and so on. And to this constitutional restriction there must be added legal and factual ones, *e.g.*, all those who are eligible to vote do not do so. In effect, therefore, one should originally speak of "We, the voting People of the United States," or, if there is desired a different restriction, "We, the indentured People," although in constitutional history and interpretation only the former is somewhat apropos.

This early constitutional limitation also involves, but is not limited to, the history of article I, section 9, clause 1, which prevented congressional prohibition of the importation of slaves before 1808. For, as it has been shown, at the time of the Convention not only slaves but many others, the indentured for example, could not vote, and other qualifications of many kinds abounded.<sup>294</sup> In this context it is significant that the vast majority of the amendments

<sup>291</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-05 (1819).

<sup>292</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 389 (1821).

<sup>293</sup> See note 222 *supra*.

<sup>294</sup> See generally D. HAWKE, *A TRANSACTION OF FREE MEN* 231 (1964). After the Civil War and reconstruction "Americans had decided, for the time being at least, that the Declaration [of Independence] did not apply to the Negro . . ." *Id.*

after the original Bill of Rights pertain to the political needs of the nation, and that of those one finds the 13th, section 2 of the 14th, 15th, 19th, and 24th amendments dealing with the right to vote. What seems to have occurred, therefore, is that the limited "People" in the Preamble has generally so remained (politically) limited, but has nevertheless broadened its coverage within such limitation. Whether or not this is a correct inference, one conclusion seems to be that despite this broadened coverage "We, the People" still remains a political term, that no other civil or human rights are encompassed by it, and that slogans do not add to it.

This writer does not subscribe to the preceding conclusion. There is alternative reasoning available which appears to be compelling. Although the Preamble as such is not a source of federal power<sup>295</sup> it may nevertheless be referred to so as "to expound the nature, and extent, and application of the powers . . . and not substantively to create them."<sup>296</sup> For example, Marshall referred to it, as quoted above, to disclose the base upon which the Constitution rested,<sup>297</sup> although these "People" cannot be extended to any but those in the United States.<sup>298</sup> According to Taney and Warren, however, the Preamble's term is synonymous with "citizens," and the former thereupon proceeded to reject one person's claim to privileges, because he was held not to be a citizen,<sup>299</sup> while the latter's views were later used to uphold the right of a naturalized citizen to a renewal of his passport while living in a foreign country, even though he had voted in an election there.<sup>300</sup> While Taney and War-

<sup>295</sup> See note 9 *supra*.

<sup>296</sup> 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (2d ed. 1851).

<sup>297</sup> See text accompanying note 292 *supra*.

<sup>298</sup> See *Downes v. Bidwell*, 182 U.S. 244, 251 (1901); *In re Ross*, 140 U.S. 453, 464 (1891).

<sup>299</sup> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856).

<sup>300</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967). Justice Black's majority opinion (5-4) now "agree[d] with the Chief Justice's dissent in" the earlier case of *Perez v. Brownell*, 356 U.S. 44, 62 (1958), in which Justice Douglas also separately had dissented. Chief Justice Warren's opinion included the following:

This Government was born of its citizens . . . . I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.

Citizenship *is* man's basic right, for it is nothing less than the right to have rights. 356 U.S. at 64.

ren both agreed that "the People" who created the Federal Government were a limited and restricted group of the entirety of the population, Warren's shift in language from "citizens" to "the people" permits one to argue that the two are not necessarily identical, that is, there may be noncitizens included in "the people" who may have some "rights," even though citizens have not only these but more, for example, aliens living here but not yet naturalized citizens.<sup>301</sup> Regardless of holdings, the reasoning in both opinions connects the Preamble's "People" with citizenship, although the 1857 decision's logical negative was reversed in 1868 by the first sentence of section 1 of the 14th amendment which makes "All persons born or naturalized" here federal citizens.<sup>302</sup> While never directly amended, was not the Preamble indirectly so changed? Is not the earlier interpretation by the Supreme Court now to be altered?<sup>303</sup> These indirect judicial amendments to the Constitution, so as to follow the intent of the people,<sup>304</sup> have precedent and even necessity behind them, and while it would be temerarious to urge that every amendment to or judicial interpretation of the Constitution automatically requires wholesale reevaluation,<sup>305</sup> there is no difficulty in reaching the conclusion here urged.

That conclusion is that "the People" in the Preamble today includes not only women, Negroes, servants, and all who come within amendments such as the 13th, 15th, 19th, and 24th, but also all who have rights under the due process and equal protection clauses of the 14th.<sup>306</sup> In effect, it may be contended in rebuttal, this per-

---

<sup>301</sup> See, e.g., *Terrace v. Thompson*, 263 U.S. 197, 216 (1923); *Truax v. Raich*, 239 U.S. 33, 39 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>302</sup> See, e.g., *Afroyim v. Rusk*, 387 U.S. 253 (1967); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). There are limitations upon this broad statement, of course. See generally *M. FORKOSCH, supra* note 278, § 362.

<sup>303</sup> The analogy may be made to a State's highest court's interpretation of a State constitution or statute, and the changed Supreme Court approach required when and if the State court's interpretation is altered.

<sup>304</sup> See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890), which in effect created the 12½th amendment. See *M. FORKOSCH, supra* note 278, at 83. On indirect judicial amendments to statutes, see *M. FORKOSCH, ADMINISTRATIVE LAW* § 302 (1956) (discussing *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)).

<sup>305</sup> See, e.g., *Commissioner v. James Beam Distilling Co.*, 377 U.S. 341 (1964); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). The majority held that the 21st amendment did not repeal article I, section 10's export-import clause or alter the commerce clause of article I, section 8, clause 3. *But see* 377 U.S. at 334, 346 (dissents by Justices Black and Goldberg). It has been held that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." *Board of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 64 (1936).

<sup>306</sup> To the extent that much of the Bill of Rights is "incorporated" in the 14th amendment, the term "people" as so used may or may not be likewise so included in the Preamble. For example, the first amendment's free speech rights include corpora-

mits the Preamble to read, "We the total number of People in the United States, with voting limited to citizens born or naturalized here and subject to the jurisdiction thereof, in Order to form . . . ." The short answer is that limited partnerships are and have been common for centuries, that we find nothing strange about a Mayflower Compact covering all the people but entered into by a few who limit the voting and other rights to themselves, and that even Magna Carta's limited and restricted parties and scope were, over the centuries, expanded with the changed times and needs to embrace more and more people and rights.<sup>307</sup> And, further, that in so concluding, our living Constitution remains alive and responsive to new generations.

---

tions. *New York Times v. Sullivan*, 376 U.S. 254 (1964). Corporations are also included in the fourth amendment's requirements that an administrative subpoena be not unreasonably burdensome. See *v. City of Seattle*, 387 U.S. 541, 544 n.5 (1967); see note 17 *supra*. Because corporations are certainly not within "the People" mentioned in the Preamble, a degree of selectivity is here required.

<sup>307</sup> See, e.g., H. CAM, *MAGNA CARTA — EVENT OR DOCUMENT?* (1965); J. HOLT, *MAGNA CARTA* (1965); W. MCKECHNIE, *MAGNA CARTA* (2d ed. 1914). Throughout the Great Charter the restriction to "free men" which is begun in the first chapter ("We have also granted to all the free men of our realm . . . all the liberties written below . . .") is continued, and the famous 29th (39th) opens "No free man shall be taken . . . except by the lawful judgement of his peers or by the law of the land." Helen Cam writes that "Coke interpreted Magna Carta lovingly, but inaccurately," and cites the introduction of Magna Carta into the colonies beginning with 1638, and eventually into the Constitution's fifth amendment. H. CAM, *supra* at 21. She concludes that "[w]hether all that has been read into the document is historically or legally sound, is not of the first importance; every historian knows that belief itself is a historical fact, and that legend and myth cannot be left out of account in tracing the sequence of cause and effect." *Id.* at 26.