

# THE “FIRST PRINCIPLE” OF POPULAR SOVEREIGNTY: *POLITICS WITHOUT END*

by  
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How should we think, or begin to think, about popular sovereignty? How ought we argue for it? What “first principle” should guide us? Provoked by the work of Akhil Amar,<sup>2</sup> I want to claim that the “first principle” of popular sovereignty is that it is a practice, nothing more or less than the incremental practice of democratic politics, an historical process, contingent and context-bound, a possibility, perhaps a tendency, but one that is never fully defined, never “authoritatively” established, never finally realized in “law,” a living practice whose meaning and destiny is always up to the political will, energy and acuity, the strength and the luck, of the living.

I’ll attempt to sketch this claim in three parts. First, I’ll elaborate what I see as the internal logic of popular sovereignty -- a practical process of creating a “people” ready, willing and able to exercise “sovereignty.” Next, I’ll argue that this process is not a progress or a cycle. It cannot yield a “yes” or “no” answer to a question about the reality or possibility of popular sovereignty at any point in time. Rather, the issue is always a messy one of degree. For popular sovereignty is the subject of a perpetual political contest, day-to-day and year-to-year. Finally, I’ll draw critical conclusions about several facets of the kind of argument typically made for and about popular sovereignty nowadays. In the end, I hope to suggest that we who are devoted to this idea need, now more than ever, to get down to “first principles,” not as a supposed means of overwhelming our adversaries at one blow, but in order to prepare ourselves for a struggle that will, by its very nature, outlive us all.

## **I. A People, One People, The People**

The idea or ideal of popular sovereignty -- bedrock of “republican” or “democratic” self-government -- is well established in American political thought and rhetoric. It is so well established that we who are drawn to embrace it tend to invoke it as a kind of talisman, imaging or hoping that its deep rhetorical power may overwhelm our critics. But the critics are not overwhelmed. Their responses (also well established) are by now predictable. They question the “legality” -- and go on to question the quality and probable outcomes and, so, the desirability -- of one or another medium proposed for the realization of popular sovereignty.<sup>3</sup> At bottom, however, their criticism goes still deeper. For the root

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<sup>2</sup> I will be reacting largely to the distillation of his position in Akhil Amar, “Popular Sovereignty and Constitutional Amendment” in Sanford Levinson, ed., *Responding to Imperfection* 89 (1995) and in Akhil Amar, “Foreword: The Document and the Doctrine,” 114 *Harvard Law Review* 26 (2000).

<sup>3</sup> See, e.g., Henry Paul Monaghan, “We the People[s], Original Understanding, and Constitutional Amendment,” 96 *Columbia Law Review* 121 (1996).

of their objection (again well established) is that no such thing as “We The People” exists or (fortunately, they might say) can exist. In their view, “the people of the United States” is an accidental agglomeration, largely ignorant, irrational and fickle, mostly passive and manipulable, a fiction, a non-entity incapable, by itself, of governing anything and, so, deserving nothing more than the hollow and cynical obeisance of its “leaders.”

We might ignore this root objection. Or we might grapple with it. Grappling with it is, I believe, the only option if we want, truly, to get down to the “first principle” of popular sovereignty: a belief in the existence, or at least the possible existence, of the (sovereign) people.

Let’s start with the preamble to the Constitution. Should we take the phrase, “We the People of the United States,” to refer to something that pre-existed the drafting and ratification of the Constitution? Or should we say that the drafting and ratification brought it into existence? How can we know whether (or to what extent) “We, the People” existed even in 1787?

Plainly, “the United States” did not exist before ratification. Logically, it follows that the same must be true of “the People of the United States.” But who, then, purported to declare its existence in the late 1780’s and then to “ordain and establish” the Constitution? Must not “the People” have existed beforehand (at least briefly) in order to do such a thing and claim some sort of entitlement to do it? As a question of logic or interpretation, this is a familiar exercise in wheel spinning. The question need not be seen, however, as one of logical implication or textual interpretation.

The Constitution, as Amar observes, was an act -- a political act, committed in particular circumstances at a particular time -- not just a text. It is not too much to say that its status as an act is more fundamental than as a text and that most “interpretations” of the text depend on conceptions of the act. It is reasonable to add, indeed, that most “interpretations” are themselves acts, political acts of a sort. On this understanding of the Constitution, the existence of the Preamble’s “We the People” becomes a practical, rather than a definitional, question.

This is not to suggest that texts are useless. In fact, they can be helpful. The claim of entitlement by “We the People” to “ordain and establish” the Constitution is based (as Amar says) in another canonical text -- the Declaration of Independence -- which proclaims the “right of the people to alter or abolish [government] and to institute new government.” This language in the Declaration is, in turn, rooted in the “social contract” or “natural rights” tradition exemplified by writing of Locke and Rousseau. If we look at these texts in reverse (which is to say, chronological) order, they offer a clue to a way of thinking about the practical question before us.

That is, they offer a way of getting behind “We the People” and getting at paradigmatic stages in the process of bringing the (sovereign) people into, or closer to, existence. To be sure, there is no neat division among the texts. They all do, at some point, imagine “the people” as a full-blown, even potentially coherent, ruling entity. (The passage I quoted from the Declaration does so, for example.) But the first two also use terminology that is not in the Constitution and that, in context, is suggestive: Locke and Rousseau refer to an initial stage of development necessary for the creation of “the people”

as sovereign. The Declaration -- in its preamble -- refers to an intermediate stage. Specifically, Locke refers to the formation, initially, of “a community,” Rousseau to “a people.” The Declaration begins by referring to “one people.” What might these (seemingly slight) shifts in terminology connote? What clue might there be in the development from “a people” (or “a community”) to “one people” to “the people”?

The terminology used by Locke and Rousseau<sup>4</sup> connotes, I believe, a connection among persons. They both write of the formation of individuals, emerging from a “natural” state of pure autonomy, into a collective whole, a “body.” What they have in mind is not just what we call “interdependence.” Nor is it (as some suppose) simply a matter of independent persons calculating their mutual interest, the best means of preserving (much of) their individual autonomy. The “body” metaphor implies more than that. What they are referring to, I believe, is a perceived connection and, more, a felt connection, indeed a connection that is collectively valued, even yearned for. To be sure, Rousseau -- with his talk of a “social bond ... in all hearts” -- is clearer about this than Locke. For both, however, the “body,” once formed, is to be ruled by a majority. That, in turn, implies its distinct, privileged status. It implies some persons acceding sometimes to others for no other reason than the (real or imagined or yearned for) connection among them. And it is politically inescapable: Individuals who are dissatisfied may leave the whole of which they’ve been part or, perhaps, they may disobey. But if they want to rule, if they want to form a government, they can do so only one way. They can do so only as a “body,” as members of some “community” or some “people,” a connection they must envision and feel and value very highly. This is the superficially simple, but practically complex, social sine qua non of popular sovereignty.

The reference to “one people” in the preamble to the Declaration of Independence connotes a second stage of development toward popular sovereignty. Building on connection, it is the stage of commitment by persons to one body politic and to one another as its constituents. The commitment has at least three facets. First, it draws sharp lines. It imagines a people as distinct and separate from others. Thus the Declaration speaks of “one people ... dissolv[ing] the political bands which have connected them with another” and assuming a “separate and equal station”. Second, it asserts a value, an aspiration. It proclaims the value of “oneness” in a sense going beyond mere connection to embrace some kind of unity -- a unity, at least, of broad purpose. And, third, it expresses a gathering together, a summoning of political will to achieve that purpose. Thus the Declaration ends with an explicit commitment, “pledg[ing] to each other our lives, our fortunes, and our sacred honor.” So phrased, the commitment seems rather heroic. But, even if more modest, some such commitment is the prerequisite of any significant collective political action -- hence, of any effective popular sovereignty.

The exclusive reference in the Constitution to “the people” connotes something beyond the necessary stages of connection and commitment. It is a more muscular term. It connotes some sort of aspiration to control. “We, the People” are not simply prepared to act. “We” do act -- and act effectively. “We” act to “ordain and establish.” “The People”

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<sup>4</sup> The texts I have in mind are John Locke, Second Treatise of Civil Government, chapter 8 and Jean-Jacques Rousseau, Of the Social Contract, Book 5, Chapters 5 and 6.

is an entity that rules. The phrase has had that connotation (at least aspirationally) ever since. To be sure, it is vague: by itself, it does not identify the medium through which “the people” are to rule. Nor does it tell how they are to do so in what circumstances. These, obviously, are complex issues. Still, the phrase does something important in our political culture: it unfolds, displays and asserts the complete imagination of popular sovereignty.

Here, then, is my first claim: “The people” cannot exercise sovereignty -- cannot control anything -- if it does not exist. It cannot exist unless there already exists “a people” and “one people” -- first, connection and, next, commitment. And those -- need I argue the point? -- are no easy matters. As social-political developments, we surely know, they are anything but simple or automatic or self-sustaining. The open issues of control just add another layer of difficulty. That was the case in 1787. And it has been so ever after.

## **II. Popular Sovereignty As Day-to-Day Politics**

So, back to the initial question: Did “We, the People” exist when the Constitution was drafted and adopted in Philadelphia? When it was ratified? Was “We, the People” then “sovereign”? Now, add further questions: Has “the people” been “sovereign” ever since? Or only at certain “constitutional” moments? On other occasions as well? Or not until a new Constitutional Convention is called and its handiwork ratified -- or a new mode of constitutional revision by means of direct popular participation “outside” Article V is invented and instituted? And, now, the master question: Can there possibly be a “yes” or “no” to this kind of inquiry? Any lawyer has got to be suspicious -- at least anyone who has been influenced, even a little, by legal realism.

(When I was a law student at the end of the 1960’s, a basic message of legal realism was still intact. It was captured in a story told to us. A formalist fuddy-duddy, so the story went, approached a young colleague with a legal question. The colleague responded: “There’s no clear answer. It’s a matter of degree. It depends on the context, which is complex and changing. There are varying points of view on the matter.” At that, the fuddy-duddy cut short the whipper-snapper and pronounced: “I always knew you had a second-rate mind!” The story was, of course, told to mock the formalist as the real second-rater. But my generation of students was not satisfied with that. Amid the civil rights and antiwar struggles, we demanded more moral/ political/legal clarity. Then and there was launched the left-leaning search for “right answers” that has colored legal discourse -- sometimes obscuring the legacy of realism -- for the last three decades.)

If (as I’ve claimed) popular sovereignty is a process involving complex phenomena of collective connection, commitment and control, its presence -- and possibility -- cannot ever be perfectly clear. It cannot help but be a context-bound matter of degree. Nor can there help but be conflict over its development -- indeed, over its interpretation. Nor, finally, can it help but be a fluid process, mutating significantly through time.

I don’t mean to suggest that law professors who feature popular sovereignty in their theories of constitutional law -- especially Akhil Amar and Bruce Ackerman -- are unaware of all this. But I do believe that their advocacy sometimes comes across as portraying popular sovereignty as a simpler, “on/off” matter than it could plausibly be. I

want, ever so briefly, to distinguish my view from the impression they sometimes convey - and, more importantly, from implications they draw which, to my mind, seem to turn popular sovereignty upside-down.

Amar tends to depict the development of popular sovereignty as a comforting story of progress. He has, indeed, described the Constitution as a “bedtime story.” To interpret it, is “to understand what the American People meant and did when We ratified and amended the document.” Over the centuries, he says, more and more Americans have been embraced into the People -- which, in turn, has regularly exercised its sovereign prerogative in a most benignant, high-toned, high-quality fashion marked by “thoughtful discussion,” “good deliberation.”<sup>5</sup> He thus imagines popular sovereignty as if it were periodically full-blown, and getting better and better in every way. When, eventually, it is employed to amend the Constitution “outside” Article V, the apparently unproblematic progress will (over the rainbow?) fulfill its promise of public happiness ever after. If only all bedtime stories were as charmingly cozy as this one!

Ackerman’s theory<sup>6</sup>, for present purposes, isn’t totally different. He depicts the process of popular sovereignty as a cycle. Unlike Amar, he insists that constitutional amendment “outside” Article V has already happened at least twice. His is a “dualist” theory, positing “moments” of “higher” or “constitutional” politics followed by longer stretches of “ordinary” politics. But then Amar, too, imagines that popular sovereignty has been exercised periodically. And Ackerman, like Amar, seems to portray his cycle as spiraling onward and upward. Both of them, finally, characterize the exercise of popular (“constitutional”) sovereignty as blessed with a sort of civic virtue, with popular participation wonderfully high in quality (“deliberation”) as well as in quantity. Both (I hope I m not out of line in saying this) wear the same smiley face.

Trying to give popular sovereignty a good name -- and promote its career -- they wind up, I’m afraid, giving it a bad one. The reason is that their account of it is over the top in its simplicity and rosiness. It thus plays into the conventional mockery of opponents. Worse, by depicting the actual exercise of popular sovereignty as full-blown and civically virtuous -- but only periodic and fairly rare -- they open the door to arguments promoting “creative” judicial “interpretation” and “elaboration” (that is to say, flabbergasting extension) of the supposed will of the people during the long “ordinary” periods in which the people are supposedly dormant. Indeed, with gusto, both of them tend to parade through that very door. They thereby pervert the ideal they purport to serve. They accept what they imagine to be the “ordinary” dormancy of the people. And, in its name, they substitute a license for -- even a celebration of -- the empowerment of a tiny, unrepresentative elite: judges and their academic doppelgangers.

Far better, in my view, to face, embrace and enter into the messiness -- the ordinary politics -- of engagement in the real-world enterprise of popular sovereignty. What does that mean? Consider: (1) We must realize that popular sovereignty has never existed, full-blown, in any place at any time. It is a matter of more or less. The question is: how much

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<sup>5</sup> Akhil Amar, “Foreword,” note 2 supra at 26, 47, 29, 36-39.

<sup>6</sup> See Bruce Ackerman, We the People: Foundations (1991); Bruce Ackerman, We The People: Transformations (1998).

is enough? To that there is no right answer. What then do we want? The answer is: More. (2) We must realize that popular rule depends, first, on broad social-political developments that we can affect, but cannot regulate as we please. To the extent that it depends on our voluntary action, it demands on-the-ground political energy, skill and good fortune in circumstances that offer opportunities but no guarantees. (3) We must realize that the degree to which popular sovereignty has been and can be achieved is fluid. Its career through time is unlikely to be a progress, onward and upward. Regression is as likely as forward movement. Indeed, in the last century, regression seems to have been dominant.<sup>7</sup> (4) We must realize that, especially when forward movement is possible, there will be powerful elite opposition. In a would-be republic or democracy, the most poignant and inevitable conflict is bound to be over any redistribution of political power. This is a conflict that will never, can never, end. (5) We must realize, then, that if this is a political war, it cannot help but be a ground war, a day-to-day struggle over every square foot of territory. It is contest of incremental politics, with no comfortable distinctions between “higher” issues and “ordinary” issues. (6) We must realize that popular -- that is, mass -- self-rule cannot be held to standards (much less “academic,” deliberative standards) of civic virtue. Such standards are the typical tools of elitists. (7) Finally, and most fundamentally, we must realize that we can play a useful part only if we truly accept and value ordinary people. And that requires accepting and valuing the ordinariness in ourselves. Without this (and it is not fun for judges, professors and other we-know-better members of the would-be “governing class”) our advocacy of popular sovereignty is at best empty -- phony, poisonous posturing at worst.<sup>8</sup>

Here, then, is the bottom line: Far better to understand references to “the people” in the Constitution in the way Learned Hand understood the Bill of Rights: as hortatory -- not as something ever or potentially achieved and established. This may not be inspiring to some. It may not be comfortable or suitable for children at bedtime. But it ought to be liberating. It ought to be bracing. And bracing, I think, is what we’re going to need if we hope to move even a little closer to our ideal.

### **III. Implications For Legal/ Political Argument**

From this perspective, I draw several implications for advocacy of measures meant to move toward an ideal of popular sovereignty. My suggestions apply with special urgency -- but by no means exclusively -- to advocacy of the boldest (most far out) reforms, such as the call for constitutional amendment by popular referendum. What follows is a list of don’ts and do’s:

- Our primary premise should be that popular sovereignty is a vital and long-standing aspiration, not a past or present reality. If we portray it as in effect now or in the past, we not only exaggerate. We also make a double pragmatic mistake: On one hand, in a posture of celebrating what “has been” or what “is,” we make it harder to advocate the need for something new, something that “ought to be.” On the other hand, we set

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<sup>7</sup> See Robert Wiebe, Self-Rule: A Cultural History of American Democracy (1995).

<sup>8</sup> See Richard Parker, “Here, the People Rule”: A Constitutional Populist Manifesto (1994); Richard Parker, “Taking Politics Personally,” 12 Cardozo Stud. L. & Literature 103 (2000).

ourselves up for attacks on flaws in past or present lawmaking “by the people,” backing ourselves needlessly into a difficult defensive stance. Such attacks cannot be entirely avoided, of course. (They will be mounted to question the practicality and desirability of proposals for anything new.) But we ought not play into them. Instead, we should insist (not merely concede) that previous measures flying the flag of popular sovereignty have, indeed, been flawed, falling too short of a deep American aspiration.

- We should argue like political reformers, not like case lawyers. That is, we ought to argue “the merits.” We ought not argue from authority -- even if it is the Constitution. Again, to do so is a double mistake: It immediately embroils us in debates (often against a consensus of historians) over what was really going on -- or what limitations were accepted -- in 1787 or on some other occasion. Worse, argument from external, transcendent authority is inherently in tension with a claim for popular sovereignty. If “the people” is to achieve something closer to sovereignty in the future, we should not start off by proclaiming, as a matter of principle, its systematic subordination to anyone, anytime.

- It follows that we should not invoke the supposed authority of “social contract” or “natural rights” principles, even via the Declaration of Independence. Such a line of argument flirts with three more mistakes: First, if invoked to suggest that some body of “natural rights” would impose a practical limit on the exercise of popular sovereignty, it makes a patently false promise. Second, if it is cited to argue that “natural rights” should, in principle, limit popular sovereignty, it is close to self-contradictory. Third, even if it is relied on only to support the “right” of the people to rule, it suggests a pre-political or supra-political (or fictional) source of law which is deeply at odds with popular sovereignty and our advocacy of it.

- Recognizing that popular sovereignty involves a complex, long-term social-political process -- along with a day-to-day practice of politics, attempting to approach an ideal without purporting to institute it once and for all -- we should embrace incrementalism and eschew grandiosity. To demand nothing less than one great leap forward may be dramatic, but it risks fooling ourselves and nobody else. Indeed, it may simply elicit disinterest from all who, sensibly enough, do not believe in sudden, complete transformations. Take, for instance, advocacy of constitutional amendment by national referendum. Why not work toward it by steps: first, defending and extending processes of constitutional amendment at the ballot box in the states; then, at the national level, promoting (to start with) an “advisory” referendum on some salient but simple issue; and pressing for actual lawmaking, and eventually constitutional amendment, after the ground has been prepared.

- Eschewing grandiosity and embracing on-the-ground politics, we ought to reject the distinction between “ordinary politics” and “constitutional politics.” We should shun, first, the idea that “the people” may “ordinarily” remain dormant, mobilizing to control government and make law only when “higher,” “constitutional” issues are at stake. So truncated, the aspiration to popular sovereignty is not only needlessly weak; it too easily serves as a cover for elite (judicial, but not only judicial) power. We must, secondly, disdain the implication that “ordinary” matters (ones ordinary people often most care about) are somehow inherently inferior to “constitutional” matters (ones professional elites love to discuss). Any such idea is a cancer on the ideal of popular sovereignty.

- It follows that we must have nothing to do with claims that the quality of participation by “the people” in the exercise of popular sovereignty would have to be (or would be) high. An emphasis on quality perverts and subverts advocacy of popular sovereignty. Whether by building elitist tendencies into such advocacy (with adjectives like “deliberative,” “thoughtful,” and so forth) or by setting up an easy target for elitists to shoot at, such a concession does the work of the opponents of popular sovereignty. At its heart, the ideal of popular sovereignty has to do with quantity (government by “the many” not “the few”) and we must not be the ones to try to cut out that heart.

- It should go without saying (but I’m afraid it cannot) that advocacy of popular sovereignty must not be corrupted by claims that popular lawmaking would (or would have to) produce certain “good” outcomes. Such claims typically display and massage elite, politically correct predilections, which are poison to such advocacy. What’s more, any such claim very obviously mocks the fundamental argument that “the people” are not only to be trusted with their own fate, but are entitled to rule themselves.

- Finally, we should not only avoid political correctness, but violate it. Specifically, if we believe that the existence of “the people” depends on the prior development of “a people” and “one people,” we should be wary of promoting fashionable separatist versions of what is called multiculturalism. We should, instead, promote assimilation. We should promote patriotism, too. True, this might put us at odds with dominant opinion in academia. But it will align us with the mass of ordinary Americans. As advocates of popular sovereignty, isn’t that exactly where we belong?

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