THE VERY IDEA OF POPULAR SOVEREIGNTY: "WE THE PEOPLE" RECONSIDERED*

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The sovereignty of the people, it is widely said, is the foundation of modern democracy. The truth of this claim depends on the plausibility of attributing sovereignty to "the people" in the first place, and I shall express skepticism about this possibility. I shall suggest as well that the notion of popular sovereignty is complex, and that appeals to the notion may be best understood as expressing several different ideas and ideals. This essay distinguishes many of these and suggests that greater clarity at least would be obtained by focusing directly on these notions and ideals and eschewing that of sovereignty. My claim, however, will not merely be that the notion is multifaceted and complex. I shall argue as well that the doctrine that the people are, or ought to be, sovereign is misleading in potentially dangerous ways, and is conducive to a misunderstanding of the nature of politics, governance, and social order. It would be well to do without the doctrine, but it may be equally important to understand its errors. Our understandings and justifications of democracy, certainly, should dispense with popular sovereignty.

I. Sovereignty

I shall start with an explication of the notion of sovereignty. The analysis I offer is complex and cannot be fully defended here.[1] While I would contend that this account captures the essential elements of modern notions of sovereignty, it may appear to beg the question against popular sovereignty. For it will be hard to see how the people *could* be sovereign on my analysis. Still, it will be useful to begin with an explication of the concepts relevant to this question.

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[1] See my book *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998), ch. 7.

Sovereignty is not a simple idea. As one should expect with a notion that has a long and controversial history, it is rather complicated. To understand the different elements of the notion of sovereignty, it is important to keep in mind certain aspects of the history of the emergence of the modern state in the sixteenth and seventeenth centuries. Medieval rule was, broadly speaking, feudal, imperial, and/or theocratic. The early modern competitors of the state were city-states and leagues of cities, as well as empires, the Church, and various remnants of feudalism. Two features of modern governance were relatively absent in all of these earlier forms of rule: exclusivity of rule (a "closed" system of governance) and territoriality. The (modern) state only emerges when its claim (or that of its head, the monarch) to govern alone, exclusively, is recognized. And a determinate realm, with relatively unambiguous geographical boundaries, is a prerequisite of the (modern) state and is largely missing in early forms of political organization. A "sovereign" is the unique ruler of a realm, whose sphere of authority encompasses the whole realm without overlapping that of any other ruler. It—initially the monarch, later the state, then "the people" (of a state)—rules without superiors. As the historian F. H. Hinsley claims, "at the beginning, the idea of sovereignty was the idea that there is a final and absolute political authority in the political community . . . *and no final and absolute authority exists elsewhere.*"[2] The last clause alone suggests that the notion is new. With the development of the concept of sovereignty, we have the main elements of what is called the state system: independent states and "international relations" (and "international law").

Let me present my analysis. The core notion of sovereignty I shall express thus: *To be sovereign is to be the ultimate source of political power within a realm.* This I take to be the core of the modern notion of sovereignty that is developed by Jean Bodin, Thomas Hobbes, Jean-Jacques Rousseau, and other modern political thinkers.[3] I shall explicate, in turn, the different elements of this general characterization.

Sovereignty pertains, first of all, to political power *within a realm.* The notion of sovereignty is characteristically modern. The realms in question are, for the most part, modern states, territorially defined. The jurisdiction of the rulers is a well-defined territory.[4]

[2] F. H. Hinsley, *Sovereignty*, 2d ed. (Cambridge: Cambridge University Press, 1986), 25-26.

[3] See Jean Bodin, *Les Six livres de la république* [1576], translated as *The Six Bookes of a Commonweale*, trans. R. Knolles, ed. K. D. McRae (Cambridge, MA: Harvard University Press, 1962); Thomas Hobbes, *Leviathan* [1651], ed. R. Tuck (Cambridge: Cambridge University Press, 1991); and Jean-Jacques Rousseau, *Du Contrat social* (*On the Social Contract*) [1762], in *Oeuvres complètes*, vol. 3, ed. B. Gagnebin and M. Raymond (Paris: Editions Gallimard, 1964). See my *Essay on the Modern State*, ch. 7, for an analysis of sovereignty and additional references.

[4] While Christendom, with its ambiguous and indeterminate boundaries, could be a suitable realm for a "sovereign" (i.e., an emperor or a monarch), in modern times the notion of sovereignty is typically connected to territories with well-defined borders. The modern notion does, of course, borrow from Roman law, but the boundaries of the Roman Empire were ambiguous. See my *Essay on the Modern State*, chs. 2, 7, and esp. 8.

A *political power* in these contexts is a political *authority*. Something is an authority, in the sense relevant here, only if its directives are (and are intended to be) action-guiding. The law, for instance, forbids us from doing certain things, and it intends these prohibitions to guide our behavior; specifically, these prohibitions are reason-providing. Authorities, then, guide behavior by providing reasons for action to their subjects. This is, for instance, Hobbes's view of the law: "Law in generall, is not Counsell, but Command ... addressed to one formerly obliged to obey him [who commands]," where command is "where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that sayeth it."[5] On this view, political authority is not to be understood simply as justified force. Something is a genuine authority only insofar as its directives are reasons for action.[6]

It is possible for something to have authority in this sense without possessing any (non-normative) power or without being able to impose sanctions for disobedience. However, it may be that *political* authority cannot be *justified* if it is not, to some extent, effective, and effectiveness for most political regimes may require some capacity for imposing sanctions. On this view, justified political authority requires political *power*, understood as a *de facto* or causal ability to influence or control events (e.g., by imposing sanctions).[7]

[5] Hobbes, *Leviathan*, ch. 26, 183, and ch. 25, 176. It is, of course, controversial whether Hobbes had the theoretical resources to defend this account of the normativity of law. Influenced by Joseph Raz's account of exclusionary reasons, H. L. A. Hart interprets Hobbes's account of a command to mean that

> the commander characteristically intends his hearer to take the commander's will instead of his own as a guide to action and so to take it in place of any deliberation or reasoning of his own: the expression of a commander's will that an act be done is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act.

See H. L. A. Hart, "Commands and Authoritative Legal Reasons," in *Essays on Bentham* (Oxford: Clarendon Press, 1982), 253.

[6] My analysis follows Joseph Raz; see Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), chs. 1-2; and Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), chs. 2-3. See also Raz, *Practical Reason and Norms* [1975], 2d ed. (Princeton: Princeton University Press, 1990); and Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988).

[7] This thesis is substantive, for it depends on the reasons for which political authorities are desirable (e.g., resolving assurance problems, providing collective goods, securing justice, redistributing wealth). See my *Essay on the Modern State*, ch. 7. Raz holds that effectiveness is a condition of something's being a legitimate political authority; see Raz, *The Authority of Law*, 8-9; and *The Morality of Freedom*, 75-76.

Note that when I speak here and elsewhere of *justified* authority or power, I do not mean "regarded as or thought to be justified." It is possible that some theorists believe that a power is justified if it is widely believed to be so (but this sort of view always raises the question of what it means to believe that something is justified). Rather, I speak of justification *simpliciter*, without distinguishing between moral, rational, and other kinds. A lengthier discussion can be found in my *Essay on the Modern State*, chs. 4-6.

Sovereignty is the ultimate source of *political* authority/power within a realm. What is the scope of 'political' here? Clearly, the law is included. Sovereignty is the source of (positive) law within a realm. Does it also include morality? By this, one might mean that sovereignty could be a source of moral authority in the sense that it could determine (i.e., constitute) what is morally right or wrong. One might read Hobbes and Rousseau in this way, but it would not be a very plausible view of morality, even for moral conventionalists.[8] So I shall not understand sovereignty to be a source of moral authority in this way.[9] A consequence of this interpretation is the possibility of being (politically or legally) obligated to do something that is morally wrong.

What is it for a source of authority to be *ultimate*? In this as well as other contexts, this word can have several meanings. An authority may be ultimate if it is the *highest* authority. In this sense, sovereignty requires a *hierarchy* of authorities, such that one (or more) can be at the summit, as it were. A distinguishing characteristic of modern governance is that it is *direct*, by contrast with the indirect rule characteristic of medieval Europe. Rule is *direct* if there are no intermediaries with independent authority. The highest authority in a chain of direct rule, then, has authority over all levels of the hierarchy. An ultimate authority in this sense is the highest element of a continuous chain of direct governance (a strict ordering). Directness in this sense is one of the distinguishing features of *modern* rule, characteristic of contemporary states.[10]

Secondly, an ultimate authority is also *final*. There is no further appeal after it has spoken; it has, as it were, "the last word." Finality in this sense does not mean that moral appeals are excluded.[11] It merely means that no further appeals are possible within the system.

Lastly, an ultimate authority may be one which is *supreme*. 'Supreme' is sometimes just a synonym for 'ultimate'; but the sense I wish to isolate is special: an authority which is supreme (in a realm) can regulate all other sources of authority (in that realm). If the state claims supremacy in this sense, then it claims authority over all other authorities (e.g., corporate,

[8] But see David Gauthier's recent work on "public reason": for instance, "Public Reason," *Social Philosophy and Policy* 12, no. 1 (Winter 1995): 19–42.

[9] There is another sense in which we might speak of the political here as including the moral. It may be that political (and legal) authority *override* or *preempt* morality. I discuss this below when I explain the meaning of 'ultimate'.

[10] See Charles Tilly, *Coercion, Capital, and European States* (Oxford: Basil Blackwell, 1990), 24–25, 103–6, 144–46; and my *Essay on the Modern State*, ch. 2. See also Quentin Skinner, "The State," in *Political Innovation and Conceptual Change*, ed. T. Ball, J. Farr, and R. L. Hanson (Cambridge: Cambridge University Press, 1989), 90–131.

[11] Consider the U.S. constitutional system, which incorporates moral rights into the law through the Ninth Amendment ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"). See my "Droits originaires et Etats limités: Quelques leçons de la république américaine," *Science(s) politique(s)* 4 (December 1993), 105–15.

syndicate, church, conscience).[12] The state's authority, then, is supposed to "preempt" all competing authorities. Hobbes and many classical theorists of the modern state so understand the state's authority: it overrides all competing sources of authority, even that of morality (and especially that of religious authorities and of conscience).

Summarizing, then, *sovereignty is the highest, final, and supreme political and legal authority (and power) within the territorially defined domain of a system of direct rule.*

The classical modern theorists—e.g., Hobbes and Rousseau—understood sovereignty also to be absolute, indivisible, and inalienable. Sovereignty is *absolute* if it is unconstrained or unlimited.[13] Sovereignty is *indivisible* if it is unique and cannot be divided. And it is *inalienable* if it cannot be delegated or "represented." This conception of sovereignty, which I attribute to Hobbes (and Rousseau), I shall refer to as "the classical view":[14] the sovereign is the ultimate source of absolute, indivisible, inalienable political authority within a realm.

The doctrine that states are sovereign in the classical sense proved to be enormously influential. William Blackstone's views are not unrepresentative. He thought that "there is and must be in all of [the several forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside." While recognizing that the sovereignty of Parliament is constrained by natural law, he held that

> [i]t hath sovereign and uncontrollable authority in making, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession of the crown. . . . It can alter the established religion of the land. . . . It can change and create afresh even the constitution of the

[12] This is Raz's account of supremacy in these contexts (*Practical Reason and Norms*, 150–52). Certainly, this is what Hobbes and many modern theorists also claim for the state's authority.

[13] "For Power Unlimited, is absolute Soveraignty" (Hobbes, *Leviathan*, ch. 22, 155). Rousseau appears to agree; see his *Social Contract*, Book IV, ch. 4, 374–75, and ch. 5, 376. See also Robert Derathé, *Jean-Jacques Rousseau et la science politique de son temps* [1950], 2d ed. (Paris: Vrin, 1988), ch. 5, esp. 332ff.

[14] Even though Bodin's account antedates it. For Rousseau, sovereignty is also indivisible and inalienable (*Social Contract*, Book II, ch. 2, 369–70; Book II, ch. 1, 368). Additionally, the sovereign cannot bind itself to itself or to others (Book I, ch. 7, 362–63).

> kingdom and of parliaments themselves. . . . It can, in short, do every thing that is not naturally impossible. . . .[15]

Classical sovereignty is no longer as popular as it once was. It is now widely thought that sovereignty can (and should) be limited. It is often thought as well that one of the most effective institutional means of limiting the authority and power of states is to divide sovereignty among a plurality of agents or institutions; there need be no single authority. *Contra* Hobbes and others, republican and democratic theory has stressed the value and importance of divisions of power within states. Thus, indivisibility is no longer assumed to be essential to sovereignty. Our notion tends to be one of limited sovereignty.[16]

II. The Sovereignty of the People

In early modern times, European monarchs fought the limits imposed on them by imperial and papal authorities and sought as well to overcome the independent powers of feudal lords, self-governing towns, and autonomous guilds. The struggles that ensued, as well as the ferocity of religious conflicts, suggested to many the need for unitary absolute power, and the modern notion of sovereignty was born.[17]

Sovereignty was initially attributed to, or claimed by, monarchs.[18] In Britain it became customary to attribute sovereignty to the trinity of "the King in Parliament" (i.e., the monarch and the two houses of Parliament). On the Continent, sovereignty was usually understood to be a defining attribute of *states* (as opposed to governments). Rousseau and some of

[15] William Blackstone, *The Sovereignty of the Law, Selections from Blackstone's Commentaries on the Laws of England*, ed. Gareth Jones (Toronto: University of Toronto Press, 1973), 36, 71. On the influence of Blackstone's views, Gordon Wood writes:

> By the early 1770's, particularly with the introduction of Blackstone's *Commentaries* into the colonies, the doctrine that there must be in every form of government "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or rights of sovereignty, reside" had gained such overwhelming currency that its "truth," many Americans were compelled to admit, could no longer "be contested."

Gordon Wood, *The Creation of the American Republic, 1776-1787* (New York: Norton, 1969), 350; see also 345, 362, 382-83.

[16] While theorists of what I have called the classical view of sovereignty tend to be indifferent or hostile to division of power, and checks and balances, these institutional devices may serve to limit sovereignty. Hence, partisans of limited sovereignty may also support divided powers. While the issues are more complex than I have implied, it should be kept in mind that sovereignty pertains first of all to the nature of political authority, and that questions about division of powers concern the design of institutions.

[17] Hinsley claims that "[s]overeignty has been the 'constitutional' justification of absolute political power. Historically, it has been formulated only when the locus of supreme power was in dispute. . . . It is the justification of absolute authority that can arise and exist only when a final power is considered necessary in a body politic . . ." (*Sovereignty*, 277).

[18] Unless we understand the Deity's authority and power as a type of sovereignty.

the founders of the American system attributed sovereignty to the people, and the French *Déclaration des droits de l'homme et du citoyen* of 1789 claims sovereignty for the "nation."

Many, if not most, modern theorists shared Blackstone's view that "there is and must be in all of [the several forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside." These theorists understood states to be forms of political organization with considerable authority over all internal persons and entities ("internal sovereignty") and independence from all external powers ("external sovereignty"). This authority was to be exerted over the residents of well-defined territories, the boundaries of which must be recognized and respected by all alike. This dual concern with internal and external authority reflected the historical context of classical conceptions of sovereignty.

States are still thought by many to possess sovereignty, especially in their ("external") relations to other states. But it is also widely thought today that *peoples* are the rightful bearers of sovereignty. The doctrine of *popular sovereignty* is especially influential in the American and French political traditions, and it may be a central feature of the dominant conceptions of political power of these political cultures.

Who are the holders of sovereignty, then, according to this influential doctrine? We need immediately to distinguish '*the* people' from '*a* people'. The two notions need to be sharply distinguished. 'The People'—hereafter with a capital—in its modern sense, is a term that originally designated the members of the nonaristocratic (and nonclerical) classes of society. The radical idea of the French Revolution was that these classes (or their representatives) had the right to rule, *contra* the claim of all of the European aristocracies. Gradually 'the People' comes to be more inclusive, covering at least all members of the polity and sometimes all those subject to its governance (including, e.g., nonmember residents). The old connotations of the term remain—"he is a man of the people"—but, generally, it is now to be understood in these contexts to include almost every inhabitant of a state. This notion of "the People" echoes classical Roman ideas, as does its associated notion of citizenship.[19]

'A people', by contrast, designates a collective entity whose unity is social and not primarily political. The notion of a people, then, is similar to that of a nation or national group; it is of a group of humans united by ties of history, culture, or "blood." Many think that groups of this sort are entitled "to assume among the powers of the earth the separate & equal

[19] Even in its extensive sense, 'the People' is ambiguous with regard to the inclusion of many subjects who are not full members—e.g., foreign legal residents, tourists, immigrants, and, in Western Europe, citizens of other countries of the European Union. I shall return later to this point.

station to which the laws of nature . . . entitle them."[20] But few theorists today attribute sovereignty to peoples in this sense.[21] Nationalists, contemporary and classical, are properly better interpreted as seeking statehood or another political status for peoples.[22] Popular sovereignty is the attribution of sovereignty to the People (which need not be *a* people).

The claims of states (and monarchs) to sovereignty—classical or limited—may be found wanting, or so I argue elsewhere.[23] We might query whether transferring sovereignty to the People may be more plausible. Given my characterization, however, it is most unlikely that the People could be sovereign. It is hard to imagine how the People's rule could be direct in the manner characteristic of modern states, much less how its authority could constitute a hierarchy of authorities. In all democracies, insofar as the People may be said to rule, they do so through intermediaries. Additionally, it is difficult to see how the People could be a source of law, except occasionally through referenda and the like. Law in modern states is determined by legislatures and courts, and only occasionally through direct popular consultation.[24] The sense in which the sovereign People is a source of legal authority would be a rather weak one. Certainly, it would not be what we ordinarily mean when talking about sources of the law.

The classical and contemporary problems about aggregation of the "general will" also create difficulties for this interpretation of popular sovereignty. The People cannot speak until they are given the means to express themselves. There are numerous such means (e.g., voting procedures, polling methods, systems of representation), and it is hard to see how the choice among them could be made by the People in the requisite manner. Additionally, it may often turn out that the People talk in circles, so to speak, or have nothing to say.[25]

[20] The opening paragraph of Jefferson's Declaration of Independence attributes certain entitlements to peoples, in this sense. (Proto-nationalist ideas are present, but not usually noticed, throughout Jefferson's document: "a distant people," "our British brethren," "the voice of justice and consanguinity," "to send over not only souldiers of our common blood, but Scotch & foreign mercenaries . . . these unfeeling brethren.") I quote from the version of the Declaration of Independence printed in *The Portable Thomas Jefferson*, ed. M. Peterson (Harmondsworth, Middlesex: Penguin, 1975), 236–41.

[21] The attribution of sovereignty to the "nation" in the French *Déclaration* of 1789 is probably best understood as designating the People as the source of political authority.

[22] For instance, were the province of Québec to secede from Canada, all current residents of Québec, not merely French nationals, would presumably share sovereignty (of some sort).

[23] See my *Essay on the Modern State*, ch. 7.

[24] This claim about the "sources" of law should be taken loosely, since I do not want to rule out theories, for instance, that understand the law to be the best interpretation of the practices of a country or legal culture.

[25] That is, we should acknowledge the possibility of preference cycles or empty choice sets. I make allusion in passing to social choice theory. These sorts of problems seem to me devastating for most doctrines of popular sovereignty, though I shall not belabor the point. See, for instance, Russell Hardin, "Public Choice versus Democracy" [1990], in *The Idea of Democracy*, ed. David Copp, Jean Hampton, and John Roemer (Cambridge: Cambridge University Press, 1993), 157–72.

There are additional problems in attributing sovereignty to the People. The matter of determining what is a People only starts with the distinction between "*a* people" and "*the* People." The individuation of Peoples (with the definite article) is considerably more problematic than may have been noticed. What is surprising perhaps is the casualness with which political thinkers have assumed that Peoples are readily identifiable. Certainly, prior to modern states, it is hard to identify Peoples in our general or inclusive sense.[26] With the advent of the state, the People becomes identified with the bulk of the subjects or residents (of the state). This may be inadequate for many of the concerns that now trouble us.[27] Still, it is an initial answer. Defenders of popular sovereignty, however, cannot say that *states* determine who constitutes a People. For it is "We the People" who are supposed to be constituting the state in the first place! If states are prior, then their constitution by the People becomes impossible.[28] A constitution can, coherently, create a new body and then empower it. But the People cannot be understood to possess sovereignty in the ways claimed by their supporters if the People's powers are granted it by a constitution and not merely "retained."[29]

We could try to individuate Peoples by identifying them with *peoples* (with the indefinite article). Thomas Jefferson is famous for his assertion (in the Declaration of Independence) of "the right of the people to alter or abolish [government destructive of the ends of life, liberty, and the pursuit of happiness], and to institute new government." This right is evidently a right of the People (in our sense). Jefferson also seems to believe that peoples (with the indefinite article) have claims. His famous opening paragraph asserts that the laws of nature entitle "one people . . . to assume among the powers of the earth [a] separate and equal station." Many later passages, some excised by the Continental Congress, clearly make reference to peoples in the sense of a socially determined set of individuals. Both notions of "people" are evidently present in Jefferson's

[26] The exceptions are those forms of political organization—for instance, Rome—that explicitly identified the People. But ancient Peoples never included the total population of a realm.

[27] For instance, the rights of illegal immigrants (and of their children), and the rights of noncitizen (legal) residents to vote in local elections.

[28] In a number of places, Akhil Amar says things that imply that the American People are or were constituted by the state or the Constitution. See Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96, no. 7 (June 1987): 1463 n. 163, where Amar writes that "the most important thing that the Constitution constitutes is neither the national government, nor even the supreme law, but one sovereign national People, who may alter their government or supreme law at will"; and Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V," *Columbia Law Review* 94 (March 1994): 489, where Amar writes that "the Constitution formed previously separate state peoples into one continental people—American!—by substituting a true (and self-described) Constitution for a true (and self-described) league. . . ."

[29] Many of the arguments about the People's "retention" of various powers require their existence prior to and independently of the state. Some make use of classical claims about inalienability, which would be unintelligible without this priority and independence.

Declaration, whether or not he himself was aware of this. Whatever is to be decided about the interpretation of Jefferson's thought, one could try to individuate Peoples by identifying them with peoples; the People, thus, is constituted by a people. There are a few plausible cases for the claims of peoples or national groups to independence. But they tend to impose a number of conditions and constraints on the rights of peoples (or "encompassing groups"), and these make it impossible to generalize the identification of peoples and Peoples.[30] In the American context, we might just note that the identification of the People with the "one people" referred to in Jefferson's Declaration would exclude Africans, native peoples, and some European immigrants from citizenship.[31]

We could simply identify the People with "the governed," but this is also problematic. The governed consist of subjects and citizens, the latter being a proper subset of the former. The notion of "a subject" here is not, of course, the classical one of someone who is *subjugated* to another; a subject in this formal sense is merely someone *subject to* the laws of a state or polity. Foreigners, whether residing or just passing through, are subjects but not citizens. Normally, one might identify the People with the set of full members, that is, citizens. But this is not always plausible. Certainly, it would not have been prior to "universal suffrage." In the case of states or empires which have colonies or which govern "subjected peoples," many subjects would not have the status of membership. In some other states, there may be many more nonmember residents than citizens. Independently of what we think of the justice of the case, identifying the People with the set of citizens yields rather nonpopulist implications in the instance of Kuwait, Monaco, Israel (including the West Bank and Gaza), Germany, or classical democratic Athens. Additionally, especially in an increasingly interdependent world, there are third parties, neither citizens nor subjects, whose lives are affected in important ways by the decisions of states. Simply excluding them by fiat, by identifying the People with citizens or subjects, is question-begging.

Political theorists often appear to assume that individuating Peoples or even societies is not problematic. John Rawls, for instance, assumes that societies are easily individuated.[32] But what exactly is the justification for attributing unity to sets or networks of people interacting in a particular

[30] See Avishai Margalit and Joseph Raz, "National Self-Determination," *Journal of Philosophy* 87, no. 9 (September 1990): 439-61.

[31] Recall Jefferson's cry against "these unfeeling brethren," deaf to "the voice of justice and consanguinity," who sent over "not only souldiers of our common blood, but Scotch & foreign mercenaries." Scotch and German, presumably, were alien and could not easily join the "one people" Jefferson is thinking of.

[32] Recently Rawls has characterized the basic structure of a society as "a society's main political, social, and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next." Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 11. In *A Theory of Justice*, Rawls restricts his attentions to a society "conceived for the time being as a closed system isolated from other societies," and he assumes that "the boundaries of these schemes are given by the notion of a self-contained

geographical space? In most cases, where the geographical setting is not saliently one and distinct—where it is not, for example, an island—or where the individuals do not evidently constitute a single people or nation, the attribution of unity to "the society" seems question-begging.[33] We need to be careful here lest we transfer to societies (or to particular sets of individuals) some of the features that are characteristic of modern states. It is interesting to notice that when we talk of "a society" there is implicit individuation in the designation. The U.S. or Italy, for instance, are supposed to be societies in this sense, but Europe or North America are not. But what makes a society *one*, a unified social entity? The unity that we tend to attribute to societies or to Peoples may be genuine; but when it is, it may be *political* and a consequence and artifact of the political form of organization, namely, its state. The examples of Italy and the U.S., just cited, are cases in point.[34]

I have argued that it is hard to see how the People could be sovereign, at least on my account of sovereignty. Additionally, it is difficult to see how Peoples are to be individuated independently of states. If their identification is not prior to and independent of the existence of their states, then the People's sovereignty cannot be constitutive of states. The sense in which the People, or the subjects of a realm, may be sovereign must be some other than the notion I have analyzed. Determining the sovereignty of the People seems to be considerably more complex than determining the sovereignty of states. What I shall suggest is that many different theses are expressed, usually misleadingly, by appeals to popular sovereignty. Disentangling and evaluating these, however, is a rather complicated affair.

III. "We the People" Reconsidered

Appeals to the People's sovereignty, I shall suggest, may express half a dozen or more claims. All may be expressed or articulated in other ways, without making use of the notion of sovereignty. Only some of these claims are plausible. However, my primary efforts will be analytical—namely, to distinguish and clarify these different claims. I shall suggest

national community." See Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 8, 457.

[33] Even with islands, attributing unity may not be warranted (e.g., Ireland or England).

[34] Michael Mann's comparative and historical sociology is based on the assumption that *societies* are not unitary. He urges us to think of them instead "as confederal, overlapping, intersecting networks"; they are "constituted of multiple overlapping and intersecting sociospatial networks of power." Mann, *The Sources of Social Power*, vol. 1 (Cambridge: Cambridge University Press, 1986), 16, 1 (italics omitted). David Copp offers an account of society which allows societies to overlap considerably and to be nested within one another; see his *Morality, Normativity, and Society* (New York: Oxford University Press, 1995), ch. 7. While his account makes societies less unitary than most, it still seems to apply most problematically to medieval Europe.

that popular sovereignty may express a number of different ideas or ideals, some more closely related than others.

The first idea expressed by popular sovereignty is simple and, today, commonplace. It is the idea that the ends of a polity should be determined by the interests or desires of its members.[35] It is assumed as well that membership should be accorded to the great majority of permanent inhabitants of the realm. Calls for popular sovereignty in France in the late eighteenth century may be understood as demands that full membership (i.e., citizenship) be accorded all (male) inhabitants and that the interests of all citizens be considered in determining the ends of the polity.

The legitimate scope allowed citizens in determining the ends of the polity may not be as great as many have thought; I consider this question below. The question here is the narrow one of whether policy is to be determined by considering the interests of the ruling class or the interests of all. Classical "sovereigns" (i.e., monarchs) and governing elites considered the realm *theirs*—the king's "estate"[36]—and thus would not have thought of including the interests of all, except instrumentally, in the ends of the polity. This (and full membership) is precisely the demand of the spokesmen of the People toward the end of the eighteenth century.

The proposal to include the interests of all of the members of the polity has not been contested for a long time. Even tyrannical regimes that rarely or never consult the People attempt to justify their rule by populist claims. The view that the interests of all should determine the ends of the state is commonplace today. We forget that it was once a radical and controversial proposal.

This idea, that state policy be governed by the interests of all, is tied to various ideas about popular involvement in government, the scope of the People's authority, and the conditions for the determination or aggregation of the public interest to which I briefly alluded. These we shall consider later. The second idea that I wish to discuss is the model of political *authorization* that is implicit in popular sovereignty. It is a "bottom-up" conception of authorization. Government has authority (i.e., is permitted or has the right) to act only insofar as it is so authorized, and this authorization must come from the People governed. In earlier times, authority or the right to rule came from above, as it were; rulers in Christendom often were thought to derive their (just) powers from God. The station and duties of the governed were similarly determined. This model of authorization is "top-down." Note that both conceptions are hierarchical; they differ simply in reversing the direction of authorization:

[35] I shall not, for the most part, distinguish between 'interests', 'desires', 'preferences', and their cognates. But I should warn that a more complete treatment of these issues requires such distinctions.

[36] "L'État c'est *à* moi" ("The state is mine"), as Louis XIV might have said. See Herbert H. Rowen, "'L'État c'est à Moi': Louis XIV and the State," *French Historical Studies* 2, no. 1 (Spring 1961): 83–98.

Top-Down	**Bottom-Up**
Ruler(s)	Ruler(s)
⇓	⇑
People	People

The "bottom-up" model of authorization emerges at the same time as skepticism about the idea that some are "born to rule," entitled to rule by nature. This claim, often associated with the aristocratic classes, ceases to be plausible. The assertions of human equality in the writings of, say, Hobbes, Locke, and Jefferson must be understood (primarily) as denials of these classical claims of aristocracies to rule by virtue of their birth.[37] The thesis of human equality, so understood, is a negative claim, and it effectively sets a condition for acceptable accounts of political authority: rulers must obtain their right to rule from the governed. As sympathetic as Hobbes was to the cause of monarchs and absolute sovereigns, he is one with most modern theorists on this point; for him the governed must authorize their ruler.[38]

With the realization that no one is entitled by birth to rule, it is very natural to come to think of rulers as *agents* of the ruled. Much of modern political theory is an attempt to explicate the appropriate agency relations, as well as to address the age-old problems of "agent and principal." The bottom-up model may suggest an agency conception of political authority.[39] Locke understands the relation to be one of *trust*, establishing a fiduciary relationship.[40] We take such ideas for granted today, as few contest them. Our complacency here should not lead us to forget that they are part of what early proponents of popular sovereignty struggled to express.

The thesis that the interests or wishes of all should determine the ends of the polity (constrained by justice), and the bottom-up model of autho-

[37] Locke is especially clear that this is his point. See his *Second Treatise of Government* [1690], in his *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), sections 4, 54.

[38] It was the limits of the sovereign's power, apparently inherent, as required by this bottom-up model of authorization, which led Bishop Bramhall to understand *Leviathan* as "a Rebell's Catechism." See Jean Hampton's interesting discussion in *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986), 197-207.

[39] See Hampton, *Hobbes and the Social Contract Tradition*, chs. 8-9; and Hampton, *Political Philosophy* (Boulder, CO: Westview Press, 1996), chs. 2-3. "The service conception" of political authorities is what Raz calls the view that "their role and primary normal function is to serve the governed"; see Raz, *The Morality of Freedom*, 55-67.

[40] Locke, *Second Treatise of Government*, sections 149, 156, 221, 240. A trust sets an *end* to be pursued, e.g., the preservation of members (their life, liberty, and property) (section 171), establishes a *responsibility* of the trustee, giving the latter certain discretion (sections 159-68). Unlike a contract, however, the trustee need not benefit, the trust is revokable without injury to the trustee, and the settlor (the creator of the trust) may be the sole judge (section 240). See A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton: Princeton University Press, 1993), 68-72.

rization, are ideas worth retaining. I do not wish to challenge them, even if the precision with which I have expressed them leaves much to be desired and more to be said. These two elements of popular sovereignty seem worth retaining. The same may not be true of the remaining ideas or theses expressed by appeals to popular sovereignty.

Jefferson famously asserts that to secure our rights "governments are instituted among men, deriving their just powers from the consent of the governed." Part of what he undoubtedly expressed thereby was the idea of bottom-up authorization that I have just discussed. He is often interpreted as putting forward another thesis as well, one commonly associated with Locke: the thesis of *political consensualism*, which holds that the consent of the governed is necessary for legitimate rule. This is the third thesis that I associate with the assertion of popular sovereignty.

If, in the past, we may have been rather casual with the notion of consent and of related ideas of agreement, it is harder to do so today. The contemporary literature makes evident a number of distinctions that are required for clarity on these issues. Genuine consent is an engagement of the will. It must involve a deliberate and effective communication of an intention to bring about a change in one's normative status (one's rights or obligations).[41] There are varieties of consent, the most important in this context being *express* (direct and explicit) and *tacit* or *implied* (indirect).[42] Political consensualism would thus express the thesis that express or tacit consent is required for legitimate authority. The "will" of the People is a condition of legitimate rule.

Political consensualism today has many rivals. It is not a commonplace, at least once we make the distinctions mentioned and understand it correctly. While virtually no one today claims that someone's rule is legitimated by his or her birth, many claim that the *nature* and *quality* of rule may legitimate it: good government may be self-legitimating. Some utilitarian and, more generally, consequentialist theories may hold that political authorities are legitimated by the beneficial consequences of their

[41] My formulation is a paraphrase of Simmons's characterization; see his *On the Edge of Anarchy*, 69–70. See also Raz, *The Morality of Freedom*, 80–94. These distinctions are not clear in Hobbes's work, since his account of the will is eliminativist, reducing intention to the desires that immediately precede action (see *Leviathan*, ch. 6).

[42] Hypothetical consent is not, however, a type of consent. This point must be stressed, as it is not always recognized. See Raz, *Morality of Freedom*, 81n. ("Theories of hypothetical consent discuss not consent but cognitive agreement"); Christopher Morris, "The Relation of Self-Interest and Justice in Contractarian Ethics," *Social Philosophy and Policy* 5, no. 2 (Spring 1988): 121–22; Morris, "A Contractarian Account of Moral Justification," in *Moral Knowledge? New Readings in Moral Epistemology*, ed. W. Sinnott-Armstrong and M. Timmons (New York: Oxford University Press, 1996), 219–20; Gerald F. Gaus, *Value and Justification* (New York: Cambridge University Press, 1990), 19, 328; and Simmons, *On the Edge of Anarchy*, 78–79, where Simmons writes that hypothetical contract theory bases "our duties or obligations not on anyone's actual choices, but on whether our governments (states, laws) are sufficiently just, good, useful, or responsive to secure the hypothetical support of ideal choosers. . . . [T]he 'contract' in hypothetical contractarianism is simply a device that permits us to analyze in a certain way quality of government. . . ."

rule. Similarly, other accounts may determine legitimate authority by the level and distribution of benefits. Certain contractarian or conventionalist theories may accord legitimacy to political arrangements that are mutually beneficial in certain ways. For none of these accounts is consent necessary, and on some it may not be sufficient either. Consensualism, in this sense, is merely one of many ways of developing the bottom-up conception of authorization.[43]

This is not the occasion to evaluate political consensualism, since the issues, especially in moral theory, are very complex.[44] I do not, in fact, endorse it, so I should not want to counsel acceptance of this thesis of popular sovereignty. At the least, it would assist clarity not to express consensualist theses by using the notion of popular sovereignty. I am not sure that classical partisans of the People were very clear about these issues. I note in this respect an emerging consensus in the literature that political consensualism can only with great difficulty, if at all, escape "philosophical anarchism," the thesis that no political authority in fact is justified.[45] Certainly this was not intended by early proponents of popular sovereignty.

Proponents of "participatory democracy," who think that democracy requires active citizen participation in governance, as well as many republicans, who worry about the corrupting influence of commerce, might deny the *sufficiency* of consent for legitimacy. And some such theorists have understood claims of popular sovereignty (e.g., by Rousseau) to imply an activist or participatory conception of governance.[46] The second element of "government of the people, by the people, and for the people" may be understood to require something more than mere consent. Democracy, it may be argued, is *self-rule*, and only the active involvement of citizens can ensure this. The fourth claim to be associated with popular sovereignty might then be these familiar calls for activist or participatory governance.

[43] The works cited by Leslie Green (in note 6) and John Simmons (in notes 40 and 45) are representative of contemporary consensualism; see also Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). Utilitarian or more generally consequentialist positions are commonplace. The best examples of mutual-advantage contractarian and conventionalist accounts, respectively, are probably the classical theories of Hobbes and Hume. Some very useful distinctions are drawn by David Schmidtz in his essay "Justifying the State," *Ethics* 101, no. 1 (October 1990): 89–102.

[44] For instance, do our basic or fundamental (moral) rights protect *choices* or *interests*?

[45] Philosophical anarchism, it should be noted, seems to be the dominant position in the contemporary literature. For those not familiar with recent discussions, I might note that the position is compatible with the view that most people, most of the time, have reason to obey just laws (but not necessarily the sorts of reasons the law claims). See, for instance, A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), ch. 8; and Green, *The Authority of the State*, chs. 8–9. I think as well that some states can be legitimate even if their claimed authority is not justified and their subjects' obligations are considerably less extensive than they assert (see my *Essay on the Modern State*, chs. 7 and 10).

[46] If sovereignty is inalienable, then popular sovereignty may require, as Rousseau argued, participation in governance.

Recall my substantive claim earlier that while it is possible for something to have authority without possessing any (non-normative) power or without being able to impose sanctions for disobedience, it may be that *political* authority cannot be *justified* if it is not, to some extent, effective. Effectiveness, for most political regimes, may require some capacity for imposing sanctions. On this view, justified political authority requires political *power*, understood as a *de facto* ability to influence or to control events (e.g., by imposing sanctions). I mentioned earlier that this thesis is substantive, for it depends on the reasons for which political authorities are desirable. Now if we retain this substantive thesis and want to make the People the ultimate source of political authority, then some sort of activist or participatory conception of popular rule may be required. For authority will be popular only if power is to a considerable degree popular. But I am skeptical that the requisite institutional forms for the required efficacy of *popular* rule can be established, at least in large, anonymous societies such as the U.S. It may not be possible even to establish the institutions necessary for effective *state* rule.[47]

Now one should not understand the rejection of activist or participatory popular rule to imply a denial of a right to rebel against tyranny or to overthrow illegitimate government. In fact, the medieval doctrines of popular resistance against tyrants, to which modern partisans of popular sovereignty appealed, defended something like a right to rebel.[48] The modern doctrine may be associated with medieval opposition to the Pauline prescription of non-resistance to tyrants. Now we can perfectly well accept the (moral) right of rebellion while denying that a more active participation in government is required. In medieval and early modern times, some argued that subjects *always* had an obligation not to rebel against their rulers.[49] Some today interpret popular sovereignty as nothing more than the denial of the thesis that it is never right to rebel.[50] But if all that is expressed by popular sovereignty is the right to overthrow tyrants, then not much is claimed. It is unclear why we need to make use of an important and complex classical notion in order to express this; it would be better simply to say what we mean.

[47] This is a complicated, and possibly controversial, matter. See my *Essay on the Modern State*, ch. 7.

[48] See Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge: Cambridge University Press, 1978).

[49] I formulate the thesis in terms of an obligation not to rebel, rather than a right to rebel, for several reasons. First, the right to rebel cannot, without great difficulty, be a legal right. (What is rebellion? If it is the overthrow of the constitutional order, *that* order cannot authorize it. Cf. Kant's problems with a right to revolution in "On the Common Saying: 'This May Be True in Theory, but It Does Not Apply in Practice'" [1793], and in *The Metaphysical Elements of the Theory of Right* [1797], both in Immanuel Kant, *Political Writings*, 2d ed., ed. H. Reiss [Cambridge: Cambridge University Press, 1991], esp. 81-83, 143-47.) Secondly, someone like Hobbes could not make sense of a claim-right to rebel, though he could make room for the dissolution of the obligation not to rebel.

[50] See Charles Beitz, "Sovereignty and Morality in International Affairs," in *Political Theory Today*, ed. David Held (Stanford: Stanford University Press, 1991), 236n.

These participatory and activist claims are familiar to anyone acquainted with contemporary political theory. They merit serious study and reflection. I should like to suggest only that one need not be committed to them by acceptance of the first two elements of popular sovereignty—the inclusive understanding of the public interest and the bottom-up view of authorization. An activist or participatory understanding of popular rule may have much to be said for it, but it cannot plausibly be claimed to be entailed by the first two theses associated with popular sovereignty. Additionally, one might want to argue that republican and participatory ideals of self-rule, however admirable, may not be particularly well-suited for contemporary societies and temperaments. It is not clear why political activism must be an aim of all or even most adults in our large impersonal societies; in normal times, many politically inactive ends may be more fulfilling for most individuals. For now let me merely assert that this activist or participatory thesis is not necessarily part of popular sovereignty. As I said, however, there is much more to be said about the (more important) question of the merits of this view.

The claim to popular sovereignty may merely assert the People's right to intervene occasionally in governance (e.g., through popular referenda). Aside from extraordinary powers of *constituting* a state and its government,[51] the People may retain extraordinary powers, as Locke believed, to alter the state and its constitution. The latter is the thesis recently defended regarding the American system by the legal scholar Akhil Amar. He argues that the fifth article of the U.S. Constitution (governing the amendment process) should be read as permitting popular revision:

> My proposition is that We the People of the United States—more specifically, a majority of voters—retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V. Specifically, I believe that Congress would be obliged to call a convention to propose revisions if a majority of American voters so petition; and that an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate.[52]

I take no stand on the question of the interpretation of the U.S. Constitution and the matter of its amendment. I agree with Amar and others that one cannot understand the origins of the American constitutional order without reference to late-eighteenth-century debates about sover-

[51] As Jefferson famously asserted in the Declaration: "[W]henever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it. . . ." See also Locke, *Second Treatise of Government*, sections 149, 212–16, 220, 221, and 240.

[52] Amar, "The Consent of the Governed," 459. See also Amar, "Of Sovereignty and Federalism."

eignty.[53] But I have three worries about this sort of view. The first is that many of the arguments for popular sovereignty in the early American context were poor. Invariably they depended on assuming that "there is and must be in all of [the several forms of government]" a sovereign, that relations of authority had to form a continuous hierarchy (or strict ordering), or that sovereignty had to be indivisible.[54] But all of these assumptions are mistaken. It is not the case that a sovereign (of the sort envisaged) is in fact necessary—American political society is a case in point—and sovereignty can be divided.[55]

My second worry is that this sort of understanding of popular sovereignty makes it into a kind of *occasionalism*: the People intervene only occasionally in governance. At the very least, it is odd to express this sort of view in terms of a notion like that of sovereignty. Consider the following theological analogy: when eighteenth-century natural philosophers suggested that the Deity intervened in the natural order only to set the whole mechanism going, most believers considered this a diminution of his powers (and considered the suggestion heretical). Sovereignty is diminished considerably, I should have thought, if the body that holds it can exercise it only occasionally.[56] And this is related to my third worry:

[53] I rely on Wood's account here:

> Confrontation with the Blackstonian concept of legal sovereignty had forced American theorists to relocate it in the people-at-large, a transference that was comprehensible only because of the peculiar experience of American politics. . . . Only a proper understanding of this vital principle of the sovereignty of the people could make federalism intelligible. . . .

See Wood, *The Creation of the American Republic*, 599–600 (see also 545–47, and earlier references). A more thorough treatment of these questions would have to address Bruce Ackerman's account of the American tradition; see his *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), and his *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998).

[54] Consider James Wilson's argument at the Pennsylvania ratifying convention:

> There necessarily exists, in every government, a power from which there is no appeal, and which, for that reason, may be termed supreme, absolute, and uncontrollable. . . . The truth is, that, in our governments, the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. . . .

Quoted by Amar, "The Consent of the Governed," 474. Garry Wills claims that Wilson was strongly influenced by Rousseau's *Social Contract*; see Wills, "James Wilson's New Meaning for Sovereignty," in *Conceptual Change and the Constitution*, ed. Terence Ball and J. G. A. Pocock (Lawrence: University of Kansas Press, 1988), 100.

[55] Or so I argue elsewhere; see my *Essay on the Modern State*, ch. 7.

[56] An (or the) "ultimate" power may also mean something like "determining in special circumstances." For instance, Carl Schmitt famously attributes sovereignty to whomever decides in exceptional circumstances ("*Souverän ist, wer über den Ausnahmezustand entschneidet*"); see Schmitt, *Théologie politique* [1922], trans. Jean-Louis Schlegel (Paris: Gallimard, 1988), 15. This is, to borrow Karl Löwith's term, a species of "occasional decisionism"; see ch. 2 of his *Martin Heidegger and European Nihilism* [1984], ed. Richard Wolin (New York: Columbia University Press, 1995).

It is not obvious that the body that has the greatest say in special circumstances has sovereignty. For it need not be that the body that determines what happens, for instance,

occasionalism, if expressed in the language of sovereignty and "ultimate" authority, suggests a very misleading conception of politics, social order, and political authority. There is considerable fluidity and indeterminacy in political life, even in stable, well-ordered polities. And the very features that allow for accommodation and conciliation are threatened by the hierarchical conception of authority and power (implicitly) defended by fans of sovereignty. I shall say more about this in Section IV.

What I called political consensualism—the thesis that political authority is legitimate only if based on consent—should be distinguished from what may be called *political voluntarism*. This view understands political authority to be *will-based*. What unites theorists like Hobbes, Rousseau, and many members of the German idealist tradition is an understanding of political authority as emanating from a will.[57] Political voluntarism is the counterpart for political authority and may be understood as another thesis, the fifth, implicit in many claims of popular sovereignty.

Political voluntarism is not the same as what I called political consensualism, the view that the consent of the governed is necessary for legitimate rule. The latter is an account of the legitimate authority of a state or polity, whereas the former concerns the nature and "sources" of (authoritative) law. Voluntarism requires that genuine law emanate from the will of some individual or collective; the law's normative status requires that it be determined by a decision or choice. While many political consensualists are also political voluntarists, they need not be. One could require consent for the legitimacy of a political order that determined law in some will-independent manner (e.g., natural law). Just as acceptance of a bottom-up model of authorization does not commit one to consensualism, so the latter does not commit one to what I have called political voluntarism.

We are familiar with will-based accounts of morality (e.g., divine-will theories, Kant). Such accounts of the right have long had to face the Euthyphro problem (is something good or obligatory because it is willed, or is it so willed because it is good or obligatory?). One answer divine-will theorists can give stresses God's goodness; he could but would not choose to will what would be bad for us.[58] Rousseau's account similarly

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when social order breaks down is the same one that decides matters in other circumstances. It is as if 'ultimate' here means something like "when all else fails," and this is thought to secure some reduction ("it all comes down to . . .").

[57] As I said earlier, Hobbes's view of the will reduces it to desire. Rousseau's general will may be best interpreted as both moral and political; morality consequently, at least in the *Social Contract*, is will-based. For the German idealist tradition, see G. W. F. Hegel, *Elements of the Philosophy of Right* [1820], ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991); and Bernard Bosanquet, *The Philosophical Theory of the State* [1923], 4th ed. (London: Macmillan, 1965).

[58] See Robert Merrihew Adams, "A Modified Divine Command Theory of Ethical Wrongness" [1973], in *Divine Commands and Morality*, ed. Paul Helm (New York: Oxford University Press, 1981), 83–108.

solves the problem of the sovereign willing what is not in our interests.[59] But will-based systems of right without formal or material constraints are dangerous. At the least, it is hard to see how they could be made to sustain the law's claims on us.

It is worth considering here Leibniz's criticism of Hobbes's theory. On Hobbes's unusual (but not surprising) account of God's authority, it would be God's "irresistible power" that is the source of his rule over us.[60] Rejecting "gunmen" accounts of law and obligation, we may be more inclined to recognize God's sovereignty by considering his competence and benevolence. Criticizing Hobbes, Leibniz concludes that "Hobbesian empires"

> exist neither among civilized peoples nor among barbarians, and I consider them neither possible nor desirable, unless those who must have supreme power are gifted with angelic virtues. For men will choose to follow their own will, and will consult their own welfare as seems best to them, as long as they are not persuaded of the supreme wisdom and capability of their rulers, which things are necessary for perfect resignation of the will. So Hobbes' demonstrations have a place only in that state whose king is God, whom alone one can trust in all things.[61]

Leviathan, "that *Mortall God*," lacking God's competence and benevolence, will not possess authority over us. Classical sovereignty effectively demands "perfect resignation of the will," and Leibniz saw clearly that Hobbes's story is credible "only in that state whose king is God, whom *alone* one can trust in all things" (emphasis added). Only a being with God's competence and benevolence could command that sort of authority. Similarly, the People's will, lacking the Deity's competence and benevolence, and possibly even less well informed than the will of Hobbes's Mortall God, could not plausibly possess the authority attributed to it by fans of popular sovereignty, at least in the absence of the (genuine) consent of all.[62]

[59] Rousseau, *Social Contract*, Book II, ch. 3, 371 (*"la volonté générale est toujours droite et tend toujours à l'utilité publique"*).

[60] "The right of Nature, whereby God reigneth over men, and punisheth those that break his Lawes, is to be derived, not from his Creating them as if he required obedience, as of Gratitude for his benefits; but from his *Irresistible Power*." Hobbes, *Leviathan*, ch. 31, 246.

[61] G. W. Leibniz, *Caesarinus Fürstenerius (De Suprematu Principum Germaniae)* [1677], in *The Political Writings of Leibniz*, 2d ed., ed. Patrick Riley (Cambridge: Cambridge University Press, 1988), 120.

[62] James Wilson and others may well have wanted to apply Rousseau's account of popular sovereignty to the American federal state, but this is likely to be a doomed undertaking. The conditions for the existence of a general will are very unlikely to obtain in large or pluralistic polities. The choice set for large contemporary states is likely, on this interpretation, to be empty.

I shall say no more about political voluntarism as such. It is a very controversial position, and one could not do justice to it in a short space. But, again, if this is the core of popular sovereignty, then clarity would be better served by abandoning talk of sovereignty and using another term.

The sixth thesis that may be associated with popular sovereignty has to do with the unlimited or relatively unconstrained nature of (legitimate) political authority. It is this thesis that may be the most interesting and the most controversial. It has been claimed by many, especially in modern times, that political authority is unlimited. Just as Hobbes sought absolute authority for monarchs, so Blackstone attributed the same to the trinitarian British "King in Parliament" ("It can, in short, do every thing that is not naturally impossible . . ."). Allowances being made for excesses of rhetoric, we may read Blackstone's statement as endorsing a conception of sovereignty as unlimited, unconstrained by law and perhaps by justice itself.[63] Such an account is hostile to most constitutional government, at least of the American sort, where lawmakers are constrained by law, both procedurally and substantively.

Some contemporary theorists of the left seem to want to attribute similarly unlimited powers to the People. Adam Przeworski and Michael Wallerstein, for instance, seem to endorse some such view:

> People, by whom we mean individuals acting on the bases of their current preferences, are collectively sovereign only if the alternatives open to them as a collectivity are constrained only by conditions independent of anyone's will. Specifically, people are sovereign to the extent that they can alter the existing institutions, including the state and property, and if they can allocate available resources to all feasible uses.[64]

At the very least, Przeworski and Wallerstein seem to be endorsing a view of sovereignty as unlimited or at least as unconstrained, say, by natural or prior rights (especially to private property).

These claims about the unlimited nature of popular authority can easily be confused with a thesis about the *comprehensive* nature of legal authority. The law, Joseph Raz thinks, claims comprehensive authority in claiming authority to regulate any type of behavior. Something's claim to authority is *comprehensive*, in this sense, when there are no limits to the

[63] Gareth Jones, the editor of the edition of Blackstone's *Commentaries* I have cited (in note 15), notes that it is "impossible to reconcile Blackstone's ideas about natural (absolute) rights which no human law could contradict, with his conception of a sovereign" (xxxviii).

[64] Adam Przeworski and Michael Wallerstein, "Popular Sovereignty, State Autonomy, and Private Property," *Archives européennes de sociologie* 27 (1986): 215.

range of actions which it claims to regulate.[65] The comprehensiveness of political authority is a claim concerning its *scope*, concerning the *range of actions* which it claims authority to regulate. To claim that political authority is comprehensive is to assert a normative thesis. The same is true of the thesis of the supremacy of political authority. A political authority is *supreme* in this sense if it (rightly) claims the right to regulate all other normative systems of rules within its realm.[66] There are several senses, then, in which a political authority may be held to be "unlimited." It may be unlimited with regard to the range of actions which it claims authority to regulate, and with regard to competing sources of authority. It may also be unlimited, in a different sense, regarding the type of reasons it claims to issue.

I said earlier that authority is a reason-giving relation. What sorts of reasons do authorities claim to issue? These reasons are supposed to preempt, in a special sense, all other authorities. We may, following Raz and others, understand the reasons provided by authoritative directives to be *preemptive* in a special sense: they are meant to exclude and to take the place of some other reasons. Such reasons are *content-independent*; they provide reasons by virtue of being authoritative directives, not by virtue of what they direct people to do.[67]

The supremacy of a political authority and the preemptive nature of its reasons need not be understood to mean that it is *absolute* in another sense. We can say that a reason is *absolute* in this sense if and only if there cannot be another reason which would override it. An authoritative directive would be absolute in this sense if and only if there could be no reason which would override it. This might be yet another sense in which a political authority might be unlimited.[68]

Constitutional states, as well as others, usually understand their authority to be limited or not absolute in the above sense.[69] But the supremacy of the state's authority is compatible with its being limited. The state's authority may have limits, constitutional and customary, but these limits are those recognized by the state; that is, all but only those limits recog-

[65] Raz, *Practical Reason and Norms*, 150-51; Green, *The Authority of the State*, 83-84. If sovereignty is unlimited, then it is unconstrained legally (and morally?). This will entail that it is *comprehensive* in Raz's sense: it claims authority to regulate any type of behavior (in addition to the above, see Raz, *The Morality of Freedom*, 76-77, where most states are said to claim unlimited authority). Note that a state may be limited (or non-absolute) and yet retain the claim to comprehensive authority.

[66] Raz claims that this feature of legal systems is entailed by their comprehensive natures; see his *Practical Reason and Norms*, 151-52.

[67] Moral reasons are supposed to be preemptive but not, presumably, content-independent.

[68] Although Hobbes sometimes suggests that the monarch's authority is absolute in this sense, even he is probably not best interpreted as endorsing this consequence. For reason may sometimes advise against obeying a sovereign—for example, when the latter is threatening one's life. While Hobbes may deny us natural claim-rights, he does think we retain an inalienable (Hohfeldian) liberty.

[69] The mere fact of being a system may impose limits on the law. See, for instance, Raz, *The Authority of Law*, 111-15.

nized by the state are held to be legitimate. Its authoritative directives may be overridden, so they are not absolute; but the only considerations that may override them are those determined by the state.[70]

Just as it is implausible to think that the *state's* authority might be comprehensive and supreme—much less unlimited or absolute—so it is not plausible to think the same of the People's *authority*. If the People's authority is supreme in our sense, then it has the right to determine the authoritativeness of conscience and—to return to old debates—the Church (or churches). It would have, as well, the right to regulate the authority of the community and of national groups to which individuals might belong. External sources of authority, such as the European Union, would have authority only insofar as the People were to recognize them. Is that really plausible? Note that the People's authority in states such as the U.S. is constrained by law and by the fundamental rights of individuals. The former refers to the *legal* constraints imposed on the People's right to remove their leaders or change the Constitution, the latter to the rights of the American Bill of Rights.[71] Given these implications, many will not find the People's claim to supreme authority here credible. And modern moralists who understand the scope of justice to be universal to all humans or all persons should also find this claim hard to accept.[72]

The problem with the People's claim to comprehensive authority is similar. In both cases, too much is claimed. The People's authority, like that of the state, is limited in ways that neither wishes to admit. Their authority, in fact, is piecemeal and contextual. And this conflicts with their self-image.[73]

IV. Concluding Remarks on Political Power and Governance

The idea of the People's sovereignty turns out to be, at best, a rather complex notion. Debates about the notion are quite muddled. Part of the problem is that sovereignty turns out to be a cluster-concept, made of several elements, some of them easily confused. (Consider only the ambiguities of terms like 'ultimate' or 'absolute'.) Disambiguating these elements and distinguishing different theses can alleviate much of the confusion. But I think that many partisans of popular sovereignty may be

[70] Ibid., 30-31; Raz, *The Morality of Freedom*, 77; Green, *The Authority of the State*, 83.

[71] Amar would recognize that only majorities can commit the People to a constitutional change or a change of leadership, but perhaps this constraint is not specifically a legal one.

[72] Even contractarians and moral conventionalists who deny the universality of justice may find these claims made on behalf of Peoples implausible.

[73] Perhaps appeals to popular sovereignty are intended to express merely that the state is, in some sense, *ours*. A more thorough treatment of the topic would consider an interesting thesis put forward by Jean Hampton: "What is distinctive about modern democracies is that their structure explicitly recognizes that political power and authority are the people's creation." See Hampton, *Political Philosophy* (Boulder, CO: Westview Press, 1997), 105.

attracted to certain classical ideals of order and authority, and these may be unrealizable. The conditions for *anything's* sovereignty, classical or limited, are hard to realize in any social setting. The essential problem is that the conditions for a sovereign—a highest, final, and supreme political and legal authority (and power)—are unlikely to obtain, at least in any large society or state.[74] Attributing sovereignty to Peoples does not alleviate the problem in the slightest way.

The persisting thought that sovereignty must rest *somewhere* may motivate many who think it must be attributed to Peoples. This thought often betrays a certain pyramidal picture of political authority and power which is very misleading. The relations of political authority in most societies are unlikely to constitute a hierarchy of direct rule. Typically, political order is not the product of the sort of determinate, hierarchical system presupposed by various notions of sovereignty. Rather, it is usually the result of a combination of many different things: force, fear, hope, acquiescence, habit, adjustment, agreement, loyalty, coordination, and the like. Stable social orders are those where most people, most of the time, have reasons to act in ways that support and maintain the system. But the variety and combinations of reasons that support a stable system can be large. One should not think, as so many political thinkers have, that social order depends on all, or even most, people acting on particular kinds of reasons—for instance, authoritative directives.

Consider the pluralism and diversity of many contemporary societies, where significant numbers of people differ on a significant number of important political or social issues. Many contemporary American philosophers hold out the hope that it may be possible to forge agreement on certain fundamental principles, even in the absence of a consensus on so-called "conceptions of the good" or "comprehensive doctrines." But it is not even clear that these very distinctions—between conceptions of the good and principles of justice or conceptions of political authority—as well as related distinctions between "public" and "private" concerns, can elicit agreement. Alternatively, consider what I think we characteristically do when faced with seemingly intractable differences or disagreements. Usually, we avoid or fudge the question as long as possible (e.g., assisted suicide, abortion in the U.S. before *Roe*). The doctrine that what the state (or the law) or the People determine is in fact authoritative is not credible here, even in legalistic political cultures such as the U.S. or statist ones such as France. And this may be just as well. We can often get by, and do quite well, without the state or the People "determining once and for all" what ought to be done on certain matters. Sometimes it is better to avoid confronting an issue, especially if the main alternative is to fight.

People not infrequently use force and attempt to impose their will on others, as we all know. Equally important, however, they also compro-

[74] See my *Essay on the Modern State*, ch. 7.

mise and accommodate. Social order is maintained in each of these ways, and the commanding picture of society as a smooth hierarchy of authority and power relations is very misleading. In the conditions of the modern world, we may very well need states and governments. But they do not conform to their self-images ("there is and must be in all of [the several forms of government] a supreme, irresistible, absolute, uncontrolled authority"). It turns out we can do without the state's sovereignty.[75] I believe that the sovereignty of the People is not needed either.

The confusions about actual authority and power implicit in most doctrines of sovereignty are misleading and potentially dangerous. They are especially dangerous if they are conjoined with *majoritarianism*. The latter is, very roughly, the view that policy and law ought to be determined by *simple* majorities. Contrary to what once might have been believed by some contemporary partisans of popular sovereignty, majoritarianism is not self-evident.[76] Certainly, the mathematical properties of simple majority decision principles do not translate easily into a plausible defense of majoritarianism.[77] There is the argument that other voting rules allow for minority veto and thus are wrong or unjust; but this, in most discussions, simply begs the question. Additionally, such a view would threaten all basic or fundamental rights, for these are vetoes of sorts.[78]

We may think instead of majoritarianism as the view that *permissible* collective choices—i.e., those not unjust or forbidden for other reasons—ought to be determined by simple majorities. On this view majorities determine policy or law when, for instance, basic or fundamental rights are not at stake. I am skeptical that issues of justice (e.g., rights) and other questions of policy and law can be neatly distinguished in the manner required for this conception of majoritarianism. There may be some issues (e.g., pure coordination problems) where justice leaves matters completely undetermined, but there cannot be many, or so one might think.[79]

[75] A central theme of my *Essay on the Modern State*.

[76] Amar, "The Consent of the Governed," 460 and elsewhere. One does not know what to make of these eighteenth-century views, however self-evident they may have appeared to their proponents. (In fact, 'self-evidence' is somewhat of a special term in these contexts. I employ it in a less technical sense.) On these views, what was meant by a 'simple majority' was usually a plurality, and none of the standard considerations in favor of the former justified the latter. Were defenders of majoritarianism just confused?

[77] It is somewhat misleading to suppose that certain theorems from social choice theory show that simple majority "is the only workable voting rule that treats all voters and all policies equally" (Amar, "The Consent of the Governed," 503).

[78] Amar does, in fact, say that "[i]n the end, individual rights in our system are, and should be, the products of ultimately majoritarian processes" ("The Consent of the Governed," 503). The factual claim is, I think, unlikely to survive careful unpacking of the terms 'in the end' and 'ultimately'. More importantly, the normative claim ought to be challenged.

[79] Even if majoritarianism fails, we might still have good reason, most of the time, to accord special status to collective decisions endorsed by majorities or even pluralities. It is just that the reasons are not the sort claimed by partisans of the People. The issues about majoritarianism, however, are more complex than my brief remarks may suggest. There may

We need not dwell, at least at present, on the dangers of majoritarianism. But it may be noted how odd it is for defenders of the People to want simple majorities to determine policy and law. The classical theorists—for instance, Locke and Rousseau—required unanimity initially.[80] Members of the People can be oppressed just as well by simple majorities as they can by minorities. Giving individuals the power to block certain laws—for example, through supermajoritarian voting rules, or through basic rights—need not result in some others being oppressed.

Many contemporary theorists and political actors appeal to the notion of popular sovereignty and seem to think that it must play a central role in democratic thought and practice. I have argued that, to the contrary, the notion should not be made central to our theory, largely because the People are not to be accorded the sweeping political authority associated with sovereignty. I have suggested that infatuation with popular sovereignty often betrays a mistaken hierarchical view of political society and of governance.

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be situations where it is preferable, for instance, to have majorities of citizens interpret fundamental law than to have courts or officials do so.

[80] For Locke, constituting a "Body Politick" requires the assent of all who are to be full members; they are bound by simple majority rule only after they join (*Second Treatise of Government*, ch. 8, section 95). The interpretation of Rousseau's controversial introduction of majority voting is more complicated; on one reading, it is introduced only in an epistemic context. The unanimity rule occupies a privileged position in James Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962).