WILD POLITICAL DREAMING: HISTORICAL CONTEXT,
POPULAR SOVEREIGNTY, AND SUPERMAJORITY RULES

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In America—a democracy founded on a belief in popular sovereignty—most people agree that, at least at some level, the fundamental principle of majority rule should prevail, and that political decisions may be made by the majority simply because it is the majority. However, most people also recognize that certain issues may legitimately require more than a majority; that certain questions—such as amending the Constitution or impeaching a President—may require the assent of two-thirds or three-fourths to be concluded. This paradox of democracy exists because we understand that although majority rule is a fundamental principle within a democracy, an equally compelling imperative of a liberal/civil society is that individual rights be protected and a neutral political framework be maintained. In the Western political tradition, this generally means a constitution prescribing rules and rights that are beyond the ability of simple majorities to alter or...

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1 The use of the term "fundamental principle" is a deliberate reference to the Framers' rhetoric on majority rule. See THE FEDERALIST No. 22, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST] (declaring that a "fundamental maxim of republican government... requires that the sense of the majority should prevail"); id. No. 58, at 361 (James Madison) (proclaiming majority rule "the fundamental principle of free government"); see also THOMAS JEFFERSON, Notes on the State of Virginia, in THE PORTABLE THOMAS JEFFERSON 23, 171 (Merrill D. Peterson ed., 1975) ("Lex majoris partis [is] founded in common law as well as common right. It is the natural law of every assembly of men..."); State v. Stacy, 82 So. 2d 264, 265 (Ala. 1955) ("It is a fundamental principle of popular government that the legally expressed will of the majority must prevail in elections.").

2 See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4 (1939) (ILL). Choper observes:

Whether one looks to such classical theorists as Aristotle, Locke, and Rousseau, to such main-stays of American political thinking as Madison, Jefferson, and Lincoln, or to this nation's constitutional development from its origin to the present time, majority rule has been considered the keystone of a democratic political system in both theory and practice.

Id.

3 The U.S. Constitution currently contains nine supermajority requirements, including a required two-thirds vote of Congress or the States to initiate the amendment process (U.S. CONST. art. V); a two-thirds vote of one house of Congress to expel a member (U.S. CONST. art. I, § 5, cl. 2); and a two-thirds vote of the Senate for conviction of an impeached public official (U.S. CONST. art. I, § 3, cl. 6). See generally Brett W. King, The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and the Reinforcement of a Fundamental Principle, 8 SETON HALL CONST. L.J. 363 (1996) (discussing the types of supermajority provisions in the U.S. Constitution).
abolish. 4

Our popular idea of democracy exists comfortably within the notion of limited majoritarianism, and in spite of this paradox, few people question the legitimacy of the American political system because of the existence of supermajority rules. This comfort, however, often escapes legal and political theorists, who are in many instances troubled by supermajority requirements. 5 Because simple majority rule is a concept that, a priori, favors no group and preferences no outcome, 6 its neutrality lends it an air of both external legitimacy and reified neutrality. 7 Once simple majority rule is departed from, preexisting preferences become favored, a concept that is not easily accepted by those who assert that the very notion of democracy entails the existence of a neutral political framework around which competing interest groups in society compete for policy outcomes.

It might be assumed that after more than two hundred years of American democracy, a theory would have emerged that would explain why it is consistent with our conceptions of popular sovereignty to favor certain (and only certain) preexisting preferences by not allowing the majority to rule on those (and only those) specific issues. Unfortunately, to date no such theory has become generally accepted by American political and legal scholars, leaving a theoretical vacuum at the heart of our received version of

4 See David R. Dow, When Words Mean What We Believe They Say: The Case of Article V, 76 IOWA L. REV. 1, 17-18 (1990) ("We believe in the principle of majority rule, and we believe, concurrently, that not everything is subject to it. The Constitution's embodiment of these competing ideas in part reflects political expedience and pragmatic concerns.") (citations omitted).


Many sovereign peoples, through their constitutions, alienate part of the right to democratic self-government either by requiring supermajorities to make changes to fundamental law or by prohibiting certain changes outright. The notion that an omnipotent sovereign entity, such as the crown or the people, can choose to give up some of its sovereignty is a logical conundrum that has troubled not only lawyers and political scientists, but also many philosophers and logicians. Yet it is not a purely esoteric question for bleary-eyed academics rummaging through dusty old libraries. Democracy often clashes with assertions of rights in modern politics.

Id. at 253-54 (citations omitted); see also Cass R. Sunstein, Constitutions and Democracies: An Epilogue, in CONSTITUTIONALISM AND DEMOCRACY 327, 327 (Jon Elster & Rune Slagstad eds., 1988) ("Constitutions operate as constraints on the governing ability of majorities; they are naturally taken as antidemocratic."). Not all scholars are troubled by the paradox, however. See Jon Elster, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 6 (1979) (discussing the rationality of precommitment strategies); Dow, supra note 4, at 6 (arguing that the "countermajoritarian difficulty" is not a problem because there is nothing inherently wrong with a society holding logically irreconcilable beliefs, that is, the concurrent belief in both majority rule and limited government).

6 See Kenneth O. May, A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision, 20 ECONOMETRICA 680, 683 (1952) ("[A] group decision . . . that is not based on simple majority decision . . . will either fail to give a definite result in some situation, favor one individual over another, favor one alternative over the other, or fail to respond positively to individual preferences.").

7 This is especially important for processed-based theories of democracy, although every processed-based account is informed in some manner by underlying substantive values. See generally JOHN HART ELY, DEMOCRACY AND DISTRUST 73-75, 100 (1980) (arguing that constitutional interpretation must take account of participation-oriented, representation-reinforcing values); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063 (1980) (insisting that constitutional interpretation necessarily involves substantive value choices).
democratic liberalism. The failure of American political and legal theorists to craft such a theory is due in part to its perceived consequences. Any theory that might justify the use of a three-fifths (60%) or two-thirds (66.6%) decision rule should be equally effective at justifying a nine-tenths (90%) decision rule, or even the rule of a single person (99.9999%). Once simple majority rule is departed from, there is no logical stopping point between a fifty-one percent rule and autocracy, and so political and legal theorists—staring at a slippery slope of supermajoritarian theory that would seem necessarily to imply a justification for dictatorship—back away from the precipice and instead choose either to reframe the question or deny the existence of a wholly principled solution.

Although there may be no complete and coherent answer to the democratic paradox, the lack of any general consensus over the appropriateness and legitimacy of departures from majority rule is troubling, for it allows those who wish to entrench certain policy preferences into the democratic architecture of American politics to justify such actions based on the historical use of majority and supermajority rule making. And it serves as a

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8 The failure of American theorists to craft a solution to the paradox of democracy is not due to a lack of effort or attention. Indeed, the amount of attention paid to this subject has been considerable, if notable in its failure to achieve a consensus. See generally BRIAN BARRY, POLITICAL ARGUMENT (1965); KEITH GRAHAM, THE BATTLE OF DEMOCRACY (1986); ROSS HARRISON, DEMOCRACY (1993); Stephen Holmes, Precommitment and the Paradox of Democracy, in CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988); Richard Wollheim, A Paradox in the Theory of Democracy, in PHILOSOPHY, POLITICS AND SOCIETY 71 (Peter Laslett & W.G. Runciman eds., 2d ed. 1962).

9 That is, if a 99.9999% decision rule is employed, it effectively empowers a single individual to thwart the will of the majority.

10 See Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457, 503 (1994) (hereinafter Amar, The Consent of the Governed) (“Once majority rule is abandoned, there is no logical stopping point between, say, a 50% plus two rule, and a 99.9% rule.”).

11 That is, they attempt to “dissolve” the question by asserting that the problem is not the failure to craft a coherent answer, rather, the problem is that we have been asking the wrong question all along. See Dow, supra note 4, at 6.

12 Much like modern physics, in the post-Realist world political/legal theory exists with a certain degree of inevitable uncertainty. I agree that it is probably best to avoid “the algorithmic tendencies in some versions of liberal theory, which seek the one great rule by which difficult casts can be decided.” Alan Wolfe, Groups and Happiness, NEW REPUBLIC, June 1, 1998, at 36, 39 (reviewing NANCY L. ROSENBLUM, MEMBERSHIP MORALES: THE PERSONAL USES OF PLURALISM IN AMERICA (1993)) (discussing the difficulty of synthesizing group theory into a determinate set of rules). In this sense, given both the inherent paradox of democracy and the congenital shortcomings of comprehensive legal theories, there may be no grand unified theory of democracy that elegantly distills the chaff of supermajoritarianism from pure democratic values, practices, and thought. It may be that an emulsive theory of majority rule will have to suffice—that an incompletely theorized argument may be as good as it gets. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 3-5 (1996) (arguing that “incompletely theorized agreements” are an effective way of dealing with contemporary political conflict and represent the judiciary’s current (although unconceded) method of decision making); Dow, supra note 4, at 8-10 (arguing that efforts by scholars to resolve the majoritarian paradox are reminiscent of the quest for certainty notable in the pre-Realist legal theories of Christopher Langdell and the Formalist approach to legal reasoning). With respect to the interrelationship of science, objectivism, and theory, see generally PAUL DAVIES, SUPERFORCE: THE SEARCH FOR A GRAND UNIFIED THEORY OF NATURE (1984); John Leslie, Cosmology, Probability, and the Need to Explain Life, in SCIENTIFIC EXPLANATION AND UNDERSTANDING 53 (Nicholas Rescher ed., 1983).
justification not merely for those who argue for constitutional amendments requiring supermajority votes to balance the federal budget\textsuperscript{13} or alter the social security system,\textsuperscript{14} but also for those who would assert that the answer to the paradox is both possible and principled from a historical reading of majoritarian democratic theory. One example of the latter is Yale Law Professor Akhil Reed Amar, who has argued forcefully in a number of articles that the American people have a right to amend the Constitution at any time by simple majoritarian action, that such a right is based on a proper reading of historically contextualized democratic theory, and is consistent with the general understanding of popular sovereignty at and around the time of the framing of the Constitution. Professor Amar promotes a kind of neo-originalist interpretation of the Constitution, a method that has won him considerable renown and favor among Washington's inside-the-beltway cognoscenti, gaining him such distinguished positions as contributing editor to The New Republic magazine.\textsuperscript{15} Amar's articles on popular sovereignty/majority rule have been widely cited in legal scholarship. Despite this acclaim, I believe that a close reading of Amar's writings on popular sovereignty/majority rule show them to be not only historically inaccurate and oftentimes logically inconsistent, but also troubling as a matter of public policy. I believe that Amar should best be characterized as a "thinking man's Freeman,"\textsuperscript{16} a person who waives the Constitution, the Federalist Papers, and other founding era texts in our faces in an effort to promote unfounded and sometimes bizarre ideas based on a background reading of the American historical narrative.\textsuperscript{17} These are harsh words, but I believe they are accurate given my understanding of Amar's theories and his readings of American history. In this Article, I will offer support for my criticisms of Amar's work by analyzing his writings on popular sovereignty/majority rule in light of his assertions on the right of majoritarian action. However, my analysis in this Article is not intended to be merely critical of Amar's popular sovereignty/majority rule oeuvre or his interpretations of American political history. Rather, it is hoped that a partial deconstruction of Amar's efforts will serve to highlight the dangers that exist so long as the lack of consensus surrounding the proper use of supermajority rules persists. In this light, it is hoped that this Article will be an incremental contribution toward a coherent theory of supermajoritarianism; one step closer to answering the question: "When are departures from simple majority rule appropriate in a democratic society?"

\textsuperscript{13} See, e.g., Ashcroft Unveils Details of Economic Plan, BULLETIN'S FRONTRUNNER, Aug. 27, 1998 (reporting Senator Ashcroft's proposal for a three-part constitutional amendment requiring supermajority votes in both houses of Congress to raise taxes).


\textsuperscript{15} See Notebook, NEW REPUBLIC, May 10, 1999, at 12.

\textsuperscript{16} See infra note 213 and accompanying text for a discussion of the Freemen movement and its associated political beliefs.

\textsuperscript{17} See infra notes 213-34 and accompanying text.
Professor Akhil Reed Amar is one legal scholar who has faced the paradox of democracy head on by arguing that, indeed, there is a principled solution to the problem. In a number of articles beginning in the mid-1980s, Amar has proffered the rather radical idea that “We the People”—or more specifically, a majority of us—enjoy an unenumerated right to enact constitutional amendments in ways not explicitly set forth in Article V of the Constitution. Although Article V requires that amendments to the Constitution be approved by two-thirds of both houses of Congress and then ratified by three-fourths of the states, Amar asserts that historically rooted higher or “first order principles” of democracy trump Article V’s textual parameters, and that a majority of the people now has and has always retained an unwritten right to alter the Constitution, exercisable by a simple majority of the people “at any time and for any reason.” For Amar, the Constitution “empowers and limits government” but should not be read to “limit[] or empower[] the People themselves.”

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When Amar talks about the right of “We the People” to amend the Constitution by majority action, he is talking about the voting population of the entire United States, a sort of national referendum right that the people have to alter the Constitution at will.

19 Article V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; provided, that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

20 See Amar, Philadelphia Revisited, supra note 18 at 1050 (“What were these ‘first principles’? Simply that the People were sovereign, and that a majority of them enjoyed the inalienable legal right—that is, a right that they were incapable of waiving, even if they tried—to alter or abolish their form of government whenever they pleased.”); see also id. at 1050 n.20 (“The American understanding of the right of the People to alter their government at any time and for any reason went beyond Locke’s more limited understanding of popular sovereignty.”).

21 Id. at 1055. Amar is somewhat confusing in that his claim is about a “right” and not about
Amar contends that, consistent with this first principles theory, Congress must call a convention upon the request of a bare majority of American voters. Notably, Amar does not limit the rights of the majority to important or fundamental decision making or to times when the government is acting against the interests of the people. For example, if more than fifty percent of Americans wanted to make Groundhog Day a constitutionally mandated national holiday, that majority could assemble and do so at its pleasure, notwithstanding the text of the Constitution or the contrary sentiments of the Congress, the President, or the states.

What is the basis of this “First Principles” theory? Amar asserts that, because the people are sovereign, an accurate historical understanding of popular sovereignty theory means that a majority of the people enjoy the inalienable right to alter or abolish its form of government whenever that majority pleases. Amar tells us that these First Principles should be understood to “represent the essence of the American Revolution.” But Amar goes further than mere academic conjecture, for he is not asking us to adopt First Principles, he is asking us to readopt them. According to Amar, at the founding there existed a collective understanding by the Framers and the people that the new American constitutional structure restricted only the government itself, and that the people would always be able to alter or amend the Constitution as and when they saw fit—irrespective of Article V’s textual reservations. That is, First Principles is not a new and interesting interpretive method born of post-modernist insights into power relationships, socio-linguistic uncertainty, and skepticism over objective reality. Rather, Amar asserts that First Principles was the original understanding of the Framers at the time of the founding, and that somehow this understanding gradually receded from our collective consciousness like a kind of ideological Cheshire Cat, fading slowly into the background of political/legal history. Presently, First Principles is beyond our ken, because we have all been taught to look at the Constitution, as Amar puts it, through the “wrong end of the telescope.” Through Amarian readings and insights, however, we can (it would seem) regain a proper understanding of the Framers’ ideas and restore popular sovereignty/majority power.

“power.” See Dow, supra note 4, at 55 (noting that the question of power “lies in history and on the battlefield,” while an argument that the people can alter the government outside of Article V is “quite specifically a point about rights”). This Article will disregard any distinction between right and power in Amar’s work.

See Amar, Philadelphia Revisited, supra note 18, at 1044-45, 1061, 1065.

See Lawrence Lessig, What Drives Derivability: Responses to Responding to Imperfection, 74 Tex. L. Rev. 839, 855 (1996) (“[Amar] is looking at a historical event and at a practice surrounding this historical event. And he is giving us an account of a background understanding that makes sense of what he sees—his solution dissolves the apparent oddity of the Founders’ behavior.”).

In this Article, the capitalized term “First Principles” refers to Amar’s theory of popular sovereignty/majority rule as outlined by Amar in Of Sovereignty and Federalism, supra note 18; Amar, Philadelphia Revisited, supra note 18; Amar, Central Meaning of Republican Government, supra note 18; The Consent of the Governed, supra note 10.

See Amar, Of Sovereignty and Federalism, supra note 18, at 1441, 1458-64.

Amar, Philadelphia Revisited, supra note 18, at 1050.

rule to its rightful place atop the constitutional order. It is in this sense that Amar is a kind of neo-originalist, for he is asking us to readopt a political theory that he claims represents the true (original) meaning of the American democratic tradition.29

To a reader unfamiliar with the nuances of late eighteenth century political theory, an initial reading of Amar’s writings might render such ideas and interpretations intellectually compelling and historically illuminating. In fact, Amar’s First Principles theory is at once both deceptively simplistic and suggestively alluring, in part because it is often based on some of the most revered words in American history, such as the natural rights rhetoric of the Declaration of Independence and the “We the People” Preamble to the Constitution. But a close examination of Amar’s work reveals fundamental flaws, parochialism, and inaccuracies.30 In order to bring some structure to an unwieldy area of political thought, I have limited my criticisms of Amar’s First Principles to a number of discrete areas, which I have divided into several subcategories.31 First, I believe that Amar inappropriately capitalizes on the uncertainties and multiple meanings that are contained in concepts such as sovereignty and inalienable rights to lend support to First Principles.32 Second, Amar places heavy reliance on an important doctrinal shift that he claims occurred in American political theory between 1776 and 1787, a shift I have been unable to detect and which I believe never in fact took place.33 Third, Amar culls the historical record in an effort to find textual support for First Principles, but this effort often

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30 Although a number of articles have appeared that criticize Amar’s theory of First Principles, many of these works have merely rejected the conclusions and consequences of his First Principles theory without closely analyzing its foundational architecture. See, e.g., Lawrence Friedman & Neals-Erik William Delker, Book Review: Preserving The Republic: The Essence of Constitutionalism, 76 B.U. L. REV. 1019, 1042-46 (1996) (offering mild criticism of Amar’s First Principles theory); Lessig, supra note 24, at 838-60 (conceding skepticism in Amar’s theory of constitutional amendment).

31 For other criticisms of Amar’s First Principles theory, see Dow, supra note 4, at 29-35, 39-61 (criticizing Amar’s First Principles arguments and dismissing them as “theories [that] do not possess even minimal persuasive power”); Charles Fried, The Supreme Court, 1994 Term—Foreword: Revolutions?, 109 HARV. L. REV. 13, 34-45 (1995); id. at 29-32 (asserting that Amar confuses the Right of Revolution concept of “amendment” and “popular upheaval”); Henry Paul Monaghan, We the People[s], Original Understanding, and Constitutional Amendment, 96 COLUM. L. REV. 121, 121-22 (1996) (arguing that First Principles is “historically groundless,” slight the role of the states in the Constitution, and “ignores the fact that the Constitution nowhere contemplates any form of direct, unmediated lawmaking or constitution-making by ‘the People’”); John R. Vile, Legally Amending the United States Constitution: The Exclusivity of Article V’s Mechanisms, 21 CUMB. L. REV. 271 (1991) (rejecting First Principles for both original intent and general interpretive reasons); Eric Grant, Responding to Imperfection: The Theory and Practice of Constitutional Amendment, 13 CONST. COMMENTARY 125, 136-38 (1996) (book review) (criticizing Amar’s use of historical analysis); Lessig, supra note 24, at 852-60 (questioning a number of Amar’s First Principles arguments). For purposes of this Article, I have not discussed those weaknesses in First Principles that I believe are adequately covered in these works.

32 See infra Parts III & IV.

33 See infra Part V.
betrays a tendency to rely on language taken out of context or misinterpret in light of events at the time." Fourth, Amar seems to slight the importance of competing fundamental rights, ignoring the fact that supermajority rules are an imperfect mechanical solution to a sociopolitical problem inherent in democracy. Finally, I will provide support for my earlier assertion that Amar should be seen as a "thinking man's Freeman," a neooriginalist who uses the placidity of late eighteenth and nineteenth century political rhetoric to argue for interpretations of the Constitution that are ultimately unsupportable and suspiciously self-serving.

II. JOHN LOCKE AND CONSENT THEORY IN THE COLONIAL/POSTCOLONIAL ERA

To understand the fundamental weakness of Amar's First Principles argument, it is necessary to place it in the context of late eighteenth century political thought, particularly the writings of John Locke. While it is generally accepted that the work of the Framers was influenced by the writings of many political theorists, including Montesquieu, Hume, Harrington, and others, it was John Locke whose ideas formed the core ideological foundation of the new American nation. Therefore, Lockean political

34 See infra Part VII.
35 See infra Part VIII.
36 See infra Part IX.

[u]nlike Hobbes, the defender of absolute sovereign power, who regarded humans as uniformly selfish in a world without external authority to restrain their passions, Locke sought to devise a set of institutional arrangements which would allow individuals to escape the perils of social disorder without having to surrender their entire stock of individual rights. Locke's goal was to vest all of the benefits created by political union with the individuals composing the society. Unlike Hobbes, Locke posited that the government merely succeeded to the private rights given up to it by the contracting individual members of society. Thus, the state itself has no claim to new and independent rights as against the persons under its control. As a modern commentator has put it: "The state can acquire nothing by simple declaration of its will but must justify its claims in terms of the rights of the individuals whom it protects."

Id. (quoting RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 12 (1985)).

41 For a discussion of Locke's influence on various founding era politicians, including Samuel Adams, Benjamin Franklin, and James Madison, see Doernberg, supra note 40, at 57 ("It would be difficult to overstate John Locke's influence on the American Revolution and the people who created the government that followed it."). See generally LAWRENCE H. LEDER, LIBERTY AND AUTHORITY: EARLY AMERICAN POLITICAL IDEOLOGY 1689-1763, at 37-40 (1968); DAVID W. MINAR, IDEAS AND
theory is a necessary backdrop to any debate over the origins and context of Amar’s First Principles. Although the influence of Locke on the founding era has been exhaustively documented elsewhere, a very brief review of the state of Lockean political thought during the American Revolutionary period is a necessary preface to a discussion of the historical interplay of majority rule, popular sovereignty, and supermajoritarian theory at that time.

For Locke, in the state of nature individuals are equally sovereign and free, and from this starting point it is necessary that any government founded by individuals be premised on a delegation of rights and authority to the collective—a process accomplished by contract that may only legitimately occur with the consent of the governed. As Locke stated in a chapter entitled “Of the Beginning of Political Societies”:

The only way whereby any one devests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another. When any number of Men have so consented to make one Community or Government, they are thereby presently incorporated, and make one Body Politick, wherein the Majority have a Right to act and conclude the rest.

Politics: The American Experience 47 (1964). Minar maintains that Locke can be regarded as: the advance ideologist of the American Revolution. He developed a set of political ideas which has very largely served as the basis for American political values and for the institutional structure which American and British government has since assumed. His importance for American political thought can hardly be overestimated; indeed, there is probably no better short summary of the ideas of Locke than the American Declaration of Independence.

Id. (citations omitted); see also Paul R. Verkuil, Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State, 50 N.C. L. Rev. 548, 580-82 (1972) (discussing Locke’s theoretical contribution to the Declaration of Independence). But see Donald S. Lutz, The Origins of American Constitutionalism 11 (1988) (“[H]istorians’ cumulative work during the past thirty years has rendered anachronistic the view that American political thought derives largely from John Locke.”).


See Epstein, supra note 40.

42 John Locke, Two Treatises of Government 348-49 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); see also id. at 349-50. Locke notes that in assemblies empowered to act by positive law:

where no number is set by that positive Law which impowers them, the act of the Majority passes for the act of the whole, and of course determines, as having by the Law of Nature and Reason, the power of the whole. And thus every Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the majority, and to be concluded by it . . .

Id.; see also Franz Neumann, The Democratic and the Authoritarian State 136 (1964) explaining that for both Locke and Rousseau, “[p]opular sovereignty is the actual or potential force that unifies the state which, for convenience, divides its functions”; Carlos E. González, Reinterpreting Statutory Interpretation, 74 N.C. L. Rev. 585, 640 (1996) (“Initially expounded by Locke and Montesquieu, popular sovereignty found its first practical applications on American soil in colonial compacts, then later in the Declaration of Independence, the state constitutions of the Revolutionary period, and in
Upon the formation of civil society, the people not only delegate and transfer rights and authority to the government, but they also agree thereafter to accede to all laws made in accordance with the contract. The objective of the contract is to overcome collective action problems and establish a government whose purpose is to "maintain peace and order within the territory" and to protect private property.

Significantly, Locke believed that the extent to which people may give up rights upon joining a civil society is limited. "No body can... take away his own Life, [and] cannot give another power over it." Thus, Locke considered each individual as naturally possessing a bundle of rights, which for ease of reference can be divided into three categories: (1) "Delegated Rights": those the individual cedes to the government upon formation of a civil society; (2) "Retained Rights": those the individual retains (but could have ceded if he chose); and (3) "Inalienable Rights": those that are not ceded to the government because they are incapable of being ceded, irrespective of a person's desire to do so. Inalienable Rights are, ipso facto, retained by the people at all times.

Once citizens join together in contractual civil society, the government assumes a role akin to a political trustee, able to exercise all such power...
consistent with its Delegated Rights, for the pursuit of the general good and happiness.  Upon the formation of society, the majority are to rule, unless the original contract specifies otherwise:

Whosoever therefore out of a state of Nature unite into a Community, must be understood to give up all power, necessary to the ends for which they unite into Society, to the majority of the Community, unless they expressly agreed in any number greater than the majority.

This passage is fairly persuasive evidence that Locke did not believe that the right of a simple majority to rule is an Inalienable Right, for if supermajority rules are expressly allowed when made part of the social contract, then the right of a majority to rule is obviously subject to (the majority's own) limitations.

Once consent to the contract has been obtained, the government becomes the "supreme power" and each citizen has a moral obligation to obey all laws passed by it. However, the idea of the government as trustee is significant, for Locke was quite clear in asserting that if the government performs acts in contravention of the powers and responsibilities delegated to it by the people, this breach abnegates the legitimacy of the government and absolves the people of their duty to comply with the laws made

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it from Locke rather than from other authors, it is clear that it was already a political commonplace before Locke's time."


32 See Doemberg, supra note 40, at 62-63. Doemberg observes that:

In emphasizing that the transfer of power from community to legislature is a delegation rather than an alienation, Locke explicitly makes the legislature's power subordinate to the people's "Supremum Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them . . . . [T]he legislative power is explicitly limited to the publick good of the Society . . . ."

Id. (emphasis in original) (citations omitted).

33 LOCKE, supra note 44, at 351. Rousseau expressed the contrary view: "[W]hat, failing a prior agreement, is the source of the minority's obligation to submit to the choice of the majority? . . . The majority principle is itself a product of agreement, and presupposes unanimity on at least one occasion." JEAN-JACQUES ROUSSEAU, SOCIAL CONTRACT 17 (Willmoore Kendall trans., Henry Regnery Co. 1954) (1762). The majority may, even in nature, decide to create an oligarchy or a monarchy as more conducive to its rights and interests. See LOCKE, supra note 44, at 354-57.

34 See LOCKE, supra note 44, at 365-66. Locke maintained that:

every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit Consent, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government.

Id. at 366; see also Doemberg, supra note 40, at 59 n.41 ("[B]ecause few people entering an established civil society affirmatively consent to its government, and to avoid the illegitimacy that would result from such a mass absence of consent, Locke constructed a theory of tacit consent, struggling to ensure that the theory was neither oppressive nor illusory.")
Thus, if the people determine that their government is not acting in their best interests, or that their government has attempted to exercise authority outside of the bundle of Delegated Rights granted to it by the people, then they have a Right of Revolution—to abolish the current (now illegitimate) government and establish a new one in its place. For Locke, the people’s Right of Revolution was an Inalienable Right, although not absolute; it was “not exercisable in response to isolated acts of tyranny; resistance was authorized only when there was a calculated governmental design to subvert the law.” And Locke emphasized that resorting to political force was not justified so long as alternative avenues of legal or civil recourse were available.

One problem with a detailed contemporary reading of Lockean political theory is its internal circularity: for Locke, the external validity of any governmental structure is entirely derived from the consent of those subject to the authority established by it. Although Locke felt that majoritarian or

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56 See *Locke, supra* note 44, at 425-26. Locke wrote:

But if any one should ask, Must the People then always lay themselves open to the Cruelty and Rage of Tyranny ... I Answer: Self-defence is a part of the Law of Nature; nor can it be denied the Community, even against the King himself. ... [It] is the Privilege of the People in general, above what any private Person hath; That particular Men are allowed ... to have no other Remedy but Patience; but the Body of the People may with Respect resist intolerable Tyranny ....

Id. at 458-39; see also Kendall, *supra* note 42, at 127-31 (asserting that Locke’s right of revolution is to be exercised only in such cases where a majority of the society finds its government to be oppressive).

57 Doernberg, *supra* note 40, at 64 n.70 (citing John H. Franklin, *John Locke and the Theory of Sovereignty* 95 (1978)) ("[T]he right of revolution is designed, in Locke’s view, to deal with the situation where government fails to rule within its proper boundaries.").


No revolution could be justified simply by a group of politicians, activists or intellectuals asserting that the existing government was not serving “the real interests” of the people. The expressed wishes of a stable majority had to have been violated; the express consent of the majority of the people had to have been lost. Otherwise, the current regime would have to be tolerated, and changes in its practice could be justifiably promoted only by normal political means.


59 The exact basis of Locke’s beliefs is not clear, although he was undoubtedly at heart a natural law philosopher. See Sterling Power Lamprecht, *The Moral and Political Philosophy of John Locke* 136 (1918) ("There is no point which Locke insisted upon more constantly and more forcefully than that all legitimate governments rest upon the consent of the governed."); David R. Dow, *Individuals, Governments, and Rights: A Reply to Cathleen Herasimchuk*, 30 S. Tex. L. Rev. 369, 374-75 (1989) (discussing Locke as a natural law philosopher). For purposes of this Article, I will put aside our post-modern skepticism over Lockean thought’s internal circularity and emphasize instead those ideas that were critical to the founding era of American democracy.
supermajoritarian voting rules could be legitimized by original consent, he did not spend time justifying his assertion that such consent—the voluntary assent to authority—either meant or defined its legitimacy or circumscribed when and how consent was itself an object of authority, coercion, or power; consent was to be the ultimate “rule of recognition” for Locke, beyond which little else mattered. In a Lockean world, once consent is obtained, it’s “turtles all the way down.”

Notwithstanding our modern-day problems with Locke, his work played a fundamental role in the founding era. The notion of consent as the key to political legitimacy did not merely seep into American political thought, it flowed throughout pre-Revolutionary democratic discourse and became the ideological basis for the American Revolution and the post-Colonial period. The primacy of its status was confirmed by its conspicuous placement in the Declaration of Independence, the Articles of Confederation and the U.S. Constitution. So influential was the notion of

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60 See Richard A. Primus, When Democracy Is Not Self-Government: Toward A Defense of the Unanimity Rule for Criminal Juries, 18 CARDOZO L. REV. 1417, 1439-40 (1997). Primus notes that: According to John Locke, “[e]very man, by consenting with others to make one body politic under one government, puts himself under an obligation, to every one of that society, to submit to the determination of the majority.” Rousseau wrote that the obligation to obey the majority proves that there must have been an original social convention at which people agreed unanimously that the majority would govern. For both Locke and Rousseau, majority stands in need of justification, but the original unanimity they imagine is self-evidently legitimate. Id. at 1439 (citations omitted).

61 See generally Frederick Schauer, Amending the Presuppositions of a Constitution, in RESPONDING TO IMPERFECT, supra note 18, at 147-48 (“C]onstitutions rest on logically antecedent presuppositions that give them their constitutional status [and make up their ultimate rule of recognition].”).

62 That is, for Locke, there was no need to go beyond certain foundational norms, such as consent and human free will; he considered the meta-rule of natural rights to be self-declaring. From a late twentieth century perspective, such an assumption is problematic. If the entire notion of natural rights and other such ideas are rejected (e.g., if reality is deemed to be socially constructed, making the concept of natural rights no more than historical discourse entangled in a Western humanist myth), then constructs such as consent and contract could have radically different meanings. However, once post-modern scholars dismiss the self-declaratory nature of ideologies, we, unlike Locke, are faced with an infinite regress, where no meta-rule can ever be externally legitimized. This Article will therefore take as given many historical assumptions with respect to human political behavior, and will proceed with Locke and other ideological and meta-ideological constructs as they have traditionally been employed in American political and legal thought. In short, this Article presumes the existence of, and rests squarely on the back of, at least one turtle. See STEPHEN HAWKING, A BRIEF HISTORY OF TIME 1 (1988) (employing the turtle example in the context of meta-rules of indeterminacy); Roger C. Crumton, Demystifying Legal Scholarship, 75 GEO L.J. 1, 2 (1986) (examining the history of the turtle example). See generally MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION (Colin Smith trans., Routledge and Kegan Paul 1962).

63 See THE DECLARATION OF INDEPENDENCE (U.S. 1776) (using the notion of consent as a legitimizing rational for severing political ties with England and establishing a new nation).

64 See Articles of Confederation, art. XIII (requiring the unanimous consent of the states to alter the document).

65 See U.S. CONST. art. VII (requiring a state to consent to the Constitution before the document became binding on the state and its people); see also Raymond Ku, Consensus of the Governed: The Legitimacy of Constitutional Change, 64 FORDHAM L. REV. 535, 567 (1995) (“The requirement of consensus is not the child of some esoteric academic theory or some abstract modern day notion of justice. It originates with the American conception of sovereignty and constitutional governance . . . .”).
consent during the founding era that Thomas Jefferson went so far as to declare that "[e]very constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right." 66 Although Jefferson would later be accused of sinning "grossly on the side of abstraction," 67 his preoccupation 68 with consensual rights and strict majoritarianism demonstrates the degree to which the idea of consent as the legitimizing meta-narrative of popular government had become generally acknowledged, 69 even to the point where, for Jefferson, the absence of explicit consent because of temporal succession becomes problematic.

In addressing Jefferson's intergenerational dilemma, Madison rejected natural rights and firmly grounded his ideology in contract: "On what principle does the voice of the majority bind the minority? It does not result I conceive from the law of nature, but from compact founded on conveniency. A greater proportion might be required by the fundamental constitution of a Society if it were judged eligible." 70

Once original consent is obtained and the contract is in place, how is governmental change effected as circumstances change? Unless provided for in its terms, the Lockean social compact would be effective until such time as the government were to abuse the power delegated to it or assault the fundamental rights of the people in violation of the raison d'être of the compact itself. For Locke and others, contractual rigidity was less important than the notion of in perpetuity that was so favored by prior generations. 71 In fact, many post-Colonial era state constitutions did not contain amendment provisions, leading a number of historians to view the Constitution's Article V supermajority amending provision as one of its most

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66 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 THE REPUBLIC OF LETTERS 631, 634 (James Morton Smith ed., 1995) [hereinafter LETTERS]. This is a fairly unsophisticated view of liberalism, at least from a late twentieth century perspective. For a more robust discussion of contemporary liberal-democratic theory, see STEPHEN HOLMES, ON THE THEORY OF LIBERAL DEMOCRACY (1994) (arguing that constitutional precommitment is justified because it does not enslave but rather enfranchises future generations by creating a governmental structure that ensures individual liberties).


68 Jefferson went so far as to use French mortality tables to construct a time frame of generational passage to arrive at the 19 year period. See Brannon P. Denning, Means to Amend: Theories of Constitutional Change, 65 TENN. L. REV. 155, 172 (1997).

69 See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 182 (1969) ("It was axiomatic by 1776 'that the only moral foundation of government is, the consent of the people.'") (citation omitted).


71 See JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764), reprinted in 4 U. MO. STUD. 303, 318 (1929). Otis argued that:

the community may be said . . . to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place, till the government be dissolved and such dissolution may only happen when the government violates the fundamental rights of the people.

Id. (quoting LOCKE, supra note 44, at 385).
novel aspects. But can a majority adopt supermajority rules to limit future majorities from changing the terms of the contract? According to Locke and Madison, the answer is clearly “yes.” If one accepts First Principles at face value, however, the answer must be “no.” So who is correct, Locke, Madison et. al., or Amar?

III. AMAR AND SOVEREIGNTY

One of the cornerstones of Amar’s First Principles is the notion that “We the People” are sovereign, and we are therefore unrestricted in our ability to govern ourselves. Amar offers up historical rhetoric and textual citations in an attempt to convince us that the Framers understood that the ultimate sovereign in America was to be the people of the United States, and that more than fifty percent of the people (acting as a whole, and not through the states) have the right to do as they please, consistent with the theory of popular sovereignty on which American democracy rests. In particular, given an historical understanding that there can be one and only one sovereign, if the American people are truly sovereign, then there can logically be no authority higher than the people. Therefore, the people must at all times retain the authority to govern themselves, including the authority to change the Constitution as and when they see fit.

To analyze Amar’s First Principles on this point, one must start by asking a simple and yet terribly complex question: In the United States, precisely who is sovereign? The issue of sovereignty was “the most important theoretical question” that was debated in post-Revolutionary America—the “ultimate abstract principle to which nearly all arguments were sooner or later reduced” by Colonial and nineteenth century politicians, lawmakers, and scholars. Considering that the Civil War was fought in large part because of disagreements over the sovereignty of the states and their proper role in a federalist system, it might be expected that, by the end of the twentieth century, American political and legal theorists would have developed a concise and cogent theory of sovereignty. Unfortunately, the concept of sovereignty remains as addled and imprecise a political construct today as it was in Colonial America.

The confusion surrounding the concept of “sovereignty” stems in large part from the diverse set of meanings that are encompassed by that single word. Only by unpacking two of the variations that have been compressed into the notion of “sovereignty” is a coherent discussion of First Principles possible. Historically, and in its purest form, the term “sovereignty” refers

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72 See, e.g., Lutz, supra note 41, at 110; Dow, supra note 4, at 32 n.157 (observing that only six of the 13 state constitutions passed after the Declaration of Independence included mechanisms for amendment).
73 See DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 247 (1988) (indicating that “the essence of the American constitutional tradition [is] . . . that while all governments are derived from the people, constitutional decisions shall never be made by transient majorities”).
74 WOOD, supra note 69, at 354.
75 In this Article, I divide the concept of sovereignty into “Type I Sovereignty” and “Type II Sov-
to the "supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will . . . ." 76

Because this conception of sovereignty is by definition a superlative, there can be only one sovereign; any notion of "divided sovereignty" is thus an oxymoron, much like trying to say that there are three tallest buildings in Chicago. 77

For the sake of clarity, I will refer in this Article to this conception as Type I Sovereignty. Identifying the sovereign in America is quite easy with respect to Type I Sovereignty. In the United States, we believe deeply in the notion of popular sovereignty—that the ultimate (and only legitimate) authority of government must (can only) be derived from the people. 78

Popular sovereignty therefore means that "The People" 79 are the sub-

ereignty." However, this is not to imply that these are the only variations of the construct; a more detailed analysis of sovereignty would certainly yield a number of other variations and additional types. Sovereignty is to political theory as subatomic particles are to physics: a basic building block—still not wholly understood—that comes in strong and weak forms, and in various flavors, kinds and types.

76 BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) [hereinafter BLACK'S]; see also City of Bisbee v. Cochise County, 78 P.2d 982, 985-86 (Ariz. 1938) (discussing various interpretations of "sovereignty"); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 21-22 (Fred B. Rothman & Co. 1981) (1880) (stating that under the American system of sovereignty, "the nation is possessed of supreme, absolute, and uncontrollable power in respect to certain subjects throughout all the States, while the States have the like unqualified power, within their respective limits, in respect to other subjects"); JAMES R. FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 410 (1992) (defining sovereignty as "the ability of a state to act without external controls on the conduct of its affairs"); WOOD, supra note 69, at 350 (noting that Blackstone defined sovereignty as the "supreme, irresistible, absolute, uncontrolled authority, in which the jura sumni imperii, or the rights of sovereignty, reside"); Charles Cotesworth Pinckney, America's Unique Structure of Freedom, Address Before the South Carolina Ratifying Convention (May 14, 1788), in 2 THE DEBATE ON THE CONSTITUTION 577 (Bernard Bailyn ed., 1993) [hereinafter ANTI-FEDERALIST PAPERS]. Cotesworth observed that:

In every government there necessarily exists a power from which there is no appeal, and which for that reason may be termed absolute and uncontrollable.

The person or assembly in whom this power resides, is called the sovereign or supreme power of the state. With us the Sovereignty of the union is in the People.

77 This concept of sovereignty is deeply rooted in American political ideology. Political thought in the late seventeenth century and the eighteenth century had developed a central, even axiomatic, conviction that sovereignty was by its very nature indivisible, that in every state there must be one and only one indissoluble supreme power, one true sovereign from whom no appeal was permitted. As Gordon Wood notes:

A state with more than one independent sovereign power within its boundaries was a violation of the unity of nature; it would be like a monster with more than one head, continually at war with itself, an absurd chaotic condition that could result only in the dissolution of the state.

WOOD, supra note 69, at 345-46; see also id. at 350. See generally ROUSSEAU supra note 53, at 162-65 (arguing that popular sovereignty is indivisible).

78 See THE FEDERALIST No. 22, at 152 (Alexander Hamilton) ("The fabric of American empire ought to rest on the solid basis of the CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."); THE FEDERALIST No. 49, at 313-14 (James Madison) ("[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived . . . ."); ELBRIDGE GERRY, OBSERVATIONS ON THE NEW
preme, absolute, and uncontrollable power by which the nation is governed.  

However, the term sovereignty is also used to denote the much broader concept of direct political authority, which I will refer to as Type II Sovereignty. Thus, "sovereignty" also means the "paramount control of the constitution and frame of government and its administration." When the Supreme Court decides that the federal government lacks the authority to pass a law restricting gun possession near public schools, for example, the federal law is said to be impinging on state sovereignty. Of course, without Type II Sovereignty, there could be no "state sovereignty" or "federal sovereignty" since the people would be the only true sovereign (and there cannot be three tallest buildings). Because the people only exercise their sovereignty indirectly through representatives, Type II Sovereignty refers to how the social contract divides the direct source of political authority in areas of public policy. If the states alone are granted the authority to enact geographically specific gun possession laws, any attempt by the federal government to do so will be thought to trample on state sovereignty (i.e.,

CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS (1788), reprinted in Pamphlets on the Constitution of the United States, Published During Its Discussion by the People 1787-88, at 6 (Paul Leicester ed., 1971) (1888) ([The origin of all power is in the people, and ... they have an incontestible right to check the creatures of their own creation ... .]); NOAH WEBSTER, An Examination into the Leading Principles in the Federal Constitution Proposed by the Late Convention Held at Philadelphia (1787), reprinted in Pamphlets on the Constitution of the United States, Published During Its Discussion by the People 57 ("The powers vested in Congress are little more than nominal; may real power cannot be vested in them, nor in any body, but in the people. The source of power is in the people of this country ... ."). In January 1776, the Massachusetts General Court declared: "It is a Maxim ... that, in every Government, there must exist, Somewhere, a Supreme, Sovereign, absolute, and uncontrollable Power; But this Power resides, always in the body of the People ... ." WOOD, supra note 69, at 362 (citation omitted).  

79 Admittedly, "to invoke The People is to invoke what is at best a metaphor." Lawrence G. Sager, The Birth Logic of a Democratic Constitution, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE (Jack Rakove & Jonathan Riley eds.) (forthcoming).  

80 The modern definition of "sovereignty" in Black's Law Dictionary seems to accord nicely with the understanding of the Framers. See BLACK'S, supra note 76. As James Wilson asserted, popular sovereignty means that "in our government, the supreme, absolute, and uncontrollable power remains in the people." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432 (Jonathan Elliot ed., William S. Hein & Co., Inc. 1996) (1891) [hereinafter DEBATES].  

81 The concept of Type II Sovereignty is necessary to understand arguments of legislative supremacy. Locke offers an account of this conception of sovereignty:  

In all Cases, whilst the Government subsists, the Legislative is the Suprem Power. For what can give Laws to another, must needs be superior to him: and since the Legislative is no otherwise Legislative of the Society, but by the right it has to make Laws for all the parts and for every Member of the Society, prescribing Rules to their actions, and giving power of Execution, where they are transgressed, the Legislative must needs be the Supreme, and all other Powers in any Members or parts of the Society, derived from and subordinate to it.  

LOCKE, supra note 44, at 385-86.  

82 BLACK'S, supra note 76, at 1396. See also Douglas G. Smith, An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution, 34 SAN DIEGO L. REV. 249, 256-7 (1997) ([The concept of a division of sovereignty between a general government and subordinate governments was not novel, but was expressed in the writings of various political philosophers well before ratification of the Articles of Confederation.]).  

constitutionally granted state authority). Thus, historical arguments over state sovereignty generally refer to its incarnation as Type II Sovereignty, in the same sense that we recognize the people as the Type I Sovereign but confer "sovereign immunity" on actions taken by state, federal, and local governments. Because Type II Sovereignty is derived from the constitutional structure, the answer to the question "Who is sovereign?" with respect to Type II Sovereignty lies in an examination of the architecture of the Constitution. While there was considerable debate during the Constitutional Convention of 1787 on the political structure of the new nation, what emerged from Philadelphia and was ratified by the states was a constitutional structure that divided authority between the states and federal government. The states—acting as a group comprising three-fourths—were established as the ultimate Type II Sovereign: They are answerable only to the people, who, acting in their capacity as the Type I Sovereign, control the government indirectly through state and local elections. On this point the Constitution is clear. Under Article V, if two-thirds of the states call for a convention to propose amendments to the Constitution, Congress must call such a convention; proposed amendments become effective upon the approval of three-fourths of the states. This mechanism unambiguously places constitutional sovereignty—the "paramount control of the constitution and frame of government"—in the states. If three-fourths of the states so desired, they could, acting collectively, eliminate the Presidency, the Supreme Court, or one or both houses of Congress, or reconfigure the entire structure of the American government, including the elimination of the federal government itself. If three-fourths of the states can abolish the federal government, then the federal government cannot be the supreme and ultimate constitutional power in the United States, since it exists at the pleasure of three-fourths of the states.

Despite the relatively uncomplicated logic of this argument, it is one that is not understood by those political and legal scholars who assert the

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84 See, e.g., U.S. Const. amend. XI (confering sovereign immunity on state governments).
85 Because the Constitution only broadly defines the boundaries of Type II Sovereignty, accusations of encroachments on federal or state authority are a continuing theme in American history. In contrast, because Type I Sovereignty is absolute, the concept of impinging on popular sovereignty is completely foreign to our democratic political system.
86 Even at the time of the Constitutional Convention, the sovereignty distinction was not clear. See LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 140-57 (1995) (noting that at the Constitutional Convention, James Madison discussed the possibility of a divided sovereignty—the possibility of a people empowering both state and national governments with different but equal functions and powers).
87 See Thomas B. McAffee, Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion, 1996 BYU L. Rev. 351 (discussing the Ninth Amendment in its historical context during the argument over retained state sovereignty).
88 BLACK'S, supra note 76, at 1396.
89 The elimination of the states might actually require more than a three-fourths consensus because the Constitution requires a State's consent before its suffrage in the Senate may be infringed or its borders altered. See U.S. Const. art. V; U.S. Const. art. IV, § 3; see also Brendon Troy Ishikawa, Amending The Constitution: Just Not Every November, 44 CLEV. St. L. Rev. 303, 310 (1996) ("Article V . . . represents the Framers' solution to the possibility of a renegade federal government . . . ").
primacy of the federal government, or claim "that the states today stand legally naked against the potential onslaught of federal power." A state, however, is unclothed when acting alone as a single state subordinate to the federal government. Notions such as "state sovereignty" are often used to justify the claim that the actions of a state trump the actions of the federal government. Clearly, this is not the constitutionally prescribed balance of power, as each state is subject to the Constitution and the federal laws made pursuant to it as the supreme law of the land. But when the states are acting as a group equaling at least three-fourths of their number, they exercise authority superior to the federal government. Understanding this structure, the Supreme Court noted in McCulloch v. Maryland that:

No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

When arguing First Principles, however, Amar is indeed being both wild and a political dreamer, for First Principles breaks down the lines that separate the states and allows the people to act collectively in a veritable national constitutional referendum or convention. First Principles assumes that a majority of the people of the United States have the rightful authority to act notwithstanding the states—in effect, nationalizing and consolidating the electorate into "one common mass." Indeed, Amar seems to have little respect for the states, at one point arguing that " 'We the People of the United States' may choose to destroy states by constitutional amendment." On this point First Principles has drawn criticism for...
"[w]hat Amar has done is bypass, for ratification purposes, the states." In short, Amar's First Principles assumes the submission of the authority of the states into the federal government, when in actuality the states are superior to the federal government as Type II Sovereigns. The Constitution clearly gives the states the power to destroy the federal government, not the other way around.

Additionally, Amar attempts to offer support for First Principles' conception of "sovereignty" by exploiting the placidity of that word's multiple meanings. He argues for the notion that, notwithstanding the federalist structure of American government, indivisible sovereignty means that the people must always be seen as the only true source of political authority. For Amar, because it was historically recognized that there could only be one sovereign, the people must be the one true sovereign and therefore retain the right to alter or amend the Constitution at their pleasure; any attempt to place limitations on that right smacks of divided sovereignty, an impossibility given the historic understanding of that construct. This historical sovereignty argument becomes problematic for Amar when a number of the Framers, particularly Madison, speak of dividing sovereignty in the new nation. Amar solves this problem by concluding that, in fact, First Principles is a coherent political theory, though the Framers themselves were somewhat confused: "To the extent [the Framers'] understandings [about Popular Sovereignty] were simply logically inconsistent, we today must necessarily choose among them." The alternative explanation could be, as I have argued, that the term sovereignty is a concept that includes a number of different meanings. The Framers believed, as we do today, that the people are the ultimate sovereign. They also constructed a federal system whereby Type II Sovereignty was given to the states, and the state and

thirty-eight states having the remaining 35%. See Michael Lind, Pat Answers, NEW REPUBLIC, Feb. 19, 1996, at 13 (noting the "undemocratic" nature of a proposal by presidential candidate Patrick Buchanan to allow the Constitution to be amended by the approval of three-fourths of the states without the need for a congressional vote, because the aggregate population of the least populous three-quarters of the states is substantially less than 50%); see also Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) (maintaining that the Constitution contemplates a United States that is "an indestructible Union, composed of indestructible States"). For a criticism of Amar's (mis)use of "We the People," see Monaghan, supra note 31, at 135.

95 Dow, supra note 4, at 30.

96 During the constitutional debates, Madison reasoned that:
we are not to consider the Federal Union as analogous to the social compact of individuals: for, if it were so, a majority would have a right to bind the rest, and even to form a new constitution for the whole; which the gentleman from N. Jersey [Patterson] would be among the last to admit. If we consider the federal Union as analogous not to the social compacts among individual men, but to the conventions among individual states . . . [then] a breach of any one article, by any one party, leaves all the other parties at liberty to consider the whole convention as dissolved, unless they choose rather to compel the delinquent party to repair the breach.

5 DEBATES, supra note 80, at 206-07. Amar does acknowledge that different Framers seemed to have different views on what "sovereignty" meant, although this distinction is not always made clear. See THE FEDERALIST No. 32 (Alexander Hamilton) ("[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.").

97 Amar, Philadelphia Revisited, supra note 18, at 1064 n.77.
federal governments were to co-exist with separate and overlapping powers. What emerged was a system born of practical expedience, not procrustean adherence to any single historical conception of "popular sovereignty."

Finally, Amar's First Principles faces a problem of international proportions. Many other democratic nations—such as Germany, France, and India—purport to base their political systems on notions of popular sovereignty and yet explicitly restrict amendments to their constitutions, in some cases even disallowing certain types of amendments altogether. In particular, Germany's Basic Law prohibits constitutional amendments on a wide range of topics that depart from the (entrenched) concept of liberal democracy, even in the face of overwhelming support from "We the German People." While Amar does not discuss this point, if First Principles is to be a valid political theory, it would need to differentiate the American conception of sovereignty from the construct of the same name that has been spreading across the globe during the past century.

IV. THE (IN)ALIENABILITY OF MAJORITY RULE

Another component crucial to Amar's First Principles theory is an understanding that the very notion of popular sovereignty entails the inherent inalienability of the right of the majority to rule—that is, that no restrictions may be placed on such right, even by the majority itself. Majority rule must always be a first order principle.

From a purely theoretical standpoint, the concept of inalienable majoritarianism is one principled answer to the paradox of democracy. Recognizing that any theory that allows for more than simple majority rule will place us on either the slippery slope to autocracy or require contrived exceptions as to why we might allow, say, a 60% voting rule but not a 60.01% voting rule, Amar has stepped back and asserted that, at the highest level, the majority always has the right to rule—that such a right should

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93 See Katz, supra note 5, at 264 ("The French and German Constitutions, among others, explicitly prohibit changes to fundamental democratic principles. In India, the courts have found that the constitution implicitly prohibits certain amendments."). Katz continues:

German and Indian courts distinguish among constitutional principles based on their amendability. While the German courts relied on text and the Indian courts relied on extra-textual theories, both courts could have restricted their holdings to a strictly-defined, narrow group of rules that cannot be subject to amendment. Instead, the courts found that their respective constitutions elevate certain constitutional values above other constitutional rules, thus requiring the courts to invalidate amendments that contradict certain fundamental principles.

Id. at 274. But see Lessig, supra note 24, at 857 (discussing the validity of amendment to the French Constitution made by a majority vote of the French people that was contrary to the textual provisions of the extant constitution).


100 See Amar, Philadelphia Revisited, supra note 18, at 1050.
properly be understood as a fundamental component of popular sovereignty.\textsuperscript{101} For Amar, the people can restrict government, but the government may never restrict the people; thus the people at all times must be considered to retain the right to conclude decisions, constitutional text notwithstanding.\textsuperscript{102}

However, Amar’s use of the concept of inalienable rights presents difficulties at a number of levels. To understand these difficulties it is necessary to understand the subtle but critical distinctions between Inalienable Rights, Retained Rights, and Delegated Rights noted above.\textsuperscript{103} Again the caveat: like much of American political ideology, although these rights concepts lie at the heart of our modern democratic structure, there is little consensus about them apart from their core meanings.\textsuperscript{104}

As the term is generally employed by political and legal theorists, Inalienable Rights are those rights that are considered innate to all human beings and are so fundamental to personhood and human identity that they may not be legitimately alienated in any way, even with the fully informed, voluntary consent of the individual.\textsuperscript{105} For example, a person’s right to liberty is generally considered inalienable in the sense that the state will neither recognize nor enforce property rights in humans, irrespective of the nature of the consent that purports to create such rights.\textsuperscript{106} Thus, Inalienable Rights are considered inseparable from the rights holder, and neither the state nor the individual may alter that arrangement. At the founding, the Right of Revolution—the right of the people to alter or abolish their government whenever it acted against the interests of the people or in breach of its delegated authority—was considered an Inalienable Right.\textsuperscript{107} Other Inalienable Rights commonly include the right of conscience and the

\textsuperscript{101} See generally id. (discussing First Principles).
\textsuperscript{102} See id.
\textsuperscript{103} See supra text accompanying notes 49-52.
\textsuperscript{104} The terms “unalienable” and “inalienable” are generally considered interchangeable terms for the same proposition. To avoid confusion, I will use “inalienable” in this Article.
\textsuperscript{105} See, e.g., N. H. CONST. OF 1784, art. I, cl. IV (“Among the natural rights, some are in their very nature unalienable because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.”).
\textsuperscript{106} Thus, the state will not recognize the enslavement of a human being, no matter how such enslavement is created, whether by law or private contract (irrespective of how fully informed the contracting parties were or the nature of the consent involved). Many people feel the right to life is inalienable, even in the face of a conviction for murder, thus making the death penalty problematic and the debate over abortion intractable. While the freedom of speech is generally considered alienable, political speech is often viewed as inalienable; thus the government may not suppress for any reason my advocacy of communism or fascism; any laws or contracts purporting to limit advocacy of communism or fascism would be either illegitimate or per se unenforceable.
\textsuperscript{107} For a discussion of certain natural rights that were considered inalienable at the founding, see Jeff Rosen, Was the Flag Burning Amendment Unconstitutional?, 100 YALE L. J. 1073, 1078-79 (1991). Rosen notes that:
only three groups of rights are repeatedly called natural or unalienable [Inalienable Rights] in the Revolutionary declarations and state ratifying conventions: the individual right to “worship God according to the dictates of conscience”; the individual right of “defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety”; and the right of a majority of the people to “alter and abolish” their government.
Id. (footnotest omitted).
right to pursue one's religious identity.

Inalienable Rights stand in contrast to Retained Rights, that is, rights that can be relinquished upon the consent of the rights-holder but are not transferred to a government upon the formation of civil society. For example, the right to a jury trial was not given up by the people at the founding, but because it may be waived by a criminal defendant, it is a Retained Right rather than an Inalienable Right. As noted at the founding, "[a] people, entering into society, surrender such a part of their natural rights, as shall be necessary for the existence of that society." In one way or another, most rights held by the people are Retained Rights, since they can be either waived by the rights-holder or restricted because of the exercise of competing rights. Delegated Rights are those that the people give to the government upon its formation, such as the powers granted to the state and federal governments by the Constitution, as well as subsequent delegations of authority achieved through constitutional amendments. The demarcation of Retained Rights and Delegated Rights is dynamic. The right to consume alcohol, for example, was a Retained Right at the founding, became a Delegated Right during the Prohibition Era, and is once again retained by the people (subject to the right to regulate alcoholic consumption, which is a Delegated Right given to the government).

Clearly, a distinction between Inalienable Rights and Retained Rights is crucial for theorists such as Amar, for his entire First Principles argument is premised on the notion that Article V cannot be the exclusive means of amending the Constitution in a society based on principles of inalienable popular sovereignty. That is, the right of the majority to alter or abolish its government must be seen as an Inalienable Right. If majority rule were instead seen as a Retained Right, then the Constitution would effectively limit the rights of the majority to the terms contained in the text of the document. Therefore, whether majority rule is more properly understood to be an Inalienable Right or a Retained Right is fundamental to the First Principles argument.

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101 See Rights Retained by the People app. A at 351 (Roger Sherman's Draft of the Bill of Rights (1789)) (Randy E. Barnett ed., 1989). Sherman contended that:

[i]he people have certain natural rights which are retained by them when they enter into Society, such as the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.

Id.


110 There is some confusion over the status of Delegated Rights. Jeff Rosen states that the "power to control alienable natural rights . . . can be surrendered in exchange for greater security and safety; but both alienable and inalienable natural rights themselves are 'retained by the people' and protected by the Ninth Amendment." Rosen, supra note 107, at 1077. This argument seems faulty, for it essentially provides that all rights transferred by the people are also retained by the people. The Ninth Amendment seems to make more sense if read as a confirmation that the rights not explicitly transferred by the people to the new federal government were to be retained by the states or the people.

111 See U.S. Const. amend XVIII, repealed by U.S. Const. amend. XXI.
Principles argument. In order to support First Principles, Amar surveys the historical record of the eighteenth and nineteenth centuries and offers up broad language regarding the inalienable right of the people to alter or abolish their government. Amar then asks us to conclude that such examples support his view that previous generations viewed Article V as non-exclusive, that majority rule is an Inalienable Right, and that a majority of the people therefore have a right to amend the Constitution at any time. However, it appears that the link between the historical record Amar presents and his First Principles theory is tenuous at best. Indeed, the founding era discourse is permeated by references hostile to First Principles.

First, the problem of meaning and the indeterminacy of language that are always present in historical scholarship plague much of Amar’s work, particularly so in his discussions of late eighteenth century political theory. The use of the term “inalienable” in American political and legal history is inconsistent at best, and often incoherent and inaccurate. For example, inalienable is sometimes employed to mean rights that are non-transferable, non-saleable, unrelinuishable by the rights-holder, or forever vested and irrevocable by any authority whatsoever. Despite its location at the center of American political ideology, legal and political scholars seldom agree on precisely what inalienability means, which rights are themselves inalienable, and what sort of justification is necessary for a right to be alienated by either the state or the individual. This uncertainty often clouds

112 See generally Amar, Philadelphia Revisited, supra note 18.
113 See, e.g., Terrance McConnell, The Nature and Basis of Inalienable Rights, 3 L. & Phil. 25, 27 (1984) (“That which is inalienable . . . is not transferable to the ownership of another.”).
114 See, e.g., Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1092 (1972) (“An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.”).
115 See, e.g., Randy E. Barnett, Contract Remedies and Inalienable Rights, 4 Soc. Phil. & Pol’y 179, 185 (1986) (“To characterize a right as inalienable is to claim that the consent of the right-holder is insufficient to extinguish the right or to transfer it to another.”); Arthur Kuflik, The Utilitarian Logic of Inalienable Rights, 97 Ethics 75, 75 (1986) (“An inalienable right is a right that a person has no right to give up or trade away.”); Diana T. Meyers, The Rationale for Inalienable Rights in Moral Systems, 7 Soc. Theory & Prac. 127, 127 (1981) (“Inalienable rights are rights that cannot be relinquished by the individuals who possess them.”).
116 See, e.g., DIANA T. MEYERS, INALIENABLE RIGHTS: A DEFENSE 4 (1985) (“[A]n inalienable right is one that the right-holder cannot lose regardless of what he does or how others treat him and even if others are justified in declining to grant him what he demands in exercising his right.”); Stuart M. Brown, Jr., Inalienable Rights, 64 Phil. Rev. 192, 192 (1955) (“[I]f there are any rights properly called ‘inalienable,’ assertions of these rights cannot, for any reason under any circumstances, be denied.”).
117 This confusion is perhaps best evidenced by seemingly contradictory definitions of the term “inalienable rights” in Black’s Law Dictionary. One definition incorporates the concept of alienation only by consent: “inalienable rights: Rights which are not capable of being surrendered or transferred without the consent of the one possessing such rights; e.g., freedom of speech or religion, due process, and equal protection of the laws.” Black’s, supra note 76, at 759. The same term defined elsewhere seems to lack the notion of alienability by consent: “inalienable rights: Rights which can never be abridged because they are so fundamental.” Id. at 1523 (at definition of “unalienable”).

[Four different sorts of theory defend inalienability rules in private market contexts: theories of paternalism, efficiency, distribution, and personhood. Paternalism arguments deny that an indi-
discussions of popular sovereignty/majority rule. Without recognizing and attempting to navigate around the general confusion over the inalienability construct (or at least offering a clear definition of it in his work), Amar's citations can be read in any number of ways, often in ways contrary to First Principles.

The ambiguity over the terms inalienable and non-alienable are evidenced in many places. For example, the Supreme Court has spoken of the right of American citizenship as an inalienable right, even though a citizen may at any time renounce his or her citizenship and thereby relinquish all rights to it. The Court has termed a person's choice of vocation as an inalienable right, yet non-compete agreements and other restrictions on future employment are permitted. The right to participate equally in the political process has been deemed inalienable, thereby requiring that all legislative representation be equally apportioned according to the one-person, one-vote principle; yet the Court has recognized that such a right was constitutionally alienated by the Framers and the people with respect to equal state representation in the Senate. During the Lochner era, the Court's view of the right to contract was all but incoherent in the context of

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119 See Kungys v. United States, 485 U.S. 759, 784 (1988) (Stevens, J. concurring) ("American citizenship is 'a right no less precious than life or liberty.' For the native-born citizen it is a right that is truly inalienable. For the naturalized citizen, however, Congress has authorized a special procedure that may result in the revocation of citizenship.") (citations omitted).

120 See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 322 (1976) (Stevens, J. concurring). Justice Stevens observed that: "the right of the individual... to engage in any of the common occupations of life" has been repeatedly recognized by this Court as falling within the concept of liberty guaranteed by the Fourteenth Amendment. As long ago as [1884], Mr. Justice Bradley wrote that this right "is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence... ."

Id. (footnotes omitted).

121 See Whitcomb v. Chavis, 403 U.S. 124, 141-42 (1971). The Whitcomb Court noted: The line of cases from Gray v. Sanders, and Reynolds v. Sims, to Kirkpatrick v. Preisler, and Wells v. Rockefeller, recognizes that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies."

Id. (citations omitted).

122 See Brett W. King, Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules, 6 U. CHI. ROUND TABLE 133 (1999) (discussing the exception of the one-person, one-vote rule for geographic representation in the Senate); see also William H. Simon, Social-Republican Property, 38 UCLA L. REV. 1335, 1351 n.42 (1991) (noting that in Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964), the Court suggested "that rights to a fairly apportioned legislature are inalienable by holding unconstitutional a malapportioned legislature despite approval by a majority of the disadvantaged voters").
the "inalienable" right of substantive due process. Consider this addled passage from a Lochner-era opinion in light of the conception of "inalienable rights" as absolutely vested in the People, incapable of divestiture of any kind:

While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts.123

The Universal Declaration of Human Rights calls for the recognition of the "equal and inalienable right of all members of the human family,"124 and under this umbrella includes the right to "life, liberty and security of person"125 as well as the right to "periodic holidays with pay."126 The Declaration is silent, however, regarding conflicts between rights—for example, when my right to security of person depends on the occasional willingness of municipal firemen and policemen to alienate their right to periodic holidays with pay.

Putting aside the language difficulty over the historical understanding of Inalienable Rights and assuming broad agreement at the founding over the meaning of that term, Amar is faced with a much more fundamental problem. First, Amar's First Principles theory rests on an understanding that the thirteen original colonies were, prior to their ratification of the Constitution, independent sovereign states, but that after ratification, sovereignty shifted to the people of the nation as a whole.127 Thus, any under-

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123 Frisbie v. United States, 157 U.S. 160, 165 (1895). The Court continued: [The government] may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.

Id. at 165-66; see also Crowley v. Christensen, 137 U.S. 86, 90 (1890) ("The right to acquire, enjoy and dispose of property is declared in the constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property."); Powell v. Pennsylvania, 127 U.S. 678, 692 (1888) ("The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in any judgment, no State can give and no State can take away except in punishment for crime.").


125 Id. at art. 3.

126 Id. at art. 24.

127 See Amar, Philadelphia Revisited, supra note 18, at 1062. Amar contends: In 1787, each state was an independent nation. Thus, at that time, the relevant sovereign entity in, say, Boston was the People of Massachusetts, and a bare majority of Massachusetts voters could bind everyone in the State. But as I have argued at length elsewhere, after Massachusetts adopted the Constitution, it lost its nationhood, and sovereignty was relocated to the People of the United States, as a whole.

Id.; see also Amar, The Central Meaning of Republican Government, supra note 18, at 750 ("Because each state was sovereign and independent prior to ratification [of the Constitution], popular sovereignty took place within each state.").
standing of First Principles must account for how, in the face of a theory of inalienable majority rule/state sovereignty, the sovereignty of each former colony was alienated when it ratified the Constitution. Amar offers this explanation:

Popular sovereignty theory presupposes that at any given moment in time sovereignty is vested in a unique set of electors, a majority of whom may speak for the whole. One sovereign may lawfully lose its sovereignty only by irrevocably transferring it to another sovereign entity or entities. Thus, sovereign individuals could (by unanimous mutual agreement) create a sovereign people, which in turn could (by a majority vote) become part of some larger sovereign people.129

But this attempt by Amar to account for the alienated sovereignty of the states seems contrived, an ad hoc attempt to fill a theoretical lacuna within First Principles. Amar’s view of majority rule would ask us to view the following hypothetical as a consistent and coherent understanding of popular sovereignty: In Delaware, prior to the adoption of the Constitution, any provision of the Delaware Constitution that purported to bind a future majority in any way must be considered per se invalid because a majority may not in any way alienate the sovereignty of a future majority. For example, an amendment to the Delaware Constitution that required a two-thirds vote to raise taxes could at any time be removed by a simple majority vote of Delaware citizens (even if the Delaware Constitution stated that a three-fourths vote was necessary to remove such a rule) because even the unanimous vote of the people of Delaware could not ever legitimately enact a law that would bind future generations. A majority of the People must always have the right to rule. However, in 1787 once the Delaware ratifying convention voted by more than a majority to approve the new federal Constitution, the state of Delaware forever alienated its sovereignty, and the sovereignty of all future citizens of Delaware, to the people of the United States as a whole. Thus, in the tax amendment example, the wishes of 99% of the people of Delaware would not matter in the face of popular sovereignty theory, but in the case of constitutional ratification, 50% plus one controls.

Putting aside the original state sovereignty problem, Amar must overcome yet another challenge. Having established that the right of the ma-

128 Amar’s use of the term “lawful” seems inconsistent with the vocabulary used to discuss first order political theory. If the people are the sole and absolute authority, how can they act “unlawfully”? That is, how can a sovereign “unlawfully” lose its sovereignty?

129 Amar, Philadelphia Revisited, supra note 18, at 1052 n.69. In support of this proposition, Amar cites Locke and Rousseau:

See John Locke, The Second Treatise of Government § 95 (MacMillan, Thomas P. Peardon, ed., 1952) (“When any number of men have so consented to make one community or government, they are thereby presently incorporated and make one body politic wherein the majority have a right to act and conclude the rest.”); Rousseau, Social Contract bk. I, ch 6 at 60 (“These articles of association, rightly understood, are reducible to a single one, namely the total alienation by each associate of himself and all his rights to the whole community.”); id. at bk I, ch 5 at 59 (“The law of majority-voting itself rests on a covenant, and implies that there has been on at least one occasion unanimity.”).

Id.
majority to rule is inalienable, is he not committed to the view that there can be no restrictions on majority rule? That the right of the majority to rule is absolute and unconditional?

Cleverly, Amar has decided that there are in fact areas where the majority may not rule. He maintains that freedom of speech may not be infringed because it would undermine democratic legitimacy. Therefore, the right to free speech must be considered part of the popular sovereignty principle. Similarly, no one would argue that the majority has the right to deprive the minority of life or liberty simply because it is a majority. Thus, we can place some fundamental rights on the same plane as majority rule, such as the right of the individual to life, liberty, and the pursuit of happiness. While this argument is compelling, once competing rights are placed on the same level, a rule is necessary to resolve conflicts between those rights; but Amar does not address situations in which these rights conflict, an omission that he fails to recognize is often solved by utilizing a Constitution with supermajority provisions for amendment.

This gap is evident in Amar's dismissive treatment of instances where he claims that majority rule is alienable. For example, to support his assertion that "[e]ven Anti-Federalists shared [the] belief in majority rule as a clear corollary of popular sovereignty[.]", Amar adduces the Federal Farmer: "So too, the Federal Farmer—perhaps the leading Anti-Federalist pamphleteer—wrote that '[i]t will not be denied, that the people have a right to change the government when the majority chuse it, if not restrained by some existing compact'—i.e. a valid treaty." 

Note here Amar's appended id est at the end of the quotation. This seems to have been included lest the reader think that the Federal Farmer believed that the "existing compact" that might legitimately restrain the rights of the majority to change their government could be a constitution. But it is unclear whether Amar's interpretation of the Federal Farmer's narrative is correct. Nonetheless, even limiting such an "existing compact" to a treaty creates parallel difficulties. In Amar's world of pure majoritarianism, notions of contractually binding obligations, whether created by treaty, constitution, bond indenture, or otherwise, become terribly problematic. If the majority cannot bind future majorities in a duly approved constitution, how can it bind future generations at all, in a treaty or otherwise? And if, as Amar seems to indicate, a majority can be bound by treaty, then why can the majority not be bound by a constitution?

As Amar concedes, "[a]dmittedly, not even popular sovereignty can avoid all forms of entrenchment." Amar's list of approved restrictions on majoritarianism includes a prohibition on infringing speech rights; re-

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130 See id. at 1045 n.1 ("An amendment abolishing free speech might also be unconstitutional—regardless of the mode of adoption—since abolition of speech would effectively immunize the status quo from further constitutional revision . . . .").


132 Id. at 485-86.

133 Amar, Philadelphia Revisited, supra note 18, at 1073-74.
requirements that proposed constitutional amendments be conditioned on a deliberative process,\textsuperscript{134} and a fixed definition of "the People" that can decide certain procedural rules.\textsuperscript{135} But if these areas of the political process can be entrenched, why not others? As one Amar critic has noted, "[w]hat this amounts to... is that Amar seems prepared to permit 'We the Majority' to amend only if he has no deep disagreement with the substance of the amendment."\textsuperscript{136} In the end, Amar seems to have developed a constitutional political theory purportedly based on history that seems to have the consequence of entrenching his own preference for liberal democracy.\textsuperscript{137}

\textsuperscript{134} See id. at 1064 n.79 ("A strong argument can be made that the People must in fact deliberate on a proposed amendment rather than reflexively registering exogenous preferences."). Amar further notes that:

\begin{quote}
[the question of whether a petition could demand not a Philadelphia-style proposing convention, but simply a Congressionally-called referendum on a proposed amendment text specified in the petition itself resembles the question discussed above: whether popular sovereignty requires deliberative assemblies (conventions) at the ratification stage. My own tentative view is that, since the amending majority must be deliberative, a convention may well be necessary for both the proposing and ratification stages.]
\end{quote}

\textit{Id.} at 1066.

\textsuperscript{135} See id. at 1074-76. Amar argues that:

\begin{quote}
First, the substantive constitutional rules adopted by one generation remain the status quo default rules governing subsequent generations unless and until amended. However, if a subsequent, deliberate majority can in fact amend these default rules, then their failure to do so can plausibly be seen as reflecting their implied consent. Since by definition, some status quo default rule must exist, resort to some form of implied consent argument is inescapable.  
\end{quote}

\begin{quote}
...  
Second, the People in one generation must unavoidably entrench some definition of itself—for example, "the sovereign People of Massachusetts" or "the sovereign People of America." To argue that the boundaries of any definition are perhaps arbitrary (e.g., why are New Mexicans "in" and Mexicans "out"?) is, however, to argue not simply with the theory of popular sovereignty, but with the entire idea of the nation state.  
\end{quote}

\begin{quote}
...  
In the end, the two types of entrenchment created by the Philadelphia Constitution's establishment of a status quo default rule and its definition of the People of the United States must be seen as qualitatively different from the type of entrenchment that would arise from reading Article V as exclusive. The first two types of entrenchment are unavoidable. Indeed, they are indispensable to any workable system of popular sovereignty; the right of a majority of the People to amend obviously presupposes these two types of entrenchment defining who gets to amend what. The third (Article V) type of entrenchment, by contrast, would rip the heart out of this fundamental right.  
\end{quote}

\textit{Id.} (emphasis in original omitted) (footnotes omitted).

\textsuperscript{136} Monaghan, supra note 31, at 176. Monaghan also points out that "Amar's other arguments turn out to have similar difficulties. He posits an 'unamendable' Constitution, i.e., he claims that certain constitutional amendments must be rejected because they do not 'fit' the American constitutional order." \textit{Id.}

\textsuperscript{137} See Amar, \textit{The Consent of the Governed}, supra note 10, at 504-05. Amar also suggests:  

\begin{quote}
[a] further turn of the screw: Article V, if exclusive, seems to say anything goes; no right is immune from abandonment—except Senate equality and (prior to 1808) the slave trade. So much follows from the logic of expressio unius and a blinded examination of Article V in isolation. But these are the very flawed interpretive premises the "First Theorem" challenges. Once we see the Constitution through, say, James Wilson's eyes, we see that perhaps not everything is properly amendable. Certain higher law principles—including popular sovereignty majority rule, but encompassing other inalienable rights as well—frame Article V itself. If we look at state declarations, we see, for example, that the individual "right of conscience" may, like popular sovereignty itself, be "unalienable." Ordinary Government should arguably \textit{not} be allowed to amend this away—despite the fact that Article V itself says nothing explicit about "conscience"—at least in the absence of a solemn (judicial) declaration of the People them-
V. MAJORITY RULE, THE RIGHT OF REVOLUTION, AND THE IMPORTANCE OF QUALIFIERS

One of the central justifications Amar employs for First Principles is derived from the historical "Right of Revolution," an idea embedded in the very concept of popular sovereignty/majority rule. According to Amar, the Right of Revolution was recognized at the founding of the American republic in 1776, but because of the unique nature and beliefs of the American version of popular sovereignty/majority rule, this concept was radically transformed by the Colonialists so that by the time of the drafting of the Constitution in 1787 it had become more akin to a "Right of Revision"—the right of the People to peacefully alter their government at any time and for any reason, from time to time as they saw fit. For Amar, the newly constituted Right of Revision is a major foundational block in the architecture of First Principles, a concept derived directly from our understanding of popular sovereignty and a cornerstone of the ideological foundations of the American government.139

In order to appreciate Amar's derivative use of the Right of Revolution, the concept must first be reviewed in the context of the ideological metanarrative employed by the revolutionary protagonists during the Colonial struggle for independence. The Right of Revolution developed concurrently with democratic theory and the idea of limited governmental authority. As discussed above, its premise is that any government acting against the interests of the people is ipso facto illegitimate, and under such circumstances the people have a right to alter or abolish such government. As Amar correctly notes, at the time of the drafting of the Constitution, the Right of Revolution was not a dusty, ill-used concept existing only in the history books; rather, it was employed by the English in the seventeenth century against both Charles I and James II, and was invoked by the Colonialists in 1776 as part of the ideological basis of the American Revolution.140 The Right of Revolution takes its most familiar form to Americans in the Declaration of Independence, one of the most salient expressions of founding era political ideology:

We hold these truths to be self-evident, that... Governments... deriv[e] their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to...
alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.\textsuperscript{141}

The Declaration of Independence was in large part a text concerned with enumerating the abuses of the British Crown in order to demonstrate that English rule of the Colonies had in fact become destructive of "these ends"—life, liberty, and the pursuit of happiness. Once such a case was made to a candid world, the Colonialists felt they could legitimately invoke the Right of Revolution to dissolve their political ties to Great Britain and establish a new nation.

However, by incorporating the Right of Revolution into the theoretical underpinnings of his First Principles theory, Amar faces a qualifier problem. The Right of Revolution does not exist as an absolute, but rather as a contingency; it could only be invoked \textit{whenever} a long train of abuses made the government destructive of the ends for which it was designed. On this point Locke and others were quite clear. As Jefferson noted in the Declaration of Independence, "[p]rudence, indeed, will dictate that Governments long established should not be changed for light and transient causes," but only when "a long train of abuses and usurpations, pursuing invariably the same Object[,] evinces a design to reduce them under absolute Despotism . . ."\textsuperscript{142} Thus, the Right of Revolution as understood at the end of the eighteenth century meant only that the people could alter or abolish a government that had become illegitimate, not that a majority could pass a constitutional amendment at any time on any subject (e.g., declaring Groundhog Day a national holiday). Again, many theorists, including Locke, believed that the Right of Revolution could only be invoked as a last resort—after all other avenues of reform had been tried and each had failed to correct the abuses of the government.\textsuperscript{143}

In order to use the Right of Revolution to support First Principles, Amar must therefore find a way to separate the "for cause" qualifier from the general theory allowing for a popular right of action. He attempts to sunder the qualifier from its constructive base by seizing upon a subtle difference between Lockean and post-Revolutionary American political thought:

Although sovereignty originally resided with the People, Locke suggested that they had to "give [it] up" to government so that day-to-day order could be maintained. The People could only reclaim their surrendered sovereignty—by

\begin{footnotesize}
\textsuperscript{141} \textsc{The Declaration of Independence} para. 2 (U.S. 1776) (emphasis added). Later in the text, the Declaration provides: "But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." \textit{Id.; see also} 1 \textsc{Joseph Story, Commentaries on the Constitution of the United States} 299-300 (Boston, Hilliard, Gray & Co. 1833) ("The declaration of independence . . . puts the doctrine on its true grounds . . . Whenever any form of government becomes destructive of these ends, it is a right of the people (plainly intending, the majority of the people) to alter, or to abolish it . . . ").

\textsuperscript{142} \textsc{The Declaration of Independence} para. 2 (U.S. 1776).

\textsuperscript{143} Locke emphasized that a resort to extra-legal force was not justified so long as alternative legal recourse remained. See Wallach, \textit{supra} note 58 and accompanying text.
\end{footnotesize}
revolution—if government breached faith with the People by “act[ing] contrary to their trust.” In sharp contrast, the Americans came to believe that the People never parted with their ultimate sovereignty. Rather, they delegated certain sovereign powers to various governmental agents, but could revoke those delegations, and reclaim those powers, at any time and for any reason.

The violent nature of revolution, it appears, induced Locke to limit strictly the legitimate occasions for the exercise of the People’s right to revolt. Americans domesticated and defused violent revolution by channeling it into (relatively) peaceful conventions. As a result, Americans could expand the People’s right to “revolt”—to alter or abolish their government—into a right that could be invoked (by convention) on any occasion at the pleasure of the People.144

For Amar, the differential locus of sovereignty between the Lockean and American structures of government meant that for the Colonialists, the Right of Revolution was expanded (that is, the “for cause” qualifier was dissolved) and was transformed into a Right of Revision: an absolute right to alter or amend the Constitution or change the form of government “on any occasion at the pleasure of the People.” I will refer to this as Amar’s “differential sovereignty” theorem.145

It would be difficult to overstate how doctrinally weak this argument is, and ordinarly it might be dismissed with a cursory analysis.146 However, because Amar has made it a critical component of his First Principles theory, it must be afforded due consideration. Such an analysis can be performed on two levels, one legal and theoretical, the other empirical and practical.

First, assuming that the differential sovereignty theorem was factually correct as a matter of political history, at a fundamental level such a theorem is inherently weak because it attempts to draw an extremely fine distinction in an area of political ideology where there is, at best, only broad agreement on abstract ideas and concepts. Like its modern counterpart, eighteenth century political thought did not possess the objectivity of Newtonian physics; considerable disagreement exists even today over what Locke and the Framers meant when they wrote and spoke of inalienable rights, majority rule, and popular sovereignty. Amar seems almost to con-

144 See Amar, Of Sovereignty and Federalism, supra note 18, at 1435 n.41 (emphasis in original omitted) (citations omitted).

145 Id.

146 See Amar, The Consent of the Governed, supra note 10, at 475-76. Amar describes it thus: For starters, there is of course the text of 1776 Declaration of Independence, which Publius quoted, after shearing off its more limited Lockean language requiring a long train of government abuse. Thus Madison in Number 43 placed the accent on Jefferson’s broad phraseology of a right to the people to amend “as to them shall seem most likely to effect their safety and happiness,” which Hamilton in Number 78 paraphrased as “the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness.” Likewise, Wilson stressed that by legalizing the right of revolution—through peaceful conventions—Americans had broadened the right beyond Locke, invocable in the new world “whenever and however [the People] please” to “increase the happiness of society.”

147 Id.

148 Amar’s transition from a Right of Revolution to amendment at any time and for any reason is so subtle that it has almost been lost on some commentators. See, e.g., Lessig, supra note 24, at 856 (discussing Amar’s theory as inclusive of the right of revolution, not an anytime, anywhere convenience).
cede this point in the language he uses to discuss the differential sovereignty theorem— that Locke only "suggested" that sovereignty was transferred to the government (Was it?), and that as a result, Americans "could expand" (But did they?) the Right of Revolution. Amid such textual equivocations, Amar asserts that the American version of sovereignty stands in "sharp contrast" to the ideas of Locke. Herein lies the difficulty: at the level of distinction discussed by Amar, nothing stands in sharp contrast to anything else; it's mostly gray; there is seldom black and white. For example, is Amar talking here about Type I Sovereignty or Type II Sovereignty? What about Locke? In this context, the theorem seems muddled as a matter of historical understanding. Amar asks us to believe that Locke thought sovereignty was originally generated in the People, and that the People transferred that sovereignty to the government, with a right of reversion conditioned on breach. Whereas the Americans stood "in sharp contrast" to Locke because they believed that "the People never parted with their ultimate sovereignty," they merely "delegated certain sovereign powers to various governmental agents" with a right of reversion or revision for breach. But this distinction is specious. When Americans delegate sovereignty to their government, are they not "giving it up" as surely as under Locke's theory? Aren't the people under Locke's theory retaining a right of reversion? If so, is there any real distinction?

This discussion, however, seems inapposite in any event because the pretensions of Amar's differential sovereignty theorem fail when the distinction between Type I Sovereignty and Type II Sovereignty is taken into account. Like the Colonialists, Locke understood that the Right of Revolution meant that ultimate sovereignty—Type I Sovereignty—was retained by the People. Both the Colonialists and Locke thought that certain sovereign powers were delegated to the People. The language used by Locke, and in many instances his theories, differed from what was later adopted by the Framers. For example, Locke stated that "there can be but one supreme power which is the legislative." It is clear that the language used by Locke, and in many instances his theories, differed from what was later adopted by the Framers. For example, Locke stated that "there can be but one supreme power which is the legislative." Locke, supra note 44, at 84. Amar, Of Sovereignty and Federalism, supra note 18, at 1435 n.41.

While Locke did discuss the transfer of sovereignty to the legislature upon the formation of civil society, many scholars believe that Locke probably understood that the Right of Revolution and other inalienable rights meant that, as a practical matter, sovereignty was ultimately always vested in the People: In his analysis of politics in terms of force as well as in terms of rightful authority Locke is closer to the thought of our own day on the subject of sovereignty than he was to the assumptions of his own time. Behind the superior power of the legislative in his system there is always to be seen the finally supreme, all-important power of the people themselves, again conceived of as a force, though justified in its interferences once more by the concept of trust. . . . [T]his residual power must be called Locke's idea of what we not think of as popular sovereignty.

Peter Laslett, The Social and Political Theory of Two Treatises of Government, in Locke, supra note 18, at 1050 n.19.

Amar recognizes elsewhere that the language of the founding era must be carefully read so as not to impose modern day meanings and thus engender misinterpretations:

We must take care not to misunderstand Hamilton's last two words [regarding revolutions]. He is speaking of the principles of the American Revolution, rather than of revolutionary as opposed to lawful principles. Indeed, the modern dichotomy between "revolutionary" and "legal" is anachronistic to the extent it ignores the ways in which the Framers legitimated—and recognized as lawful—certain kinds of popular revolutions through the device of conventions.

Amar, Philadelphia Revisited, supra note 18, at 1050 n.19.
ereign powers were transferred by the People to the government upon the formation of civil society/ratification of a constitution. Both the Colonialists and Locke thought that a breach of trust by the government was sufficient justification for the People to revoke their delegation of authority/sovereignty. While there are indeed distinctions between Lockean thought and late eighteenth century American political theories, the type of distinction that Amar attempts to draw on this particular point is simply not meaningful. In reality, Amar's differential sovereignty theorem must fail because there is no material difference in sovereignty as he applies it. Rather, there are merely abstractions, inaccuracies, and misconceptions over how the term "sovereignty" is employed, what it means, and how in practice it is implemented. On a theoretical level, the differential sovereignty theorem seems little more than linguistic legerdemain—a superficial political comparison cloaked in the garb of academic discourse.

Even if the above arguments are rejected, as a matter of practical application the differential sovereignty theorem is still sophistry. Assuming accuracy as a matter of theory, the shift from a Lockean based sovereignty theory to the more populist American variant would be expected to produce a considerable amount of debate in late eighteenth century political writings. In spite of the general fecundity of political discourse at the time of the ratification of the Constitution and the early years of the American republic, however, Amar fails to cite any direct support for his theory that the Framers recognized that the differential sovereignty theorem either was meaningful with respect to the Right of Revolution, or that such a theorem dissolved the "for cause" qualifier into a general rule of majoritarian action along the lines of a Right of Revision.

The lack of any contemporaneous support for the shift away from the Right of Revolution should be viewed against the background of the Colonial period. Not only was the Right of Revolution employed by Jefferson in the Declaration of Independence, but it was also inserted in a number of the new state constitutions drafted and adopted during the same period. As Amar notes, "Virginia's Declaration of Rights [was] the first and most influential of all the state declarations, adopted in June 1776, one month before Jefferson's Declaration [of Independence]." Amar then cites Virginia's Declaration of Rights:

44, at 119. At least one commentator, however, disagrees:

Locke justified revolution with a theory that ordinarily required obedience. In some circumstances, according to Locke, the natural law of preservation permitted resistance to government: "The Community perpetually retains a Supream Power of saving themselves from the attempts and designs of any Body, even of their Legislators...." Yet even though the natural law of preservation sometimes justified revolution, it otherwise implied that "there can be but one Supreem Power, which is the Legislative, to which all the rest are and must be subordinate." Having been established to preserve liberty, the legislative was "the Supream Power," and therefore until the legislative breached its trust or government was otherwise dissolved, the enactments of the legislative had to be obeyed.


When any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.154

Amar again cites Virginia’s Declaration of Rights in another article:

Whenever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick weal.155

And the Massachusetts Constitution:

The people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.156

And the Maryland Constitution of 1776:

Whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government.157

Amar recites these “Right of Revolution” passages in the Colonial-era Constitutions and then, in spite of the plain meaning of the italicized text, asks us to draw the following conclusion: The “broad Federalist rejoinder, then, stressed that, as a matter of first principles, the people of each state retained the legal right to alter their government at any time and for any reason.”158

Since the Declaration of Independence and the above cited passages represent the Right of Revolution writ large, Amar is ultimately forced to concede that in 1776 the Colonialists explicitly acknowledged and invoked this right to legitimize their separation from the Crown. Amar asserts, however, that the popular sovereignty narrative of the founding era evolved between 1776 and 1787 by gradually incorporating the differential sovereignty theorem, so that by the time of the drafting of the Constitution in 1787, the Right of Revision was widely acknowledged by the Framers:

But once the Revolution succeeded, Americans re-Constituted their colonial governments on purely democratic rather than monarchical foundations.... [O]ver the next decade the previously revolutionary right to alter and abolish became domesticated and legalized in each of the thirteen former colo-

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154 Id. (quoting VA. CONST. of 1776 (Declaration of Rights), preamble § 3 (alteration in original)).
155 Amar, Philadelphia Revisited, supra note 18, at 1051 (quoting VA. CONST. of 1776 (Declaration of Rights), art. 3). This antiquated constitution was reprinted in 5 THE FOUNDERS’ CONSTITUTION 3 (Philip B. Kurland & Ralph Lerner eds., 1987).
156 Amar, Philadelphia Revisited, supra note 18, at 1051 (quoting MASS. CONST. of 1780, pt. 1, art. VII (alteration in original) (emphasis added)).
157 MD. CONST. of 1776 (Declaration of Rights), art. IV, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS 1687 (Francis Newton Thorpe ed., 1909) (alteration in original) (emphasis added).
158 Amar, The Consent of the Governed, supra note 10, at 481 (emphasis added); see also 1 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 451-52 (Trenton, James J. Wilson 1811) (“It is true, from the infancy of political knowledge in the United States, there were many defects in their [state] forms of government. But in one thing they were all perfect. They left the people in the power of altering and amending them, whenever they pleased.”).
nies. Ballots would replace bullets, and the People could exercise this right not simply (as Jefferson's initial phrase could be read to imply) "whenever any Form of Government becomes destructive of [its] ends" by violating unalienable rights, but at any time and for any reason that the People (by majority vote) deemed sufficient. By 1787, the accent had shifted to Jefferson's more expansive clause stressing the People's power to institute new Governments as "to them"—not anyone else, not a king, not the world—"shall seem most likely to effect their Safety and Happiness."

By 1787, the transition was complete. The Constitution needed no long train of abuses by state governments to justify itself, and recited none. In contrast to the Declaration, it submitted itself to a peaceful popular vote in each state, under principles of majority rule.  

Amar concludes that by 1787 "the transition was complete" because of how the Constitution was ratified, that is, peacefully by majoritarian action in specially called state ratifying conventions. Thus, it is critical for Amar's First Principles to establish that by the time of the drafting of the Constitution in 1787, the Right of Revolution had become fully transformed into a Right of Revision.

But Amar has a problem he does not seem to want to face. The first real test of his differential sovereignty theorem occurred in 1790, after the Constitution had been ratified and the first Congress had been elected and convened. During the debates over the proposed Constitution, many of its proponents had promised the early adoption of a bill of rights to ensure individual liberties as soon as the new government was constituted. As part of a proposed Bill of Rights, James Madison introduced an amendment that would have codified the Right of Revolution by placing it in the Preamble of the new Constitution. Amar discusses this point in two articles, one published in 1988 and the other in 1994. Consider the exact wording from each of Amar's articles when he discusses the amendment proposed by Madison:

One of Madison's proposed amendments to the Constitution was to append a prefix to the Preamble declaring "That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government . . . ."

One of [Madison's] proposals was to append a prefix to the Preamble which included the following: "That the people have an indubitable, unalienable and

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159 Amar, The Consent of the Governed, supra note 10, at 463-64 (citations omitted).

160 See id. at 464 ("[I]ndividual states echoed the Declaration of 1776 and extended it, giving the people's right to alter or abolish a precise, regular, peaceful, and legal form that it lacked before 1776. Sovereignty . . . could be exercised peacefully by simple majorities at the polls and in special popular assemblies/conventions.").

161 Other actions that call into questions Amar's assertion regarding the Right of Revolution preceded Madison's proposed amendment. At the Virginia ratifying convention, it was noted that "[t]he powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whenever the same shall be perverted to their injury or oppression." Amar, The Consent of the Governed, supra note 10, at 492 (emphasis added).

162 Amar, Philadelphia Revisited, supra note 18, at 1057.
indefeasible right to reform or change their Government . . . . "163

Then consider the full wording of Madison’s proposal without Amar’s exclusion of text:

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.164

Here in 1790, as demonstrated by James Madison, one of the key figures in the founding of the republic, is the Right of Revolution with its attendant qualifier. Surely if the Right of Revolution had been transformed into a Right of Revision by 1787 as Amar claims, Madison’s proposal in 1790 would have omitted the “for cause” qualifier. The convenient employment of ellipses does not hide this simple fact.165

VI. AMAR AND DORR’S REBELLION

In an attempt to bolster his claim for First Principles, Amar offers historical evidence to demonstrate how earlier generations considered popular sovereignty as more closely akin to First Principles and less similar to the modern received orthodoxy that today seems to proscribe Article V exclusivity. One such event is Dorr’s Rebellion, a dispute in the 1840s over the legitimacy of competing Rhode Island state governments. While a cursory review of Amar’s arguments in light of the rhetoric surrounding Dorr’s Rebellion might initially seem to lend support to First Principles, a closer look at Amar’s account of the rebellion does little to legitimize a First Principles reading of mid-nineteenth century American political history.

In 1841, the Rhode Island Constitution was essentially the charter granted to the Rhode Island colony by King Charles II in 1633.166 Not surprisingly, its structure favored the landholders of the state, and because it lacked any provision for amendment or revision, it essentially entrenched a propertied ruling class who resisted all attempts at governmental reform. In December of 1841, Thomas Dorr and his followers assembled in Rhode Island and adopted what they declared to be a “fair and democratic” constitution, and Dorr was elected the new Governor. In response, the existing

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165 Other scholars have made the same mistake. See, e.g., Gardner, supra note 40, at 203 n.53 (“Locke maintains that the people’s delegation of sovereign power is always revocable whenever the people wish to revoke it.”). This is an overly broad reading of Locke. In the Two Treatises passages cited, Locke is quite clear that any alteration by the people must be conditioned on prior inappropriate actions by the government. See John Choo Yoo, Our Declaratory Ninth Amendment, 42 EMORY L.J. 967, 972 (1993) (“Indeed, James Madison’s unadopted First Amendment emphasized the popular sovereignty meaning of political ‘rights’ and ‘the people’: ‘[T]he people have an indubitable, unalienable, and indefeasible right to reform or change their Government.’”) (citing I ANNALS OF CONG. 451 (Joseph Gates ed., 1789)) (alteration in original).
166 See Luther v. Bordon, 48 U.S. (7 How.) 1, 1 (1849). In 1776, the Rhode Island Constitution was revised to remove references to the Crown, but its substantive provisions remained intact.
Rhode Island government—the "charter government"—adopted a revised constitution and submitted it to the state for approval. Although Dorr's constitution received 14,000 votes, and the charter government's effort only garnered 7,000, the charter government's document nonetheless prevailed, for both procedural and political reasons (then-President John Tyler supported the chartists). When Dorr was arrested, he claimed immunity from prosecution as the rightful governor of the State. The case went to the Supreme Court, which declined to intervene and ruled that the legitimacy of competing state governments was a non-justiciable political question under the Guaranty Clause.167

Amar’s account of Dorr’s Rebellion implies that most of the parties to the dispute recognized the fundamental right of a majority to establish, alter, or abolish the government of a state and that Dorr’s efforts failed partly because the processes of adopting the rival Constitution were faulty. Thus, Amar asks us to view Dorr’s Rebellion as a window on mid-nineteenth century political thought that reveals a general sympathy during the period for a First Principles reading of popular sovereignty/majority rule theory.

However, Amar’s comparative is deficient on a number of levels. First, the events surrounding Dorr’s Rebellion simply cannot, without more, be analogized to the ordinary amending of a constitution at the pleasure of a majority. Dorr’s efforts essentially represented an exercise of the Right of Revolution, the right of a majority of citizens to effect changes in their government whenever such government has lost its legitimacy—that is, when it fails to act in the interests and promote the well-being of its citizenry. In essence, Dorr and his supporters had cause. The illiberalism of the Rhode Island Constitution in 1841 was legend; it was a document that had remained essentially unchanged for more than 200 years, it was originally granted by a King, it did not provide a mechanism for its revision, and it entrenched a favored class of citizens through malapportionment and other devices (e.g., only the eldest sons of property owners were allowed to vote).168 Dorr and his supporters were not merely offering textual improvements to a state constitution (e.g., a Groundhog Day amendment), they were attempting “to overthrow the tyrannous rule of the landholding classes who were still entrenched behind the King’s charter.”169 Amar’s attenuated comparison of Dorr’s Rebellion (an attempt to ratify a new state constitution) to the ordinary amending of a constitution (e.g., the Groundhog Day amendment) strains the very concept of an analogy.

Amar also offers quotations from the oral arguments of Dorr’s lawyer before the Supreme Court, who, not surprisingly, peppered his presentation to the Court with the rhetoric of majority rule/popular sovereignty and the

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167 See id. at 42.
168 See generally DANIEL T. RODGERS, CONTENTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 102-06 (1987) (discussing the Rhode Island contest, known as the "Dorr War").
169 Amar, The Central Meaning of Republican Government, supra note 18, at 775 (citing ROGER S. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 21-22 (1917)).
right of a majority to alter its government. But as is typical of much political discourse, the underlying nature of such rhetoric is often opaque, inconsistent, or self-serving. For example, while Dorr's lawyers did at times seem to offer clear support for Amar's First Principles theory, they also employed the "for cause" language when invoking the Right of Revolution—a notion that, according to Amar, became irrelevant to the American political system sometime between 1776 and 1787. Further, Dorr's lawyers seemed to suggest the alienability of popular sovereignty by citing authority that supports the idea of the people placing limits on their sovereignty.

Amar cites a letter from John Whipple, a leading Chartist at the time, that was sent to President Taylor in support of the Chartist's efforts to retain control of the Rhode Island government. The Whipple letter reference seems to imply that Whipple believed that the legitimacy of the Rhode Island government should be judged by its level of support among a majority of the people of Rhode Island. It is unclear exactly why Amar included a portion of Whipple's letter in his work; it seems to be an attempt to imply that even the Chartist leaders understood or were sympathetic to First Principles. But in his oral argument before the Supreme Court as the attorney for the Chartists, Whipple would clearly not have agreed with Amar's conception of popular sovereignty:

But it is urged by the opposite counsel, that the great doctrine of the sovereignty of the people, and their consequent power to alter the constitution whenever they choose, is the American doctrine... I say that a proposition to amend always comes from the legislative body.

170 See id. at 777.
171 Dorr's lawyers argued two points that, while not utilized by Amar, seem to directly support his First Principles theory:

That the great body of the people may change their form of government at any time, in any peaceful way, and by any mode of operations that they for themselves determine to be expedient.

That even where a subsisting constitution points out a particular mode of change, the people are not bound to follow the mode so pointed out; but may at their pleasure adopt another.

Luther, 43 U.S. (7 How.) at 23.

172 See id. at 18-19 ("And that when any government shall be found inadequate or contrary to [the benefit of the people], a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish the same, in such manner as shall be judged most conducive to the public weal.") (emphasis added).

173 See id. at 22. The Court observed that:

[The English authors already cited, although they all assert the right of the people to change their form of government as they please for their own welfare, do not in any instance come nearer to pointing out any specific mode of doing it than by saying that "they may meet when and where they please, and dispose of the sovereignty, or limit the exercise of it."]

Id. (emphasis added).

174 To wit:

[The issue is whether their constitution shall be carried out by force of arms, without a majority; or the present government be supported until a constitution can be agreed upon that will command a majority. ... Nearly all the leaders, who are professional men, have abandoned them, on the ground that a majority is not in favor of their constitution.

... [According to the federal Constitution,] sixteen millions [sic] of people in the large States may be in favor of amending the Constitution, but their will may be thwarted by four millions [sic] in the small States. What then becomes of this vaunted American doctrine of popular sovereignty, acting by majorities?  

Further, Daniel Webster, Whipple's co-counsel before the Court, implicitly rejected Amar's theories out-of-hand and all but offered a legal brief against First Principles:

[It is my understanding] that the people are the source of all political power. Every one believes this . . . . [But another] principle is, that the people often limit their government; another, that they often limit themselves. They secure themselves against sudden changes by mere majorities. The fifth article of the Constitution of the United States is a clear proof of this. The necessity of having a concurrence of two thirds of both houses of Congress to propose amendments, and of their subsequent ratification by three fourths of the States, gives no countenance to the principles of the Dorr men, because the people have chosen so to limit themselves.  

In his discussion of Dorr's Rebellion, Amar states that:

In any event, putting [the] justiciability issues [of the Guaranty Clause in Luther v. Bordon] to one side, let us recall what the Luther Court said on the merits, about the principles underlying the Republican Government Clause, and the Constitution generally: “No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure.”

However, it seems an overstatement to suggest that the Supreme Court's language in Luther was a statement “about the principles underlying the Republican Government Clause, and the Constitution generally.” This language from Luther comes just a few sentences after the Court declared that many of the arguments “turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so.”

Here as elsewhere, Amar seems to selectively cull rhetoric regarding the right of the majority to rule in an effort to imply broad historical sup-

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175 Luther, 48 U.S. (7 How.) at 28.
176 Id. at 29-30. Further proof of Webster's opposition to First Principles comes when he argues that no one proposed an alternative to the sober, calculated method used to amend the Constitution:
It has been said by the opposing counsel, that the people can get together, call themselves so many thousands, and establish whatever government they please. But others must have the same right. We have then a stormy South American liberty, supported by arms to-day and crushed by arms to-morrow. Our theory places a beautiful face on liberty, and makes it powerful for good, producing no tumults. When it is necessary to ascertain the will of the people, the legislature must provide the means of ascertaining it. The Constitution of the United States was established in this way. It was recommended to the States to send delegates to a convention. They did so. Then it was recommended that the States should ascertain the will of the people. Nobody suggested any other mode.

Id. at 30-31.
177 Amar, Guaranteeing a Republican Form of Government, supra note 18, at 777 (quoting Luther, 48 U.S. (7 How.) at 47).
178 Luther, 48 U.S. (7 How.) at 46-47.
port for his First Principles theory. But a careful reading of history dissolves many of the historical references and rhetorical snippets Amar offers, leaving one to conclude that we may indeed have been looking through the right end of the telescope all along.

VII. AMAR AND HISTORY

Because Amar is a neo-originalist, much of his work depends on mining the historical record of the founding era in an attempt to excavate archival support for First Principles. In presenting his findings, Amar argues forcefully that First Principles was an idea that was widely understood at the time of the founding. A detailed analysis of all of Amar's historical references is beyond the scope of this Article, but I have selected three instances—Amar's use of the writings of James Wilson, his references to the Anti-Federalists, and a citation to the Supreme Court's opinion in *Marbury v. Madison*—where I believe Amar fails to properly contextualize or rigorously analyze the work being cited.

A. James Wilson

In making his First Principles argument, Amar relies heavily on quotations from James Wilson, a leading Colonial politician who served as a delegate to the Constitutional Convention, was a signatory to the Declaration of Independence, and founded the University of Pennsylvania Law School. Wilson is a rich source for Amar because he often spoke the language of strict majoritarianism: the right of the majority to conclude decisions, amend the Constitution, and do whatever else it pleased. As such, Amar heaps heavy praise on Wilson, declaring him to have been "universally regarded as perhaps the most brilliant, scholarly, and visionary lawyer in America." What Amar fails to emphasize is that James Wilson was an ardent nationalist; at the Convention he repeatedly argued against equal representation in the Senate and wanted a strong federal government with only a limited, "local" role to be played by the states. It is therefore important to remember—in an effort to keep Wilson's majoritarian rhetoric in context—that Wilson's preferred version of the federal government was not the one that was adopted at the Convention and ratified by the states. As evidence of the general majoritarian Zeitgeist at the founding, Amar cites

179 See James Wilson, Remarks at the Pennsylvania Convention (Dec. 11, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 550, 555 (John P. Kaminski & Gaspare J. Saldino eds., 1984) (hereinafter DOCUMENTARY HISTORY) ("This . . . is not a government founded upon compact; it is founded upon the power of the people."); id. at 382-83 ("Those who ordain and establish have the power, if they think proper, to repeal and annul."); Version of Wilson's Speech by Thomas Lloyd (Nov. 24, 1787), in supra, at 350, 362 ("The people may change the constitutions whenever and however they please.").


181 See ANDERSON, supra note 45, at 7, 113 (analyzing the Constitutional Convention and dividing the delegates into an ideological tripartite, with James Wilson as a "strong nationalist").
extensively from Wilson’s remarks arguing in favor of a governmental structure that was ultimately rejected by the Framers. Amar seems to slight the fact that the “Framers” were by no means homogenous in their political beliefs, and merely finding one Framer, such as James Wilson, who often argued for a general right of majoritarian action does little to legitimize an accurate reading of history. While Wilson may have been sympathetic to First Principles, Amar’s weakness is that he seems to imply that we should therefore believe that the Framers in general were so inclined. This is a subtle association underlying much of Amar’s work that is ultimately unsupported in fact and does not seem to be a valid interpretive method of historical scholarship.

Additionally, a cursory review of founding era texts reveals that Wilson, although clearly nationalistic, was by no means an absolute majoritarian; he voted a number of times at the Convention in favor of the inclusion of supermajority rules in the Constitution. Ironically, in light of Amar’s argument, it was Convention delegate James Wilson who strongly supported the supermajority voting requirements of Article V. And while Wilson’s majoritarian rhetoric may fit snugly within Amar’s First Principles tent, it is interesting to note that one of the key ideas upon which Amar constructs his First Principles theory seems to have been rejected by Wilson during the Convention. Amar bases First Principles, in part, on the notion that at the time of the ratification of the Constitution the thirteen colonies were acting as independent, sovereign states; a concept rejected during the Convention.

The revolutionary rhetoric of individuals such as Wilson must be considered in the context in which it was made—as part of the formation of a new government and not a comprehensive treatise on political theory.

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182 See 2 DEBATES, supra note 80, at 558-60. During the Constitutional Convention, Roger Sherman of Connecticut made a motion to add a unanimity requirement to Article V. However, James Wilson intervened, first moving for a two-thirds requirement, which failed 5-6; he then moved to insert the three-fourths requirement, and the motion passed unanimously. See id.

For additional critical analysis of Amar’s use of James Wilson’s rhetoric, see Monaghan, supra note 31, at 157-59.

183 See 2 DEBATES, supra note 80, at 590.

Mr. Wilson, could not admit the doctrine that when the Colonies became independent of Great Britain, they became independent also of each other. He read the declaration of Independence, observing thereon that the United Colonies were declared to be free and independent States and inferring that they were independent, not individually but unitedly, and that they were confederated, as they were independent States.

Id. But see James Wilson, James Wilson’s Opening Address, in 1 ANTI-FEDERALIST PAPERS, supra note 76, at 791, 791 (describing the Colonies at the time of the drafting of the Constitution as “thirteen Independent and Sovereign States”).

184 In the convention, on November 28, Thomas McKean said: “If, sir, the people should at any time desire to alter and abolish their government, I agree with my honorable colleague [James Wilson] that it is in their power to do so, and I am happy to observe that the Constitution before us provides a regular mode for that event.” Thomas McKean, Remarks at the Pennsylvania Convention (Nov. 28, 1787), in 2 DOCUMENTARY HISTORY, supra note 179, at 382, 387. Note that McKean implies that the Article V power is a power of the people. This undercuts Amar’s claim that contemporary understanding distinguished sharply between the people’s right to change the Constitution and government-controlled change via Article V. See Amar, The Consent of the Governed, supra note 10, at 458-61.
When Wilson announced that the people "retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient," did he mean that the majority may enact amendments at odds with liberal notions of democracy, such as an amendment that would suppress political speech or curtail equal protection? What if the majority wants a supermajority rule? If a majority cannot enact a supermajority rule, can it be said to have the authority to amend its constitution in "whatever manner" it shall deem expedient?

Finally, during the Pennsylvania ratification debates, Wilson stated (directly counter to First Principles theory) that Pennsylvania's state constitution "cannot be amended by any other mode than that which it directs," and that if in amending a constitution the majority infringes "the act of original association" or violates "the intention of those who united under it" then the minority is "not obliged to submit to the new government." Thus, James Wilson—whom Amar concedes to be one of the "most brilliant, scholarly, and visionary lawyer[s]" in Colonial America—seems to have often been supportive of positions that are directly contrary to First Principles.

**B. The Anti-Federalists**

In making his case for First Principles, Amar also offers rhetorical scraps from a number of Anti-Federalist writings in an apparent effort to imply a general sympathy on the part of the Anti-Federalists to his First Principles theory. As Amar states: "[e]ven Anti-Federalists shared this [First Principles] belief in majority rule as a clear corollary of popular sovereignty." However, a close reading of the Anti-Federalists' writings does little to support Amar's claim that they were sympathetic to First Principles. In arguing against the proposed Constitution, the Anti-Federalists harshly criticized Article V for being so restrictive as to be impractical, an argument obviously premised on an understanding that Article V was to be the exclusive means of altering the new Constitution:

And after the constitution is once ratified, it must remain fixed until two thirds of both the houses of Congress shall deem it necessary to propose amendments; or the legislatures of two thirds of the several states shall make application to Congress for the calling a convention for proposing amendments... This appears to me to be only a cunning way of saying that no alteration shall ever be

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186 2 DEBATES, supra note 80, at 457 (statement of James Wilson). Cf. Amar, The Consent of the Governed, supra note 10, at 481 (asserting that the clause in the Pennsylvania state constitution that provided for amendments was non-exclusive, but merely added "an additional mode of amendment without in any way limiting the people's pre-existing background right to alter or abolish" it).
187 James Wilson, Of Government, in WORKS, supra note 185, at 284, 304.
189 Id. at 485.
made; so that whether it is a good constitution or a bad constitution, it will re-
main forever unamended . . . . [T]he proposed constitution holds out a prospect
of being subject to be changed if it be found necessary or convenient to change
it; but the conditions upon which an alteration can take place [the provisions of
Article V], are such as in all probability will never exist. The consequence will
be that, when the constitution is once established, it never can be altered or
amended without some violent convulsion or civil war.\textsuperscript{190}

This passage is all but a rebuttal to Amar’s First Principles argument. If, as Amar
seems to suggest, it was widely acknowledged during the late
eighteenth century that a majority of the people could alter or amend their
constitutional government from time to time at their pleasure, wouldn’t the
Anti-Federalists’ argument have been received as disingenuous and logi-
cally faulty—or, perhaps more likely, as risibly misguided? Wouldn’t the
Federalists have publicly ridiculed it on those very grounds?

Another interesting passage from the Anti-Federalists notes that the
Constitution provides for the new Congress to determine the time, place,
and manner of elections:

[S]uppose they [Congress] should think it for the publick good, after the first
[presidential] election, to appoint the first Tuesday of September, in the year
two thousand, for the purpose of chusing the second President; and by law em-
power the Chief Justice of the Supreme Judicial Court to act as President until
that time. However disagreeable it might be to the majority of the States, I do
not see but that they are left without a remedy, provided four States should be
satisfied with the measure.\textsuperscript{191}

Although admittedly a somewhat bizarre hypothetical, the Anti-
Federalists are arguing that under the structure of the proposed Constitution,
if Congress abuses its time, place, and manner authority, and four
states (the number then required to block a constitutional amendment) ac-
quiesce to that abuse, there is no corrective remedy available. Thus, Con-
gress and four states could provide for a presidential term of 211 years, and
the remaining states would be powerless in the face of constitutional rigid-
ity. This argument must logically proceed from an assumption that Article
V is the exclusive method of amending the Constitution, and thus is clearly
contrary to a First Principles understanding that the people can amend the
Constitution at any time they see fit. And these are not the only examples;
time and again the Anti-Federalists argued against the new Constitution on
the grounds that Article V’s amendment procedure presented such a hurdle
to change that the Constitution would be all but unamendable.\textsuperscript{192} I have
been unable to find a single historical source in which these assertions were
countered with the argument that the people could simply circumvent the

\textsuperscript{190} George Bryan et al., “An Old Whig” I, INDEP. GAZETEER, Oct. 12, 1787, reprinted in 1 ANTI-
FEDERALIST PAPERS, supra note 76, at 122, 122-23.

\textsuperscript{191} Letter from a Customer, CUMBERLAND GAZETEER (Mar. 1788), reprinted in 4 THE COMPLETE

24, 1787), reprinted in ANTI-FEDERALIST PAPERS, supra note 76, at 77, 90 (arguing that Article V is so
restrictive that it will require “a general and successful rising of the people” in order to amend the Con-
itution).
textual requirements of Article V by a simple majority vote.

In fact, historical evidence against First Principles is widely available to the diligent reader. For example, upon reading Article V in the proposed constitution, Patrick Henry announced that "[t]he way to amendment, is, in my conception, shut." \(^{193}\) During a lengthy discussion at the Virginia convention, Henry decried the fact that a "bare majority" in "four small States" containing "one-twentieth part of the American people" might "prevent the removal of the most grievous inconveniences and oppression, by refusing to accede to amendments." \(^{194}\)

But if, as Amar has argued, "the founding generation understood that the People were legally incapable of alienating their future legal right to alter or abolish their Constitution at any time and for any reason," \(^{195}\) how are we to understand these Anti-Federalist arguments? \(^{196}\) Consider the above arguments presented by the Anti-Federalists in the context of Amar's assertion that "[e]ven Anti-Federalists shared this [First Principles] belief in majority rule as a clear corollary of popular sovereignty" \(^{197}\) —the right of a majority of the people to alter the constitution "at any time and for any reason."

**C. Marbury v. Madison**

Consider yet another example where Amar seems to employ a selective reading of history to support his First Principles cause. Amar cites *Marbury v. Madison* \(^{198}\) a number of times in what appears to be an effort to show broad support for First Principles during the post-founding era. But consider how strategically Amar crafted the following citation from *Marbury* for inclusion in his writings:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. This original and supreme will organizes the government, and assigns to different departments their respective powers... [and may] establish certain limits not to be transcended by those departments. \(^{199}\)

To a reader without the full text of the *Marbury* opinion available, this language does seem to offer broad support for First Principles. Indeed, the quotation from *Marbury* would seem to invest First Principles with the legitimacy of one of the most important cases ever decided by the Supreme Court. However, consider again Justice Marshall's words in *Marbury*, this time including the text that Amar omits (indicated below in italics):

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\(^{193}\) Patrick Henry, Remarks at the Virginia Convention (June 5, 1788), in 9 DOCUMENTARY HISTORY, supra note 179, at 943, 955.

\(^{194}\) Id.

\(^{195}\) Id.

\(^{196}\) Id.

\(^{197}\) This question is nearly identical to one Amar poses with respect to Article IV. See id.

\(^{198}\) Id.

\(^{199}\) Id.
That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

This passage illustrates what can be accomplished through a selective citation of historical material and the convenient use of ellipses. The text omitted from this passage is neither extraneous nor non-germane to the discussion; in fact, it speaks four-square against First Principles. Chief Justice Marshall was discussing a conception of popular sovereignty that he believed was foundational and that should therefore be seldom exercised, not one that would allow Groundhog Day amendments at any time at the pleasure of a simple majority.

VIII. COMPETING PRINCIPLES AND THE ARGUMENT FROM UTILITY

Absent from much of Amar’s discussion of First Principles is a reconciliation of the competing interests of a majority. Amar seems to view the majority’s desire to enact constitutionally binding supermajority rules as an illegitimate exercise of authority inconsistent with higher principles of popular sovereignty. However, supermajority rules are not merely a means for one generation to foist its subjective preferences upon future generations. Rather, there can be a significant advantage to supermajority rules in the political context, just as there are for binding contracts in the commercial context. Although paternalistic, the ability to bind oneself is not without individual benefit and social utility.

What Amar seems to slight is that the very notion of a Constitution pre-

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200 Marbury, 5 U.S. (1 Cranch) at 175.
201 When using ellipses “in quoted material, the author should take great care to avoid altering the meaning of the original.” The Chicago Manual of Style, Rule 10.63 (Faithful Ellision) (14th ed. 1993).
202 See also William W. Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1, 18 (arguing that Article V must be understood to negate other conceivable modes of amendment).
203 See Sullivan, supra note 118, at 1480. Sullivan writes that: [m]aking constitutional rights inalienable because citizens may undervalue the worth of those rights to themselves would be classic paternalism overruling individuals’ choices for their own good. Individuals’ choices may diverge from their “best” interests for many reasons: for example, because they undervalue long-term risks; or because they undervalue their long-term interests. Choices to waive constitutional rights are no exceptions; invalidating such choices, even if perfectly voluntary, compels citizens to hang onto their rights for their own good.

supposes that certain rights are alienable because a Constitution exists to limit choices in order to preserve individual rights and increase collective utility. Just as Amar concedes that the right of free speech may be so fundamental to a democracy that it is beyond the right of a majority of the people to restrict it, so too are other rights that were placed beyond the ability of a majority to alter or abolish. That is, "the entrenchment of established institutional arrangements enables rather than merely constrains present and future generations by creating a settled framework under which people may make decisions" and can enhance the deliberative process on important public policy issues.

The notion that supermajority rules contain inherent utility does in fact make Amar's First Principles argument even more problematic (and impoverished). If "all power is in the people," then the people must have the ability to craft "a government as a majority of them thinks will promote their happiness." But Amar would seem to limit the majority by excluding all option sets containing supermajority rules, foreclosing precommitment strategies that are both rational and utility-enhancing.

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204 See generally Holmes, supra note 66, at 5-6; Katz, supra note 5, at 252-54. Additionally, Amar admits (but does not rationalize or harmonize) the presence of terms in the Massachusetts, Pennsylvania, and New Hampshire Constitutions that explicitly limited early amendments and are therefore at odds with his First Principles theory. See Amar, The Consent of the Governed, supra note 10, at 481-82 & n.84.


206 See Brenner v. School Dist. of Kansas City, 315 F. Supp. 627, 632 n.7 (W.D. Mo. 1970). In Brenner, the court notes cases of extraordinary majority requirements:

- See State ex rel. Dobbins v. Sutherland, (1878) 54 Mo. 391, involving the attempted removal of a county seat; State ex rel. Litton v. McGowan, (1897) 138 Mo. 187, 39 S.W. 771, involving the adoption of a township form of county government; and State v. Winkelman, 35 Mo. 103 (1864), involving the sale of beer on Sunday, for examples of extraordinary majority requirements which Missouri selected for the determination of questions which simply would not stay decided unless the ground rules provided were calculated to demonstrate that the proposed action had the broad support of a large number of all the citizens in the community.

Id. The court also explained that:

[a] two thirds majority requirement, and requirements of a similar nature, reflect a policy determination on the part of a particular State that a greater consensus than a bare majority of the eligible voters who usually vote in school referendum elections must be obtained before recommended governmental action in connection with the school bonds and school levies is approved.

Id. at 633; see also Contest of a Certain Special Election v. Special Rd. Dists., 659 P.2d 1294, 1297 (Ariz. Ct. App. 1982) (holding that "a state has an interest in providing for a broader consensus for substantial public indebtedness than a bare majority of what perhaps might be a small minority"); Bogert v. Kinzer, 465 P.2d 639, 648 (Idaho 1970) (citing Misreading Democracy, NEW REPUBLIC, Sept. 27, 1969, at 9, 10, which argued that state power should not rigidly adhere to the majoritarian principle "so that government may rest on widespread consent rather than teetering on the knife-edge of a transient 51 percent").

207 4 DEBATES, supra note 80, at 161.

208 Sunstein describes the benefits of constitutional precommitment strategies:

[Constitutional precommitment strategies might serve to overcome myopia or weakness of will on the part of the collectivity, or to ensure that representatives follow the considered judgments of the people. Protection of freedom of speech, or from unreasonable searches and seizures, might represent an effort by the people themselves to provide safeguards against the impulsive behavior of majorities. Here the goal is to ensure that the deliberative sense of the community
Additionally, as noted above, supermajority rules are one part of a structure employed by the Framers to address conflicts in competing first order principles. We can say that majority rule is fundamental to democracy, but so too are free speech, due process, and the maintenance of a neutral political framework. Clearly, when implementing these and other first order concepts, there will be conflicts; supermajority rules/constitutionalism are one way of addressing the problem.

Most constitutions declare the primacy of popular sovereignty and proclaim that ultimate power resides with "the people" through the democratic process. At the same time, in keeping with the notion of limiting democratic government, most constitutions also describe what the legislature, the representative of the people, cannot do. By definition, democracy is antithetical to the concept of inalienable rights. If the people are truly sovereign in the sense of controlling their destiny through the democratic process, then all rights must be alienable: a majority need only decide to alienate one right or another.2

Amar almost concedes this point when he discusses exceptions to his First Principles theory:

"The First Amendment may itself be a seemingly paradoxical exception to the general rule that amendments must not be unamendable. Ironically, in order to prevent illegitimate entrenchment of the status quo, constitutional rules that disentrench by keeping open the channels of constitutional change must themselves be entrenched. (Similarly, some free market transactions such as selling oneself into slavery or agreeing to form a cartel must themselves be invalidated in order to protect free market transactions generally.)"

But who then is to choose which constitutional rules are appropriate candidates for entrenchment? And how are such decisions to be made?

Time and again, Amar seems to undervalue the relation of First Principles to basic theories of constitutionalism. Amar asserts that it is clear that "the substantive vision underlying my (and the Framers’) process-based theory of constitutional amendment is a vision of popular sovereignty, which in turn is rooted in the substantive values of equality... and neutrality (no substantive outcome—including the status quo—should be specially privileged)."21 This statement, however, is fundamentally inaccurate
in that the Framers specifically privileged the status quo in the Constitution by using supermajority rules—and not just in Article V. The Framers’ requirement of a two-thirds vote to expel a member from Congress, for example, or to remove the President from office, was an intentional preference of the status quo.\textsuperscript{212}

\section*{IX. CONSTITUTIONAL AMAR}

At the beginning of this Article, I characterized Amar, in the context of his First Principles assertions, as a “thinking man’s Freeman.” The term “Freemen” is a loose reference to supporters of an ill-defined, quasi-political movement—principally rural and western in scope—that advances radical ideas regarding such matters as states’ rights, gun ownership laws, conspiracy theories, and the United Nations.\textsuperscript{213} I offer this comparison because Amar’s First Principles, like the theories proffered by the Freemen, are not only feeble and historically inaccurate, but also socially dangerous.\textsuperscript{214} In both cases, such ideas provide an intellectual hook on which to hang a variety of half-baked, populist-inspired political ideas, such as the notion that the House of Representatives could unilaterally rescind a portion of the Constitution and thereafter legitimate such action through some sort of national referendum—a Freemen theory with an uneasy parallel to First Principles.\textsuperscript{215} Consider, for example, a broad comparison between the narrative of the Freemen movement and Amar’s discourse on First Principles.

Part of Amar’s theory requires reconciling the states’ purportedly “illegal” adoption of the Constitution by employing the rhetoric of popular sovereignty. Similarly, a consistent theme in Freemen political philosophy

\textsuperscript{212} See supra note 3 (listing the Constitution’s nine supermajority requirements).

\textsuperscript{213} See generally David C. Williams, The Militia Movement and Second Amendment Revolution: Conjuring with the People, 81 CORNELL L. REV. 879 (1996) (discussing the Freemen movement). For purposes of this Article, I employ the term “Freemen” as an umbrella to denote the entire radical right-wing movement sympathetic to Freemen views, including militias and Christian patriots, among others.

\textsuperscript{214} See Monaghan, supra note 31, at 175 (“In an era of talk show politics, single issue platforms, and media-oriented presidents and national figures, Federalist No. 43’s caution against an ‘easy’ amendment process takes on a special appeal.”) (citations omitted).

\textsuperscript{215} See, e.g., DANIEL LAZARE, THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY (1996). Lazare suggests that, just as the Founders ignored the amending provision of the Articles of Confederation when they proposed and ratified the Constitution, a simple majority of the House of Representatives could repeal Article V’s provision for equal state representation in the Senate, then submit such action to a special election: “If the people approve of what the House has done, they can vote the members who approved the amendment back into office. If they disapprove, they can vote them out and leave it to a new crop of representatives to sort out the mess.” Id. at 292. Lazare argues that although such measures would run afoul of Article V (and other constitutional provisions), such a procedure would not itself be unconstitutional; aside from Article V, there is another amending clause that is superior—the Preamble. In declaring that “We the People” ordain and establish the Constitution and everything in it, the Preamble provides its raison d’être: the establishment of justice, endurance of domestic tranquillity, etc. Implicit therein is the right of the People to alter or amend the Constitution, irrespective of the textual provisions of Article V. See id. To support this admittedly “farfetched” theory, Lazare cites the scholarship of Professor Amar. Id. at 293 n.6. Compare with Friedman & Delker, supra note 30 (criticizing Lazare’s theories of constitutional interpretation).
is that the Constitution was illegally adopted. Like Amar, the Freemen base their political theories on revered texts of the founding era. Finally, both Amar and the Freemen are "fighting the same fight Jefferson did against Jay and Hamilton—the battle between those who favor a powerful central government and those who favor local sovereignty." Here, however, Amar is the nationalist while the Freemen support an ultra-radical vision of states' rights.

At their core, Amar's First Principles and Freemen political philosophy bear a striking resemblance to each other in their outright rejection of controlling text (notwithstanding hundreds of years of tradition to the contrary) in favor of "higher law" notions such as popular sovereignty/majority rule. As the Freemen assert, "every man is a sovereign, free from the clutches of state or federal authority [or Article V?], answerable only to the divinely inspired words of the Constitution [We the People?] and the Bill of Rights [the Tenth Amendment?]". And many of the Freemen political philosophies—stripped of their nutty corollaries and lunatic cant—bear an eerie methodological resemblance to First Principles. For example, Amar tells us that we (presumably all of us) have got it—our reading of the Constitution—all wrong because "[w]e have been taught to look at the Constitution through the wrong end of the telescope." Thanks to Amar's First Principles, we can now see the Constitution as it was meant to be seen—the way the Framers originally saw it. Interestingly, many of the leaders of the Freemen movement assert that they—and only they—can understand re-

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A related Freemen theme is that Texas was illegally admitted to the union because of the failure of the people to approve the action. See, e.g., Charles Zewe & Lou Waters, Militia/Police Standoff in Texas Continues (CNN Today broadcast, Apr. 28, 1997) (transcript # 97042802V13 available from CNN). Reporting on the 1997 stand-off between the Republic of Texas militia group and Texas authorities, Charles Zewe explained:

What they [certain Texas Freemen] want is to get Texas back. They are a group of separatists who believe that Texas, when it was annexed to the United States in 1845 was annexed illegally. They claim that there should have been a vote of the people. That Texas was a sovereign independent nation, and that when the annexation took place by a vote of the Texas legislature, that was illegal and they claim they now want a vote, a referendum by everybody in Texas, on whether they want to be part of the United States. On top of that, they are asking for... 93 trillion dollars in damage[s].

Id.

217 See, e.g., Nicole Sterghos, 'Freeman' Awaits Trial—In Jail, SUN-SENTINEL, June 5, 1998, at 3B ("Freemen share in the basic belief that the U.S. Constitution, the Bill of Rights and the Magna Carta are the only true laws and that these make Freemen immune from certain taxes, fees and regulations.").


219 See Shinbaum, supra note 216 ("[M]any anti-government extremists, militiamen included, refuse to recognize the authority of legislators and law enforcement officials, and reject laws which they deem to be intrusive . . . ").

220 Nesbitt, supra note 218 (providing supporting quotations from Jefferson).

221 Amar, Central Meaning of Republican Government, supra note 18, at 761.
WILD POLITICAL DREAMING

ervered texts such as the Constitution and the Bible and that the rest of America has got it all wrong. Thus, Freemen leaders often see it as their role to educate the rest of us on what those founding era texts really mean.222

Amar places tremendous importance on the first three words of the Constitution—"We the People"—and so do the Freemen. In fact, one Freemen chapter in Colorado is called "We The People."223 Take, for example, a quick reading of the following paragraph and ask whether it is from Amar's writings or the rantings of the Freemen:

James Madison and the other framers of the Constitution knew that in the future that if our Constitution was not interpreted in the context and according to the history in which it was drafted, we would not have a proper understanding of the original intent of our founding fathers, or in the words of Madison, primary author and the supreme expert on the Constitution: "Do not separate text from historical background. If you do, you will have perverted and subverted the Constitution ...."224

The above passage appears on the first page of the Militia of Montana website. Although the Freemen's political philosophy has been termed "absurd, outrageous and even dangerous to the health of American democratic society,"225 it should be noted that a "lot of people [associated with the Freemen movement] believe what they are doing is quite legitimate" and a truly accurate reading of American history.226 Like Amar, the Freemen have a particular affection for the writings of Thomas Jefferson. The Freemen continually appropriate the writings of Jefferson to assert that a careful, close (almost Straussian?) reading of Jeffersonian writings on liberty and freedom will yield a body of coherent thought (at least to the Freemen shaman) that provides a justification for their movement.227 The "cult-like" status of Jefferson in the Freemen movement is legendary; such veneration was widely publicized when Oklahoma City bomber Timothy McVeigh was arrested reportedly wearing a T-shirt with his favorite Jefferson quotation: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."228 Time and again, Amar cites Jefferson's writings in support of First Principles; although Amar's reliance

222 See Zewe & Waters, supra note 216. As Charles Zewe explained:

David Koresh thought he was the only person that could read the Bible and understand it, and just like the Freemen up in Montana thought they could read the U.S. Constitution and understand it, [Freeman] Richard McLaren thinks he is the only one who can also read the U.S. Constitution and the Constitution of the State of Texas and the only one who knows international law.

Id.

223 Shinbaum, supra note 216 (discussing a Denver-based organization called "We the People," an anti-government group associated with the Montana Freemen).


225 Id.

226 Id.

227 See Nesbitt, supra note 218, at A25 ("In the expropriation of Jefferson, there is a larger lesson about the unique and sometimes baroque way freemen and Christian patriots interpret the Constitution.").

228 Id.
on Jefferson is certainly less radical, it is nonetheless equally grandiloquent at times, such as when he declares that "Jefferson’s majestic proclamation of self-evident truths has reached an even more exalted status: words which people praise and do read, but don’t understand. For if understood, these words, and their evolving meaning between 1776 and 1789, call for a fundamental rethinking of conventional understandings of the U.S. Constitution."

The problem with the philosophy of the Freemen is not only its theoretical incoherence, but also its historical inaccuracy: by selectively drawing from the works of the Framers, the Freemen end up with a theory that is wildly out of context. One Jefferson scholar has noted this feature of the Freemen’s theories:

"They’re bastardizing Jefferson’s views .... There’s an anti-democratic undergirding to this movement, cloaked by all this Jeffersonian libertarianism. They [the Freemen] pick and choose those items of the icon that fit their needs.... They pick and choose those sections of the Constitution they like. The ones they like, they distort. The ones they don’t like, they ignore.” It is a hallmark of the freeman and Christian patriot movement to loudly revere the Constitution and the Bill of Rights and insist on a literal interpretation of these words, instead of viewing it [sic] as most legal scholars do—as an elastic, living text, subject to interpretation and timely revision.

The above comparison is not offered to imply that Professor Amar is in any way sympathetic to the Freemen movement. On the contrary, Amar (like most Americans) seems to be diametrically opposed to almost everything the Freemen espouse. Rather, the parallels are offered to make two points. First, the founding era contains a large amount of rhetoric about the rights of the people that is at its base both populist and plastic; it can be used to justify any number of readings of the Framers’ intent. The Colonials were fighting a war and founding a nation—actions that call for leadership, ideology, and the emotional advocacy of a cause. By attempting to turn their rhetoric into a political treatise, the Freemen take the Framers’ entire project out of context and thereby subject it to perversion.

Second, despite the many parallels, there is an odd divergence of consequence between the theories of the Freemen and Amar. When benighted rural Americans wave historical texts in our face, selectively read history, and offer novel and unsupported interpretations of the Constitution, we regard

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229 Amar, Consent of the Governed, supra note 10, at 457. Cf. Militia Movement in the United States (visited Mar. 20, 2000) <http://www.worldfreeinternet.net/news/wws33.htm> (“Americans... have not taken the time to read it [the Constitution] in detail, to familiarize themselves with the fact that all it discusses are those powers that shall be invested in the three branches of the Federal Government.”).

230 Nesbitt, supra note 218, at A25 (citation omitted).

231 See, e.g., Lessig, supra note 24, at 868-69. Lessig notes:

In Sunstein’s terms, this agreement about a “simple majority of the electorate” was incompletely theorized; when we extend it to unforeseen contexts, it is no longer plain exactly how this original agreement should be extended. And when one accounts for the institution making the extension—here a court—the suggestion is that that extension should be in accord with currently backgrounded views. These views, the argument goes, could well require a supermajority of the American electorate before an amendment could be considered ratified.

them as nutty and half-baked. When American academics and law professors do the same, we call them “brilliant,” praise their work as “refreshing,” and label their theories “novel.” But is there really a difference? There is in the sense that the Freemen are considered wing nuts, while legal counsel for President Clinton praise Amar as “[o]ne of America’s leading professors of constitutional law.” It has been suggested that “the crusading spirit threatens the scholarly spirit.” With Amar’s First Principles this seems especially true. Admittedly, my criticisms of Amar in this Article are caustic. If we expect law professors to be careful thinkers who reason rigorously and candidly, rather than aloof intellectuals who spin sophistries, then I believe these criticisms are warranted, and that First Principles is an impotent theory with little to offer the political and legal community.

X. CONCLUSION

As long as American democracy exists without a clear understanding of when it is appropriate to depart from majority rule, theorists, historians, legal scholars, Freemen, and assorted pretenders to the throne will offer up novel theories purportedly based on history that conveniently support a preferred course of action. All of these theories must be analyzed with the understanding that nature abhors a vacuum, and that a theoretical one is all too easily filled by snake oil and tripe. Perhaps the simplest way to refute the body of work that First Principles comprises is to put stock in the brief words of William Davie, a delegate to the Constitutional Convention, who maintained during the drafting of the Constitution in Philadelphia that “[i]t must be granted that there is no way of obtaining amendments but the mode prescribed in the Constitution; two thirds of the legislatures of the states . . . may require Congress to call a convention to propose amendments, or the same proportion of both houses may propose them.” I believe this is what the Framers meant, intended, and understood, Amar and the Freemen notwithstanding.


234 Peter Berkowitz, Reduction and Betrayal, NEW REPUBLIC, Aug. 23, 1999, at 38, 39 (reviewing RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999)).

315 4 DEBATES, supra note 80, at 236-37 (statement of William Davie).