FOR THE PEOPLE: DIRECT DEMOCRACY IN THE STATE CONSTITUTIONAL TRADITION

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The past quarter century has witnessed two interrelated developments that bear directly on the themes of this symposium. The first is the increased reliance on the initiative in the American states. From 1950-1974, states adopted only 279 initiatives, but in the succeeding 25 years, they adopted 929.[1] This pronounced shift cannot be attributed to an increase in the number of states employing the device: since 1975, only Mississippi has amended its constitution to authorize the constitutional initiative, and by the end of the century it had only considered two constitutional initiatives, neither of which was adopted. Instead, the proliferation of constitutional initiatives reflects a new—or, I would argue, renewed--willingness to circumvent established institutions of government that are perceived as unresponsive to the popular will. Some commentators trace this new constitutional populism to California's adoption in 1978 of Proposition 13, which froze property tax rates. But although Proposition 13 may have demonstrated the potential of the constitutional initiative and spawned analogous restrictions in other states, it was more a symptom than a cause.

Following close upon the development of this constitutional populism has been an increase in the number and fervor of attacks on the initiative and on other forms of direct democracy.[2] To a considerable extent, these attacks echo complaints about direct democracy voiced originally by opponents of the Progressives during the early years of the twentieth century, an ironic twist since many of those criticizing the initiative today define their political stance as progressive. (In fairness, not all the recent criticism repeats earlier complaints—consider, for example, the oft-repeated claim that initiatives have exacerbated divisions along the lines of race, ethnicity, and sexual orientation.) In this essay, I focus on a common and long-standing argument against direct democracy, what might be called the "if Madison could see this, he would roll over in his grave" argument.

According to this argument, the Founders` omission of mechanisms for direct democracy in the United States Constitution was neither accident nor oversight but rather a conscious choice. My fellow panelist, Joseph Bessette, has elegantly summarized this perspective in his excellent book on deliberation in Congress.[3] According to Bessette, the Founders believed that a properly designed system of representative government would be more likely to be guided

by the "cool and deliberate sense of the community" than would a direct democracy and that the "public voice, pronounced by the representatives of the people, [would thus] be more consonant to the public good than if pronounced by the people themselves, convened for that purpose." The key phrase is "properly designed," for the way in which legislatures are constructed affects both the relations between representatives and their constituents and the dynamics within the legislative bodies themselves. By creating large congressional districts, the Founders sought to prevent the election of local demagogues and to place governmental power in the hands of persons of stature, those who would be able to discern the interests of the citizenry and the most effectual means of serving those interests. In addition, large districts meant that the legislature would be relatively small, which would facilitate reasoned deliberation. By giving representatives an extended term of office, the Founders guaranteed them the independence necessary to oppose the "temporary delusion[s]" of the populace. Their extended tenure also would enable them to gain the knowledge and governmental experience necessary to legislate wisely. In sum, the Founders believed that a system promoting deliberation by experienced and knowledgeable representatives persons would tend to "refine and enlarge the public views" and thus be more likely to serve "the permanent and aggregate interests of the community" than would a system of direct popular rule.[4]

I have no quarrel with Bessette's depiction of the views of the architects of the Federal Constitution—perhaps Madison *is* turning over in his grave at the prospect of proliferating direct democracy. I do object to the whiff of nativism that occasionally accompanies the "rolling over in his grave" argument: the insinuation that the initiative should be rejected because it is a ghastly foreign import from a country previously famous only for army knives and fondue. But my more serious objection is to the oft-repeated claim that the views of Madison and other framers of the Federal Constitution are authoritative because they represent *the* American constitutional tradition. Even a moment´s reflection reveals how dubious this depiction of the American constitutional tradition is. The United States has not one constitution but fifty-one. These constitutions were drafted at various stages in the nation´s history, and their contents (not surprisingly) reflect the constitutional thought regnant at the time of their adoption. The political theory underlying state constitutions has often diverged from the perspective of 1787--in fact, some state constitution-makers expressly repudiated the handiwork of James Madison and his compatriots. A delegate to the Nevada convention of 1864, for example, attacked the "profound and reverential regard which some profess for the men who assembled in the early years of the republic, *when the government was yet but an experiment*;" and a California delegate in 1878 insisted that there was nothing to be gained by looking at constitutions formed in such "primitive times." Even eighteenth-century state constitutions reflected a distinctive perspective on republican government and its problems--otherwise, Madison would not have spent so much time criticizing these constitutions at the Constitutional Convention and in *The Federalist Papers*.

This all suggests that there is a distinct state constitutional tradition, one which differs in significant respects from the Federal constitutional tradition.[5] In delineating the relation of direct democracy—voting on measures, not candidates—to this tradition, I advance three claims. First, the initiative—and direct democracy more generally—fit comfortably within the state constitutional tradition. Second, this compatibility derives from the belief, basic to the state constitutional tradition, that the primary danger facing republican government is minority faction--power wielded by the wealthy or well-connected few--rather than majority faction. Third, the state tradition's divergence from *Federalist #10*'s diagnosis of the threats to republican government is paralleled by a skepticism about the "republican remedies" proposed in *The Federalist Papers*. More specifically, the state constitutional tradition is characterized by a distrust of government by elected representatives —representation not only fails to solve the problems afflicting republican government, but it may even aggravate those problems by empowering minority factions. If this is so, of course, then direct democracy--or mechanisms designed to approximate it--become much more attractive. The remainder of this essay is devoted to elaborating and justifying those claims.

The Eighteenth Century

Direct popular participation in constitution-making and in constitutional revision has been a feature of state constitutionalism from the very outset. The declarations of rights of the initial state constitutions acknowledged that "all political power is vested in and derived from the people only" and that the people consequently have "an incontestable, unalienable, and indefeasible right" to "reform, alter, or totally change [government] when their protection, safety, prosperity, and happiness require it" (Va. Declaration of Rights, sec. 3).[6] By the 1830s the mechanism for obtaining direct popular approval had become standardized: referenda on whether to hold constitutional conventions and on whether to ratify proposed constitutional revisions and constitutional amendments. Prior to that, the states experimented with alternative means of assessing public support for constitutional innovations, including (in Maryland, North Carolina, and Pennsylvania) distributing copies of the draft constitution among the citizenry prior to final passage. The key point, of course, is not the mechanism used to tap popular sentiment but the fact that tapping such sentiment, giving state citizens a chance to participate directly, was viewed as perfectly natural and indeed obligatory.

In the day-to-day operation of state government, state constitutions of the eighteenth and early nineteenth centuries tended to concentrate power in the state legislature. In addition to enacting laws and imposing taxes, the legislatures in most states selected the governor and state judges and appointed other state officials (and oftentimes local officials as well). Legislators could also remove officials by impeachment and require the removal of judges by address. Moreover, these broad powers existed virtually without check—most governors

lacked the veto as well as an independent political base, judicial review was as yet undeveloped, and state constitutions imposed few restrictions beyond those enshrined in state declarations of rights. Why, one might ask, would state constitution-makers lodge such power in a single institution, particularly if they were skeptical of representative government?

In part, the answer is that the legislature was the only institution that directly represented the citizenry. Even more important, however was the relationship between representative and constituents envisioned by state constitutions, which differed dramatically from that sketched in *The Federalist Papers*. Simply put, state constitution-makers sought to approximate direct democracy in their systems of representative government. The radical Pennsylvania Constitution of 1776, which was later copied by Vermont, illustrates most clearly how this might be done.

The Pennsylvania Constitution vested broad power in a popularly elected unicameral legislature, granting it—in addition to specific grants of power—"all other powers necessary for the legislature of a free state or commonwealth" (sec. 9). The legislature was large, with small electoral districts that not only facilitated close contact between legislators and their constituents but also made it more likely that representatives would mirror demographically the people they represented. The Constitution apportioned the legislature on the basis of the number of taxable inhabitants—"the only principle which can . . . make *the voice of a majority of the people the law of the land*" (sec. 17, italics added). Annual election kept legislators on a tight rein, and a constitutionally prescribed rotation in office served to avoid "the danger of establishing an inconvenient aristocracy" (sec. 19). Finally, the Constitution wove various plebiscitary elements into the fabric of government. Popular control over lawmaking was enforced by imposing a waiting period for popular consideration of proposed legislation. Except "on occasions of sudden necessity," enactments did not take effect prior to the election of a new assembly, creating an opportunity for voters to install legislators pledged to repealing unpopular legislation. This, combined with the important right of the people to "instruct their representatives," served to reinforce the point that "the people of this State have the sole, exclusive, and inherent right of governing" and that "all officers of government . . . are their trustees and servants" (Pa. Declaration of Rights, arts. 16, 3, and 4).

The Pennsylvania Constitution of 1776 thus was premised on the notion that representation was a necessary evil, acceptable only because distance and population size precluded the operation of direct democracy, and that the system of representative government should therefore replicate direct democracy insofar as possible, with representatives faithfully re-presenting the views of the populace, rather than (as Madison recommended) refining and enlarging those views. Neither Pennsylvania's effort to approximate direct democracy nor the devices it used to accomplish this end were unique. All but one of the original states kept members of the lower house of the state legislature on a tight rein through annual elections, and the sole exception, South Carolina, bowed to this consensus in 1778. By 1789 seven states had instituted annual elections for

members of the upper house as well. Most states emulated Pennsylvania in establishing large lower houses, with the expectation that small electoral districts would closely link legislators and their constituents. Five state constitutions also followed Pennsylvania's in expressly authorizing the instruction of representatives, and the practice was widespread even in states that did not expressly recognize it in their constitutions. Virginia's Declaration of Rights summarized the prevailing understanding: "All power is vested in, and consequently derived from, the people; . . . magistrates are their trustees and servants, *and at all times amenable to them*" (sec. 2, italics added).

No discussion of direct democracy during the late eighteenth and early nineteenth centuries would be complete without mention of the jury. Juries gave citizens the opportunity to participate directly in the administration of law, just as the instruction of representatives and the other mechanisms I have described gave them the opportunity to participate in its creation. Alexis de Tocqueville highlighted the close connection between these two forms of direct participation in governance, observing: "The jury system as understood in America seems to me as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail."[7] Thomas Jefferson went even further, insisting that if called upon to decide "whether the people had best be omitted in the legislative or judiciary departments," he "would say it is better to leave them out of the legislative" as "the execution of laws is more important than the making of them."[8]

One should underscore Tocqueville's phrase "as understood in America," because the role of the jury in America differed from that in England in ways pertinent to discussions of direct democracy.[9] In England, a division of responsibility had developed by the eighteenth century, such that juries decided questions of fact and judges questions of law. But during the decades prior to the Revolution, juries in America came to be understood as having the authority to render judgment not only on matters of fact but also on matters of law. This was not an invitation to popular lawlessness. Rather, the jury served as a sort of lower house in the judicial branch, allowing the people to counter arbitrariness and lawlessness by judges (who after all lacked the institutional safeguards of independence). Even more important, the authority of jurors to determine the law stemmed from the democratic belief that ordinary citizens possessed as great an ability as did a judge to discern what the law was.

This understanding of popular competence to participate directly in the administration of justice found expression in eighteenth-century state constitutions. In fact, the right to jury trial --what the New Jersey Constitution called "the inestimable right of trial by jury" (art. 22)--was the only right guaranteed by all the original state constitutions. Even those constitutions without declarations of rights safeguarded the right to trial by jury. The language common to several of these provisions might be interpreted as guaranteeing to juries the same broad authority they had exercised during the colonial era. The Pennsylvania Constitution of 1776, for example, mandated that "Trials shall be by

jury *as heretofore*" (sec. 25, italics added). The Georgia Constitution of 1777 was more explicit, mandating that "the jury shall be judges of law as well as of fact" (art. 41). But the important point is that all eighteenth-century state constitutions recognized and protected the jury as a form of direct popular participation in governing.

The Nineteenth Century

By the 1830's, citizens in most states had concluded that their initial effort to approximate direct democracy had failed. In particular, they believed that state legislators remained more responsive to the wealthy and well-connected than they were to the general public. This prompted a wave of constitutional reform. Fifteen of the twenty-four states in the Union by 1830 revised their constitutions by 1860, and two of them did so twice. Most state constitutions developed during this period sought to secure the independence and autonomy of the executive and judicial branches as a vital step in the creation of a system of checks and balances. They secured this independence by replacing legislative appointment of governors and other executive officials with popular election, and after 1846 they extended popular election to judges as well. The introduction of checks and balances might suggest a movement toward emulating the Federal Constitution; but despite surface similarities to the Federal model, the state reforms were primarily concerned with preventing faithless legislators from frustrating the popular will, not with checking majority faction. The fact that executive officials and judges were directly elected was crucial. Popular election not only ensured accountability, but it also allowed executive officials and judges to claim that they had just as strong a connection to the people, the source of all political authority, as did legislators.

A delegate to the South Dakota constitutional convention of 1889 provided what might be seen as the motto of nineteenth-century constitution-makers: "The object of constitutions is to limit the legislature."[10] Few state constitution-makers believed that checks and balances were sufficient to achieve that end. Distrust of elected representatives led states to impose various procedural requirements on the legislative process, ranging from mandating that all bills be referred to committee to requiring that bills embrace a single subject and that their titles accurately reflect their contents. These provisions served to increase the transparency of the legislative process, thereby facilitating popular control and deterring legislative misbehavior. As the century progressed, constitutional restrictions on legislatures and on the legislative process proliferated. Late nineteenth-century constitutions typically restricted the state legislature to biennial regular sessions and limited the length of those sessions. In fact, a delegate to the California convention of 1879 even proposed that "[t]here shall be no legislature convened from and after the adoption of this Constitution . . . and any person who shall be guilty of suggesting that a Legislature be held, shall be punished as a felon without benefit of clergy."[11] State constitutions also imposed numerous subject-matter restrictions on legislative action, seeking to combat

special privilege and the threat of corruption by forbidding legislatures from enacting special or local laws in various areas of public policy. The numbers speak for themselves here: the Illinois Constitution of 1870 prohibited the state legislature from addressing twenty fields of local or private concern, the Pennsylvania Constitution of 1873 forty, and the California Constitution of 1879 thirty-three.

These efforts to rein in state legislatures did not signal an abandonment of the hope of approximating direct democracy. However, during the nineteenth century the locus of that hope shifted from state legislature to the constitutional convention. A delegate to the Illinois convention of 1847 expressed this new perspective: "We are what the people of the State would be, if they were congregated here in one mass meeting."[12] What resulted from this shift in perspective was a truly extraordinary burst of constitutional activity: over the course of the century, the American states held 144 constitutional conventions and adopted ninety-four constitutions.[13]

Several factors recommended the constitutional convention as a mechanism for approximating direct democracy. First, the membership of state constitutional conventions tended to mirror the populace of the states. Convention delegates were--like state legislators--elected by the people, but unlike legislators, they did not tend to be professional politicians. Although no comprehensive study of the backgrounds of convention delegates exists, the available evidence indicates that delegates tended to resemble their constituents quite closely, thus facilitating a true re-presentation of their views.[14]

Second, the people exercised control over the calling of conventions. Whereas the legislature met regularly, a convention came into being only by popular vote, when the people wanted fundamental political issues addressed. Thus when convention delegates met, they had a ready-made agenda of popular concerns to guide their deliberations. It is true, of course, that in most states the people could not vote to call a convention unless the state legislature first put a convention call on the ballot. Although this might seem a major impediment, in practice it did not turn out that way. Popular pressure could induce even reluctant legislators to schedule a vote on a convention, as happened in Virginia in 1829 and in Mississippi in 1832. When legislators refused to bow to the popular will, citizens sometimes took matters into their own hands and convened extra-legal conventions. They defended their actions in terms that emphasized the importance of direct popular rule, insisting that the people were simply exercising their "undubitable, unalienable, and indefeasible right to reform, alter, or abolish government" in order to promote the public good (Va. Declaration of Rights, art. 3). The most famous of these extra-legal conventions occurred in Rhode Island in 1842 during the Dorr Rebellion and led to the landmark Supreme Court ruling in *Luther* v. *Borden*.[15] Yet this was hardly an isolated incident–Maryland, Michigan, and Kansas all had extra-legal conventions during the nineteenth century.

Third, ratification by referendum afforded the people an opportunity to approve or reject the measures proposed by constitutional conventions--not an

approximation of direct democracy but the real thing. State electorates did not simply rubber-stamp what conventions proposed--from 1877-1887, for example, voters in six states rejected proposed constitutions. Usually voters considered the proposed constitution as a whole rather than voting on particular provisions. Yet in at least some states the practice developed of submitting controversial proposals as separate items, lest opposition to them doom the entire document. In New York, for example, the convention of 1846 permitted a separate vote on a provision guaranteeing voting rights for African-Americans, and the convention of 1894 authorized separate votes on provisions dealing with apportionment and with canals. It need hardly be said that this separate submission of provisions closely resembles the constitutional initiative.

The nineteenth-century faith in the constitutional convention as a close approximation of direct democracy led, as has the constitutional initiative, to a constitutionalization of policymaking. The constitutional convention was viewed as an opportunity to escape politics as usual, the politics of corruption and parochial advantage, and to replace it with a politics of the popular will and the public interest. Consequently, convention delegates inserted a great deal of legislation into the constitutions they wrote, seeking a penetration of the more pristine politics of constitution making into the realm of legislation. Commenting on the phenomenon, James Bryce wrote that the delegates "neither wished nor cared to draw a line of distinction between what is proper for a constitution and what ought to be left to be dealt with by the state legislature."[16] But others viewed the delegates' actions more positively. Governor Arthur Mellette eloquently presented the case for constitutional legislation at the South Dakota convention of 1889: "If you know what is the proper thing to embrace in your legislation, the more there is in the constitution the better *for the people*. . . . It is wise, in my judgment, after *the people* have decided in what direction their interests lie, to embody them in the fundamental law of the land make it permanent."[17]

From the Constitutional Convention to the Initiative

Whether state constitutional conventions during the nineteenth century in fact approximated direct democracy may be open to dispute (although it is interesting that many of those who today oppose to calling a convention to amend the Federal Constitution base their opposition on the worry that it would reflect public opinion all too well). But even if state constitutional conventions did reflect public opinion, a convention is a rather blunt instrument for dealing with governmental institutions that are not responsive to the popular will. After all, a convention is an extraordinary and occasional intervention in the political process, while the problems it is seeking to address are ongoing ones. In any event, the idea of the constitutional convention as a mechanism for popular policymaking has faded. For most of the twentieth century, constitutional reformers have mounted a sustained attack on the practice of enshrining public policy in state constitutions; and the success of their efforts is reflected in the fact that--at least in states that lack the constitutional initiative--the movement has

been toward streamlining constitutions by removing constitutional legislation. The number of state constitutional conventions has decreased dramatically from the nineteenth to twentieth centuries, and the impetus for conventions has shifted from the populace to political elites. Indeed, state electorates in recent decades have become skeptical of the benefits of constitutional revision, rejecting several proposed constitutions and consistently rejecting convention calls in those states that mandate periodic votes on whether to hold a convention.

The decline of the constitutional convention has led to the emergence of the initiative as the twentieth century's preferred mechanism for ensuring that government reflect the popular will. Like the convention, the initiative represents an attempt to deal with the problem of unresponsive and unaccountable legislators. And like the convention, it seeks to make the popular will effectual by translating it directly into public policy. But unlike the convention, it seeks to afford the people the opportunity to make policy on a regular basis rather than merely on extraordinary occasions. Of course, whether the initiative in fact empowers the populace remains a hotly contested question.

Conclusion

In his Gettysburg Address, Abraham Lincoln spoke of "government of the people, by the people, and for the people." Both the long-standing efforts to approximate direct democracy and the current reliance on the constitutional initiative are rooted in a perception that even a system of government *of* the people and *by* the people may not produce a government *for* the people. Recent constitutional initiatives have directly addressed this concern. For example, term limitations have sought to weed out politicians who are more concerned with careerism than with the public good; fiscal restrictions have sought to limit the damage that such politicians can do; and restrictions on pensions and other perks for public officials have sought to discourage anyone from pursuing public office out of material self-interest. Initiatives restricting state taxing and spending have further served the goal of a government responsive to the people rather than to special interests by limiting the resources that legislators can dispense as benefits to such interests. Finally, some initiatives—for example, those dealing with affirmative action, with the right to die, with nuclear power, and with the tobacco industry—have addressed issues of broad public concern that legislators had refused to put on the public agenda, either out of a fear of taking stands on contentious issues or out of a concern to avoid antagonizing powerful special interests.

This concern about the lack of popular control over public officials has been a recurring theme in state constitutionalism, although the means utilized to deal with this endemic problem have varied over time, with new mechanisms replacing old as the old have proven ineffective. During the late eighteenth and early nineteenth centuries, the primary mechanism was concentration of power in the hands of the state legislature, the people’s representatives, with annual election, instruction of representatives, and other devices used to bind those

representatives to their constituents‘ wishes. During the nineteenth century, constitutional bans on special legislation were designed to make it more difficult for legislators to serve special interests, and requirements promoting transparency in the legislative process were adopted to deter legislative misconduct by making it easier to detect and punish such misconduct. During the nineteenth century also, constitutional conventions justified their insertion of detailed policy provisions into state constitutions by arguing that it was better to have policy made by a body truly responsive to the people than by political institutions that were invariably infected by corruption and self-interest. The adoption of the initiative during the twentieth century and its increased use in the latter decades of that century thus represent a continuation of efforts to secure government both by and for the people. As such, they fit comfortably within the American constitutional tradition properly understood--that is, an understanding that encompasses constitutional thought and practice at both the Federal and the state levels.

Although I have argued that the initiative represents an effort to deal with the problem of unresponsive and unaccountable government, I do not claim that it has succeeded. Critics of the initiative have charged that it merely opens up a new arena for elite politics, in which special interests and wealthy or well-positioned policy entrepreneurs determine the constitutional agenda and manipulate the public. The evidence on this point is mixed. On the one hand, anecdotal evidence confirms that wealthy individuals and organizations have financed ballot initiatives, and officials already influential in traditional political arenas have used initiatives to advance their policy agendas and, not coincidentally, their political careers. On the other hand, poll data reveal that those initiatives that have gained voter approval typically reflect popular views, even when turnout is less than optimal. The question, of course, is whether successful initiatives tap deep-seated preexisting views or merely manufacture views that did not exist prior to the initiative campaign.

This essay also does not claim that government policy that is more faithful to the unrefined views of the citizenry is a good thing, either in particular instances or in general. The argument of *The Federalist Papers* on the diseases most incident to republican government, even if drafted during what the California convention delegate dismissed as "primitive times," has certainly not been refuted. It may well be that one secures better government by being less simply democratic. Nevertheless, the history I have recounted in this paper does indicate that the argument on the dangers to popular government has two sides, each with a claim to being an important part of the American constitutional tradition. It also suggests that the question cannot readily be resolved empirically, because none of the mechanisms that the states have employed to deal with the problem of minority faction has altogether succeeded, at least in the long run. It has been suggested that philosophers are so fond of their questions that they are reluctant to see them definitively answered. I suspect, however, that it is the difficulty of determining whether direct democracy is a desirable element of popular government—and perhaps the fact that most of us are not

philosophers—that will have us continuing to debate the question of direct democracy for a long time to come.

NOTES

1. These figures are compiled from data provided by the web site of the Initiative and Referendum Institute: www.iandrinstitute.org.

2. Illustrative scholarly critiques of direct democracy include David G. Lawrence, California: The Politics of Diversity (Minneapolis: West Publishing, 1995); Hans Linde, "When Initiative Lawmaking Is Not Republican Government: The Campaign Against Homosexuality," Oregon Law Review 72:20-39 (1993); and Linda Fountain, "Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating By Initiative," Southern California Law Review 61:733-776 (1998). For a journalistic broadside against direct democracy, see David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (New York: Harcourt, Inc., 2000).

3. Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press, 1994).

4. All quotations are from Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961): #63 at 384; #10 at 82; #71 at 432; #10 at 82; and #10 at 77.

5. This position is developed in greater detail in G. Alan Tarr, *Understanding State Constitutions* (Princeton, N.J.: Princeton University Press, 1998).

6. See also, for example, North Carolina Constitution of 1776, art. 1; Massachusetts Constitution of 1780, Preamble; and New Hampshire Constitution of 1784, Bill of Rights, art. 1. For discussion of these provisions, see Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980), chs. 2-3; Akhil Reed Amar, "The Consent of the Governed," *Columbia Law Review* 94 (March 1994): 457-508; and Christian G. Fritz, "Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate," *Hastings Constitutional Law Quarterly* 24 (Winter 1997): 287-357.

7. Alexis de Tocqueville, *Democracy in America,* ed. by J.P. Mayer (New York: Harper & Row, 1966), 273.

8. *The Writings of Thomas Jefferson* (Washington, 1907), vol. VII, p. 423 (14 July 1789).

9. These differences are discussed in Shannon C. Stimson, *The American Revolution in Law; Anglo-American Jurisprudence before John Marshall*

(Princeton, NJ: Princeton University Press, 1990).

10. Quoted in John D. Hicks, *The Constitutions of the Northwest States* (Lincoln: University of Nebraska University Studies, 1923), 52.

11. Quoted in Morton Keller, *Affairs of State: Public Life in Nineteenth Century America* (Cambridge, Mass.: Belknap Press, 1977), 114.

12. Quoted in Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (New York: Basic Books, 1987), 98.

13. These data are drawn from Albert L. Sturm, *Thirty Years of State Constitution-Making*, 1938-1968 (New York: National Municipal League, 1970), 54, table 10.

14. See, for example, David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840-1890* (Berkeley: University of California Press, 1992), and Gordon Bakken, *Rocky Mountain Constitution Making, 1850-1912* (Westport, Conn.: Greenwood Press, 1987).

15. *Luther v. Borden*, 48 U.S. 1 (1849). For a discussion of these events, see Marvin E. Gettleman, *The Dorr Rebellion: A Study in American Radicalism, 1823-1849* (New York: Random House, 1973).

16. James Bryce, *The American Commonwealth* (Chicago: Charles H. Seagal, 1891), 1: 394.

17. Quoted in Hicks, *Constitutions of the Northwest States*, 54 (italics added).