Are Initiatives and Referenda Contrary to the Constitution's "Republican Form of Government"?

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July 9, 1999

Executive Summary

Citizens increasingly have used initiatives and referenda to circumvent or check unresponsive legislatures. For example, through initiatives, citizens adopted reforms such as term limits and tax and expenditure limitations.

Those who oppose reform frequently challenge initiatives and referenda in court in order to prevent or overturn public votes. Increasingly, they have been resurrecting an old argument that initiatives and referenda violate the U.S. Constitution's "Guarantee Clause" (Article IV, Section 4), by which the United States guarantees each state a "republican form of government." They argue that such methods of direct democracy are inconsistent with the republican form because that form must be a government in which decisions are made wholly by the people's representatives, not by the people themselves. In support, they cite a handful of statements by a few of the Constitution's Framers.

In this paper, Professor Natelson examines the historical record and shows that opponents of initiative and referendum are clearly wrong on this point. He shows that although one of the Framers—Madison—had a personal preference for a wholly representative form, all of the Framers who spoke on the issue, including Madison, acknowledged that direct democracy could be major, even a dominant, part of a "republican" government.

Finally, Professor Natelson shows that a principal reason modern writers have so misunderstood the Framers' views on this subject has been the failure of modern schools to properly impart the precious Greco-Roman tradition so central to the thought of the Founders.

I. Introduction

A recurrent issue in discussions of the initiative and referendum ("I&R") process has been whether, and to what extent, I&R violates that portion of Article IV, Section 4 of the United States Constitution providing that the United States shall guarantee every state a "republican form of government"—a provision commonly called the Guarantee Clause.[ii]

The issue arises because opponents of I&R argue that to be "republican," the people must enact laws exclusively through their representatives rather than directly. Opponents draw a sharp distinction between republican and democratic government, and maintain that direct democracy is inconsistent with the republican form.

The question arose before the U.S. Supreme Court in 1912 in a test of Oregon's I&R system. In that case, however, the court sidestepped the point by holding that whether a state had a

republican form of government is a political question for Congress, and therefore non-justiciable (meaning that the federal courts would not intervene).[iii] That seemed to settle the issue at the federal level.

At the state level, when courts have reached the issue they have decided almost uniformly that I&R is consistent with republican government—that republicanism and democracy are not mutually exclusive categories.[iv] Indeed, some courts have gone further, holding that I&R is a fundamental part of republican government.[v]

Nevertheless, political interest groups discontented with I&R or with the results of particular ballot measures have continued aggressively to contend that whether a state has a republican form of government is a justiciable issue in state court and that I&R either entirely or in specific cases violates the Guarantee Clause. Indeed, I&R opponents have intensified this line of argument during the 1990s. Although the courts continue to reject it,[vi] to my knowledge they have not judged it so frivolous as to justify imposition of sanctions on those raising it.

The claim that I&R violates the Guarantee Clause is based almost entirely on the supposed view of the Constitution's Framers that republicanism and democracy were wholly mutually exclusive categories.[vii] A few commentators support this view, also appealing to the historical record.[viii] The response from opposing writers has not been as strong as it might have been; for example, one of the best known of those writers claims merely that such contentions are "not proven."[ix]

This paper concludes, however, that to the extent such Guarantee Clause arguments are based on the Founders' understanding of republicanism, they are less than "not proven." They are frivolous.

II. Examining The Anti-I&R "Guarantee Clause" Argument

A. The Basis of the Argument

Those arguing that I&R is inconsistent with the republican form maintain that, in the Framers' view, no government is "republican" unless it relies on institutions wholly representative. Therefore, the argument goes, institutions of direct democracy[x] disqualify a state from having a republican form of government.

This historical case has several props. The first is the Framers' known antipathy to excessive democracy and their corresponding preference for checks and balances.[xi] Another is Madison's personal preference for republics purely representative.[xii] Still a third prop consists of a few fragments, primarily from the writings of Hamilton and Madison that, when selectively (and sometimes deceptively) excerpted, seem to exclude institutions of direct democracy from republican governments.[xiii]

As explained below, the Framers would have viewed as absurd the notion that a government is disqualified as a republic if it is not wholly representative. That notion seems plausible to some today only because those examining the issue seem to have overlooked two points:

· The Framers preferences for republican government did not fully determine their definition of republican government; but on the contrary:

· They specifically and repeatedly classified as "republican" numerous states that they themselves specifically and repeatedly acknowledged featured significant, even dominant, institutions of direct democracy.

B. Framers' Disapproval Does Not Prove Prohibition

The first point frequently overlooked is that the Framers preferences for republican government did not fully determine their definition of republican government. This would seem obvious from the historical record: There were all sorts of things the Framers wanted that the Constitution did not prescribe, and there were all sorts of things they detested that the Constitution did not proscribe. For example, many Framers believed that paper money was evil,[xiv] but the Constitution specifically banned only the state governments, not the national government, from "emit[ing] Bills of Credit.[xv] It is, in other words, an inadmissible leap to conclude that because some of the Framers disliked direct democracy they intended the Guarantee clause to abolish it.

There had to be a certain amount of latitude in the Guarantee Clause, if only because, as prominent historian Forrest McDonald has observed, "...though the Framers shared the commitment [to republicanism] in the abstract, they were far from agreed as to what republicanism meant, apart from the absence of hereditary monarchy and hereditary aristocracy."[xvi] If anything, Professor McDonald's observation overstates the level of agreement.[xvii] So it is not surprising that when James Madison, the Framer most often relied on by I&R opponents, addressed the Guarantee Clause, he offered no suggestion that it was targeted against democracy, even though excess democracy was a concern. Madison saw the Clause as serving almost exactly the opposite purpose: to "defend the system against aristocratic or monarchical innovations."[xviii] Other prominent Framers, including Edmund Randolph,[xix] who introduced the Virginia Plan, and Nathaniel Gorham,[xx] who chaired the Committee of the Whole, expressed similar sentiments while discussing the Guarantee Clause.[xxi]

To be sure, in 1787 government in all thirteen states was wholly representative at the state level (although New England towns governed themselves through democratic town meetings). But no one suggested this must remain unchanged. Madison for one liked the wholly representative system, but he also recognized that the Constitution did not require adherence to existing forms. He explained:

As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the federal constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter.[xxii]

Thus, despite his strong views on what kind of republican institutions would work best, Madison considered the class of permissible alternatives under the Guarantee Clause to be broader than his particular preferences. His tolerance in this respect was shared by Hamilton: While Hamilton

favored a constitution far more centralized than what was eventually adopted,[xxiii] he viewed the final draft—and other options—as republican.[xxiv]

C. The Framers' Own Statements Prove Permission

The foregoing shows that the Framers' dislike for direct democracy does not prove that their Constitution abolished it. The second and more important overlooked point is that their understanding of republican government clearly permitted institutions of direct democracy. To understand why this is so, however, it is best to understand what they knew, or thought they knew, of Greek and Roman history.

During the Framers' generation, many educated men learned Greek, all learned Latin, and all studied extensively the history and literature of the ancient Mediterranean world. Their understanding of the various forms of government were informed heavily by classical authors such as Polybius and Cicero. Modern Americans find it difficult to appreciate the extent to which the classical world informed the Framers' outlook; for unlike Europeans we do not live among the physical remains of the classical world and our "education" has largely severed us from our roots.[xxv] Ignorance of those roots by modern courts and commentators seems to be a principal reason why the writings of the Framers, and particularly Madison, on republicanism have been so jarringly misinterpreted.

Consider, for example, the passage in Federalist No. 10 (Madison) most often cited for the claim that I&R is inconsistent with republican government:

> . . . a pure democracy [is] a society consisting of a small number of citizens, who assemble and administer the government in person. . . .
>
> A republic [is] a government in which the scheme of representation takes place... Let us examine the points in which it varies from pure democracy. . .
>
> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.[xxvi]

Those arguing that I&R violates the Guarantee Clause interpret this passage as meaning that republican government requires institutions wholly representative. Yet one might just as well interpret it to mean that republican government must have some representative institution. Thus, a free government could be republican if it is not a "pure democracy"—that is, if it is not a government in which "a small number of citizens . . . assemble and administer the government in person." Which interpretation is correct?

Note an immediate problem with interpreting Madison's construct as a spectrum of free governments containing only pure democracies and purely representative republics. Such a spectrum would exclude free governments featuring both institutions of representation and institutions of direct democracy—a category that includes 49 American states.[xxvii] Those

states are not wholly representative, but neither are they administered solely and in person by the entire citizenry. As so interpreted, Madison's construct simply omits them.

Fortunately, Madison himself clarifies the ambiguity by identifying in The Federalist, No. 63, five examples of other republics:

- Sparta,
- Carthage,
- Rome,
- Athens,
- Crete.

Hamilton also, in The Federalist, No. 6, tells us, "Sparta, Athens, Rome, and Carthage were all republics. . . ."[xxviii]

Various anti-federalist authors said similar things. For example "Brutus" (likely Robert Yates, a convention delegate from New York) avers that Rome and the various "Grecian states" were republics;[xxix] "Agrippa" (John Winthrop of Massachusetts) identifies Carthage, Rome, and the ancient Greek states as republics;[xxx] and the "Federal Farmer" refers to the "republics of Greece."[xxxi]

Modern commentators seem to have forgotten that most, if not all, of these republics featured prominent institutions of direct democracy. Indeed, some of them featured more direct democracy than even the most fervent I&R advocate could wish for. Thus, all laws adopted in Sparta had to be approved by an assembly of citizens—in other words, all laws, not just a few, were subject to a form of referendum.[xxxii] Athens was even more democratic: The assembly of all citizens over 18 both approved and initiated laws.[xxxiii]

Polybius, one of the Founders' favorite historians, says, if one focused on the awesome power of the popular Roman assemblies, "from this point of view one could reasonably argue that the people have the greatest share of power in the government, and that the constitution is a democracy." So much for the notion that "republics" must exclude direct democracy!

The Roman Republic is worth pondering, because its ideals and constitution were particularly influential with the Framers.[xxxiv] The term Roman Republic groups together the various forms of government prevailing after the end of the kingship (traditional date: 510 or 509 B.C.) until creation of the empire (27 B.C.). Stretching over nearly five centuries, the Roman was one of the longest-lived republics in the history of the world.

Sovereignty was in the whole body of citizens. Citizens elected executive magistrates (such as consuls and aediles) and judges (praetors). Executive magistrates could propose laws, but the people exercised the final say directly. The fabled Roman senate, which consisted of ex-

magistrates, was at this time an advisory and executive, not primarily a legislative, body—although as a practical matter, its prestige was enormous.

Depending on the nature of the action to be taken or on the magistrate proposing the measure, Roman citizens gathered into one of several assemblies. During the height of the republic there were four such bodies. Each had different voting rules that tilted the process toward the upper or lower classes. In the comitia centuriata, for example, the rules were stacked in favor of the nobility. In the consilium plebis, the nobility was excluded entirely.

But the point is that final decisions were made by citizens themselves, not by representatives. As Polybius, one of the Founders' favorite historians, says, if one focused on the awesome power of the popular Roman assemblies, "from this point of view one could reasonably argue that the people have the greatest share of power in the government, and that the constitution is a democracy."[xxxv] So much for the notion that "republics"must exclude direct democracy!

Of course, the fact that ancient republics relied heavily on direct democracy would not be relevant to interpretation of the Guarantee Clause if the Founders were ignorant of that fact. But the Founders knew it very well. Evidence appears at several points in the Federalist itself. In No. 63, for example, Madison seeks to show why these governments are classed as republics. He argues that all had representative institutions in addition to their democratic institutions—that none were "pure democracies." The point of this part of No. 63 appears to be that instead of being a realistic option, pure democracy is an unattainable ideal, and that all free governments of any consequence are actually republics because they all feature some degree of representation.[xxxvi]

Hamilton, too, understood that republics could include prominent institutions of direct democracy. In another part of the Federalist sometimes overlooked (No. 34), Hamilton refers to two of the Assemblies of the Roman Republic, the Comitia Centuriata and the Comitia Tributa, where the Roman people directly voted on laws, judicial decisions, and other matters.[xxxvii]

The views of John Adams also form an important part of the historical record. Although Adams was in London during the Constitutional Convention, he was in Philadelphia by proxy: Shortly before the Convention opened, the first volume of his encyclopedia, A Defence of the Constitutions of Government of the United States (i.e., the state constitutions), was published. That volume was primarily a collection of historical writings and an overview of governmental structures throughout history. Apparently, it was well-thumbed by the delegates in Philadelphia that summer.[xxxviii]

Following Cicero, Adams defined a republic as any government ruled in accordance with laws for the benefit of the people. Thus, he notes (quoting Cicero) that res publica res est populus—that "the republic is the affair of the people."[xxxix] A major thrust of Adams' thesis was that to be well governed, republics should feature checks and balances—legislative, executive, and judicial branches, and elements of monarchy, aristocracy and democracy. Being an advocate of mixed government, he opposed unchecked democracies just as he opposed unchecked aristocracy or monarchy. But far from arguing that republics had to be wholly representative, he

specifically cited instance after instance of republics with direct citizen lawmaking. Among ancient examples, he mentioned:

· The Roman Republic, with its popular assemblies enjoying lawmaking power;[xl]

· The Carthaginian Republic, which he labeled "the most democratical republic of antiquity"[xli] because any one senator could send any measure directly to the people for resolution;[xlii]

· The Athenian Republic;[xliii] and

· Laecedaemon (Sparta), which although classified as an "aristocratical republic" still gave citizens the direct power to vote "yes" or "no" on proposed laws in the style of the modern referendum.[xliv]

Among contemporary examples, Adams discussed San Marino, whose democratic assembly (the arengo) admittedly had withered,[xlv] but also:

· The Swiss canton of Grisons, which placed "sovereignty in the commons;"[xlvi]

· The Swiss canton of Underwald, where sovereignty rested in an assembly of all males 15 years of age or older;[xlvii]

· The Swiss canton of Glaris, where a similarly constituted assembly laid taxes, made law and peace, and ratified all laws;[xlviii] and

· The Swiss canton of Zug, where a similarly constituted assembly enacted laws.[xlix]

Contemporary cases aside, the fact is not surprising that the framers had so much information on the republics of classical antiquity. The histories of Polybius and Livy and the writings of Cicero were standard fare in the education of the day. For example, Polybius' passage on the excellence of the Roman constitution, including its monarchical, aristocratic, and directly-democratic parts, was very widely studied,[l] and was largely reproduced in Adams' work.[li] Other classical writers were cited or paraphrased at the 1787 convention itself.[lii]

Thus, the Framers clearly acknowledged that republican government need not be purely representative—that it may contain significant elements of direct democracy. Their views are reflected in modern case law sustaining I&R against Guarantee Clause challenges on the ground that I&R merely restricts, but does not abolish, representative government.[liii]

The Founders' debt to classical wisdom offers yet another insight into their views on democracy. To the Founders, pure democracy meant only one thing: all free male citizens gathering together in a single body. Much of the evil in that form of democracy arose from the fact that a concentrated gathering of thousands of citizens could become emotional and act like a mob. Both classical literature[liv] and the Framers[lv] repeatedly used metaphors of waves and storms to depict the results.

Obviously, the modern initiative or referendum election is held under conditions bearing little resemblance to that kind of democracy, and with little of the physical immediacy or "turbulence"[lvi] of that form. The difference would have been quite important to Madison and Hamilton.[lvii]

III. Conclusion

The continued pressing of Guarantee Clause arguments against I&R in defiance of unanimous historical and legal authority results in delay, vexation, and a waste of judicial and other resources. The courts should put those arguments to rest forthwith by classifying them as frivolous and imposing appropriate sanctions on the parties who raise them.

The usual source for Guarantee Clause arguments is the Federalist, so one wonders how such arguments could ever become current, given that one can divine the truth merely from examining that source more closely. Unfortunately, lawyers and judges do not always examine the text of documents cited to them, which gives an advantage to unscrupulous brief writers.[lviii]

However, modern lawyers and judges can be misled on this score only because most lack the fundamental classical knowledge every Framer enjoyed. For during the 20th century—and especially during the last three decades—Americans became more and more disconnected from the classical heritage that had enriched the Western World for two millennia. Twentieth century educators bear the blame: Theirs was the decision to abandon responsibility for transmitting that heritage. That decision has inflicted untold damage on our society, including radical misinterpretation of our own legal institutions.[lix]

When the legal institution involved is the U.S. Constitution, the price is particularly steep—both because of the importance of the subject matter and because of the difficulty people who are ignorant of the classical tradition often have in understanding the language of the men who wrote, debated, and approved that document. The language of the Framers—even central words like republic—is intelligible only to those who have sought and managed to find what modern "education" has denied to so many.¦

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Endnotes

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Catherine A. Rogers & David L. Faigman, "And to the Republic for Which It Stands:" Guaranteeing a Republican Form of Government, 23 Hastings Const. L.Q. 1057 (1996) ("Rogers & Faigman")

Vergilius Maro, Publius, Aeneidos (Oxford ed.) ("Virgil")

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Garry Wills, Inventing America: Jefferson's Declaration of Independence (1979)("Wills").

[ii]. U.S. Const., Art. IV, Section 4 states:

The United States shall guarantee to every State in this Union a Republican Form of Government, and all protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[iii]. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

[iv]. State ex rel. Billingston v. Sinclair, 28 Wash. 2d 575, 183 P.2d 813 (1947); Bernzen v. City of Boulder, 186 Colo. 81, 525 P.2d 416 (1974); McKee v. City of Louisville, 200 Colo. 525, 616 P.2d 969 (1980); Margolis v. District Court, 638 P.2d 297 (Colo. 1981); Cagle v. Qualified Electors of Winston Co., 470 So.2d 1208 (Ala. 1985); Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1988); State of Oregon v. Montez, 309 Or. 564, 789 P.2d 1352 (1989); State of Washington v. Davis, 133 Wash.2d 187, 943 P.2d 283 (1997); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 237, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978) (two-thirds vote to raise local taxes). See also cases cited infra note 6.

[v]. The Colorado courts take this position. See, e.g., Bernzen v. Boulder, 186 Colo. 81, 525 P.2d 416 (1974) (viewing recall, as well as initiative and referendum, as fundamental rights of a

republican form of government which the people have reserved unto themselves); see also Margolis v. District Court, 638 P.2d 297 (Colo. 1981); McKee v. City of Louisville, 200 Colo. 525, 616 P.2d 969 (1980).

[vi]. E.g., Santa Clara County v. Guardino, 11 Cal. 4th 220, 45 Cal. Rptr. 2d 207 (1995) (contention not reached); In re Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996) (Guarantee Clause not justiciable, although court must consider possible Congressional action in judging effect of initiative); In re Initiative Petition No. 348, 820 P.2d 772 (Okla. 1991) (upholding mandatory referendum on tax increases because representative government remains, although restricted); State of Oregon ex rel. Huddleston v. Sawyer, 324 Or. 597, 932 P.2d 1145 (1997) (Guarantee Clause not justiciable); Lowe v. Keisling, 130 Or.App. 1, 882 P.2d 91 (1994) (same); State of Washington v. Davis, 133 Wash.2d 187, 943 P.2d 283 (1997).

In addition, the plaintiffs raised the issue at the trial level in a case in which I was a prevailing defendant, Nicholson v. Cooney, 265 Mont. 406, 877 P.2d 486 (1994) (sustaining petition referendum) and the American Civil Liberties Union raised it as amicus in Marshall v. State of Montana, 1999 MT 33, 1999 WL 92254 (striking down on other grounds a constitutional initiative to require public votes on tax increases). Cf. Morrissey v. State of Colorado, 951 P.2d 911 (Colo. 1998) (invalidating on Article V of the U.S. Constitution specific voter direction to state legislators to call for U.S. Constitutional convention, refusing to determine justiciability of Guarantee Clause issue, but stating in dicta that direction violated that clause).

[vii]. See infra notes 11-13 and accompanying text.

[viii]. See, e.g., Rogers & Faigman, supra note 1 (all initiatives are unconstitutional).

[ix]. Amar, supra note 1.

[x]. I&R supporters sometimes reject the term direct democracy. See, e.g., Waters, supra note 1, at 6. I use the term here to include I&R because it has the feature of direct citizen, rather than representative, lawmaking.

[xi]. E.g. Rogers & Faigman, supra note 1, at 1060 (“Indeed, some historians contend that the delegates at the Constitutional Convention were more concerned about an excess of populism in the state governments than they were about the weakness of the Articles of Confederation.”).

[xii]. See, e.g., The Federalist, No. 63.

[xiii]. See, e.g., Rogers & Faigman, supra note 1, in which a few ambiguous quotations from Madison and one from Hamilton are characterized as “a consensus among the Framers: a republican form of government was seen as the best 'safeguard against the tyranny of [majoritarian] passions’ . . . [r]epresentative decisionmaking was considered so critical that it was not only instituted at the federal level but guaranteed at the state level.” Id. at 1060-61.

See also Graves, supra note 1, at 1305 (“A growing body of opinion holds that the initiative process in California and other states violates the Guarantee Clause of the United States

Constitution. . . . A considerable amount of historical literature supports this theory . . .") The "considerable amount of historical literature" footnoted are three numbers of The Federalist: No. 51 (which does not deal with the issue); No. 9 (which is contra because it refers to ancient states with popular assemblies as "republics"); and No. 10 (which is ambiguous and is discussed infra.)

[xiv]. See e.g., the comments of Charles C. Pinckney, Elbridge Gerry, and James Madison in Madison, Notes, supra note 1, at 73, 78, 86 & 143-44) See also Storing, supra note 1 at 180 & 181 ("Brutus").

[xv]. U.S. Const., Art. I, Section 10.

[xvi]. McDonald, supra note 1, at 5. See also Cooper, supra note 1, at 245-46.

[xvii]. For example, John Adams (for one) classified even England as a republic, hereditary monarchy and aristocracy withal, because that one branch of Parliament represented the people. Adams, supra note 1, at 70.

[xviii]. The Federalist, supra note 1, No. 43.

[xix]. Farrand, supra note 1, at I.206.

[xx]. Farrand, supra note 1, at II.48.

[xxi]. Cf. comments by Tench Coxe, Kurland & Lerner, supra note 1, at 561 (Guarantee Clause designed to protect against kings and nobles"), and by Hamilton: "As long as offices are open to all men, and no constitutional rank is established, it is pure republicanism." Farrand, supra note 1, at I.432 (as reported by Yates).

[xxii]. Id. (emphasis added).

[xxiii]. See Madison, Notes, supra note 1, at 129-39.

[xxiv]. See Farrand, supra note 1, at I.432 (Hamilton as reported by Yates: "As long as offices are open to all men, and no constitutional rank is established, it is pure republicanism.")

[xxv]. For the profound debt the Framers owed to classical literature and history, see McDonald, supra note 1; Wills, supra note 1.

[xxvi]. See also The Federalist, supra note 1, No. 39: (". . . we may define a republic to be, or at least bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior.")

To my knowledge, those claiming that the Guarantee Clause requires exclusively representative lawmaking have overlooked another passage that would seem to assist them: A comment in the first paper by "Brutus," a New York writer who, although an anti-federalist, may well have been

Robert Yates, a convention delegate. See Storing, supra note 1, at 103 & 114. However, as noted infra, this seems to have been an inadvertent error by "Brutus," for he later acknowledges that Rome and the "Grecian" states were republics, both of which had extensive direct democracy. See infra note 29.

[xxvii]. Twenty-four states allow initiatives, 24 allow referenda on citizen petition, and 49 provide for legislative referenda. Waters, supra note 1, at 5-6.

[xxviii]. Cf. Hamilton, The Federalist, supra note 1, No. 70 (Rome described as a republic).

[xxix]. Storing, supra note 1, at 113 & 158 (Rome was a "free republic").

[xxx]. Id. at 230.

[xxxi]. Id. at 89.

[xxxii]. OCD, supra note 1, at 79 (Sparta) & 272 (Rome).

[xxxiii]. Id. at 376-77.

[xxxiv]. McDonald, supra note 1, contains extensive discussions of the impact of Roman Republican ideals on the Framers. There are numerous sources for the structure of Roman government. For a brief discussion, see OCD, supra note 1, at 272. A classic book-length treatment is Greenidge, supra note 1.

[xxxv]. Polybius, supra note 1, at 315.

[xxxvi]. The Federalist, supra note 1 ("The true distinction between these and the American governments lies in the total exclusion of the people in their collective capacity from any share in the latter and not in the total exclusion of the representatives of the people from the administration of the former." [emphasis in original]). Madison then states his preference for the purely representative form of republic, but as noted above there is no suggestion the Constitution imposes that preference on the states.

[xxxvii]. Actually, there were four assemblies of citizens, each apportioned under different principles and serving different purposes. OCD, supra note 1, at 272.

[xxxviii]. Rossiter, supra note 1, at 66; Bowen, supra note 1, at 11.

[xxxix]. Adams, supra note 1, at xxi-xxii. One can translate the Latin phrase res publica in a variety of ways, most of which capture the basic idea communicated to classically-trained minds of the Framers: the people's affair; popular government; the people's (or popular) state. New York Times humorist Russell Baker, admittedly no Framer, once suggested: "the public thing."

[xl]. Adams, supra note 1, at 348 (listing three of the four assemblies, and noting the independent lawmaking power of the plebeians).

[xli]. Id. at 214.

[xlii]. Id. at 213.

[xliii]. Id. at 260-85.

[xliv]. Id. at 254.

[xlv]. Id. at 11.

[xlvi]. Id. at 21.

[xlvii]. Id. at 26.

[xlviii]. Id. at 29-30.

[xlix]. Id. at 31. In later volumes of the same work, Adams cited further cases, e.g., Neuchatel, a "monarchical republic" in which "[t]he legislative authority resides conjunctively in the prince, the council of state, and the town or people, each of which has a negative. John Adams, A Defence of the Constitutions of Government of the United States of America (1787), Vol. 2, at 450.

[l]. Polybius, supra note 1, at 312-15.

[li]. Adams, supra note 1, at 171-75. See also Federalist No. 63 (Madison cites Polybius).

[lii]. E.g. Farrand, supra note 1, at I.308 (Hamilton cites Aristotle and Cicero); id. at I.449 (Madison cites Plutarch).

[liii]. E.g. Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 237, 149 Cal. Rptr. 239, 583 P.2d 1281 (1978); Kadderly v. City of Portland, 44 Or. 118, 144, 74 P. 710, 719 (1903); In re Initiative Petition No. 348, 820 P.2d 772 (Okla. 1991).

[liv]. E.g., Virgil, supra note 1, at 1.148 - 1.150 (comparing a storm at sea with a mob).

[lv]. E.g. Hamilton, The Federalist, supra note 1, No. 9 ("If they exhibit occasional calms, these only serve as short-lived contrasts to the furious storms that are to succeed.")

[lvi]. The Federalist, supra note 1, No. 10 (Madison) uses the word turbulence—another mob metaphor, from the Latin noun turba to mean a disturbance in a crowd of people.

[lvii]. See, e.g., Federalist No. 63 ("It may be suggested that a people spread over an extensive region cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions or to the danger of combining in pursuit of unjust measures. I am far from denying that this is a distinction of peculiar importance. I have, on the contrary, endeavored in a

former paper to show that it is one of the principle recommendations of a confederated republic." See also Federalist No. 68 (Hamilton cites as a principal advance of the electoral college system that each state's electors will vote in separate locations so that "this detached and divided situation will expose them much less to heats and ferments. . . .").

[lviii]. A good example is the amicus brief filed by the American Civil Liberties Union in Marshall v. State of Montana, 1999 MT 33, 1999 WL 92254. The brief misleadingly extracted portions of The Federalist, No. 63 to suggest that republican government must be wholly representative. Actually, that number of The Federalist is devoted largely to demonstrating that certain ancient governments were republics even though they were not wholly representative!

[lix]. I have commented on this phenomenon before. See Natelson, Peyote, supra note 1, and Natelson, Comments, supra note 1.