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(with a Note on the Supreme Court's Term Limits Decision)

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(Preliminary draft, comments welcome)

Rousseau and Direct Democracy
(with a Note on the Supreme Court's *Term Limits* Decision)

Nelson Lund[†]

American political thought tends to be Lockean in principle and, at its best, Montesqueian in practice. We can easily see the difference by comparing the Declaration of Independence, based as it is on assertions of universal, timeless, and revolutionary principles, with the *Federalist Papers*, which are devoted to explaining how these principles should be adjusted to fit the particular circumstances confronting those who took upon themselves the task of framing a new government.

Contemporary debates about direct democracy, to which this symposium has been my introduction, seem to correspond at least roughly to this same division. Those who focus on democratic principles—especially principles involving the consent of the governed and the sovereignty of the people—are naturally predisposed in favor of direct democracy. Those more impressed with the wisdom of our federal Constitution—which banished direct democracy from our federal mechanisms of governance—are generally much more skeptical of this approach to politics.

Rather than jumping in on one side or the other of this debate, I propose to look for a fresh perspective by examining the political thought of Jean-Jacques Rousseau. This may look a little odd, or worse. Rousseau has always had a bad name in American political and legal thought. This may be due in

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part to America's friend, Edmund Burke, who famously accused Rousseau of inspiring some of what was worst in the French Revolution.[1] Beyond that, however, Rousseau's rhetoric is at once intemperate, paradoxical, and pessimistic, all qualities that run against the grain of the American spirit. It should not be much of a surprise that Rousseau has apparently never even been mentioned in any opinion of the U.S. Supreme Court. He is not considered a respectable character.

Rousseau was, however, an undeniably great and influential philosopher.[2] He was also the first to reject key portions of Locke and Montesquieu after thoroughly confronting their political thought. For that reason, Rousseau may help us to better understand what we often take for granted through habit and familiarity. Another reason for turning to Rousseau is his kinship with certain dissident, or subdominant, strains in American thought—beginning with the Anti-Federalists[3] and extending to our contemporary communitarians.[4] Where Rousseau reached certain conclusions similar to those reached by later American writers, but on the basis of a more profound analysis of politics, he may assist us in avoiding the mistake of too easily dismissing those conclusions simply because their American advocates "lost" the political argument here. Rousseau could be useful in this way even if his direct influence on American thought has been relatively small.[5]

Before turning to Rousseau, however, I pause to ask why one should even bother trying to bring political theory to bear on the topic of this symposium. The dramatic eruptions of direct democracy during recent years in our nation's most populous state obviously provide a good reason to think seriously about

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[1] Edmund Burke, *Reflections on the Revolution in France* 269-77 (L.G. Mitchell, ed., 1993) (1st ed. 1790)

[2] In Leo Strauss' evocative formulation, "The fiery rocks with which the Rousseauan eruption had covered the Western world were used, after they had cooled and after they had been hewn, for the imposing structures which the great thinkers of the late eighteenth and early nineteenth centuries erected. His disciples clarified his views indeed, but one may wonder whether they preserved the breadth of his vision." Leo Strauss, *Natural Right and History* 252 (1953).

[3] When I say that Rousseau has a kinship with the Anti-Federalists, I do not mean to imply that they were directly influenced by him in any significant degree. I have found only one Anti-Federalist document referring to Rousseau, although it is interesting to note that the author of this document invoked Rousseau on the very topic of this symposium, contending that direct democracy is preferable to representative legislatures. 4 Herbert J. Storing, ed., *The Complete Anti-Federalist* § 4.25.3, at 251-52 (1981).

[4] *See, e.g.*, Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Culture* xx (1996); Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda* (1993).

[5] At least during the founding period, from 1760-1805, Rousseau's direct influence seems to have been negligible, for he was rarely mentioned in the publications of the time, either favorably or unfavorably. *See* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189 (1984). One commentator who claims that Rousseau had considerable influence on the founding generation managed to write a whole book defending his thesis without, so far as I noticed, citing a single instance in which any of the founders actually referred to Rousseau. *See* Frederick William Dame, *Jean-Jacques Rousseau and Political Literature in Colonial America* (rev. ed. 2000).

the costs and benefits of institutions like those that California has adopted. Such pragmatic concerns, however, are not quite sufficient to show that direct democracy should be of much interest as a matter of political theory or political principle. We regularly employ this form of decisiomaking in small groups, such as law faculties and homeowners associations. And we never use it as the regular form of government in large polities, like the United States or its constituent states, where doing so would be manifestly impracticable. This suggests that the choice between direct democracy and representative democracy need be based on little more than a consideration of the size of the self-governing group.

There are at least two obvious reasons for giving the matter a little more thought than that. First, we might want to know whether it makes sense to devolve as much political power as possible down to groups that are small enough to be governable through mechanisms of direct democracy. Given how urbanized our nation has become, however, it would probably be impossible to accomplish this in any meaningful way: an apartment building or a suburban subdivision has so little natural independence that it could hardly exercise what anyone would recognize as political self-government.

Second, and more important, the *occasional* use of direct democracy is both pervasive and quite traditional in this country. To get a sense of the range of its uses, consider just these examples. One state submitted the question of ratifying our federal Constitution directly to the people.[6] Today, forty-nine states require that constitutional amendments be approved by the voters,[7] and state and local referenda are so common that it is difficult even to estimate their frequency.[8] We might want to know whether the use of such devices should be expanded or contracted. Here again, however, practical necessity has assured that these devices could operate only at the margins of our political life. Federalism, moreover, already provides a practical mechanism for making decisions about the appropriate mix of representative and direct democracy, without much recourse to theory: the famous laboratories of state experimentation,[9] which are protected from catastrophic mistakes by interjurisdictional competition and by limits imposed through the

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[6] Rhode Island held a referendum in 1788, at which the proposed constitution was rejected. *See* Robert Allen Rutland, *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787-1788* 124-27 (1966);William Riker, *The Strategy of Rhetoric: Campaigning for the American Constitution* 217-18 (1996). Rhode Island eventually held a convention in 1790, which ratified the Constitution by a narrow margin. Rutland, *The Ordeal of the Constitution*, at 303-04.

[7] David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 36 (1984).

[8] A 1970 study estimated 10,000 to 15,000 local referenda annually. Howard D. Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 Am. Pol. Sci. Rev. 124, 125 (1970).

[9] New State Ice Co. v. Liebmann, 285 U.S. 262, 386-87 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

federal Constitution.[10]

There are, however, at least two related reasons for thinking seriously about direct democracy as a matter of political theory. First, the Internet may soon make it technically feasible for direct democracy to operate as a much more regular form of governance in large polities than it ever has before. Second, the Constitution's Guarantee Clause can be interpreted to outlaw direct democracy, and to require instead the use of representative institutions by the states.[11] Although the Supreme Court long ago held that the political-question doctrine precluded the Court from considering this possibility,[12] that doctrine has subsequently been modified in ways that could open the door to a reconsideration of the precedents.[13] And even if the textual and historical arguments for regarding direct democracy in the states as unconstitutional were to prove very weak,[14] the Supreme Court is entirely capable of ignoring such weaknesses, and injecting its own theories of democracy directly into the Constitution. I will return to this problem later in the paper.

I. Direct Democracy and Political Legitimacy

What makes a government legitimate? I think most of us would easily answer that the consent of the governed is the basis of legitimacy, though we might have doubts or disagreements about what

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[10] These limits include those enforced directly by federal courts and those imposed by Congress in the exercise of its constitutional powers.

[11] *See, e.g.*, Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. Chi. L. Sch. Roundtable 1, 8 ("The Guarantee Clause requires the states as well as the federal government to institute a system of representation rather than direct democracy."); Douglas H. Hsiao, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 Duke L.J. 1267, 1272 (1992) ("the Guaranty Clause bars the use of direct democracy by the states because it is not a Republican Form of Government").

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

[13] *Pacific States* relied on Luther v. Border, 48 U.S. (7 How.) 1 (1849) and Taylor v. Beckham, 178 U.S. 548 (1900), for the proposition that it was long ago settled that enforcement of the Guarantee Clause is confided by the Constitution exclusively to Congress. 223 U.S. at 231. In Baker v. Carr, 369 U.S. 186, 218 (1962), the Court accepted the holding in *Pacific States*, but began edging away from its sweeping claim about the Guarantee Clause, concluding instead: "Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization." And in New York v. United States, 505 U.S. 144, 183-85 (1992), the Court pointed out that in numerous cases after *Luther v. Borden*, Guarantee Clause issues had in fact been decided on the merits, thus suggesting that under these precedents a decision like the one in *Pacific States* might be open to reconsideration.

[14] *See, e.g.*, Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807 (2002).

constitutes genuine consent. But what if one asks the prior question: why should consent be the test of legitimacy? It turns out not to be so easy to give an intellectually satisfactory response.

A. The Assumption of Natural Rights

Rousseau was the first great critic of modern liberalism, which was itself founded on a rejection of classical philosophy. Perhaps the greatest division in ancient philosophy arose between those who took seriously the search for the "naturally right" political order that would foster what is naturally best in human beings (such as Plato, Aristotle, and Cicero), and those who regarded political life as fundamentally unnatural or merely conventional (such as Epicurus and Lucretius). Modern liberal thought began attempting to demolish this distinction by attributing to all men[15] certain "natural rights" that they possess apart from any political order, and then taking as the task of political philosophy the discovery of those conventions that will best protect those natural rights. The Virginia Declaration of Rights, whose words we owe to George Mason, summed up the liberal postulates as follows:

> 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
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> 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.
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> 3. That government is or ought to be instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that 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.
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> . . . .

[15] The times being what they are, it may be necessary to mention that in the English language, "man" can refer either to human beings as a class or to the male of the species, depending on the context, just as "duck" can refer to certain aquatic birds in general or specifically to the female. Similarly, masculine pronouns can be used to refer to males specifically, or they can be used in contexts where the group being referred to may include both sexes or where the sex of the individual being referred to is unknown. When I, or the authors whom I quote or paraphrase, employ this traditional English usage (or its French analog), the reader should not infer that women have been disregarded or excluded.

> 6. That elections of members to serve as representatives of the people in assembly, ought to be free; and that all men having sufficient evidence of permanent common interest with, and attachment to the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.[16]

This related group of claims was repeated more succinctly in our Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving 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.

This is all so familiar and so publicly respectable that, even on the rare occasions when we try to think seriously about the foundations of our polity, Americans tend to regard them as self-evident truths indeed.[17]

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[16] Virginia Declaration of Rights (1776). Note that ¶ 6 seems clearly to assume that direct legislation by the people is permissible.

[17] It is true, of course, that a good many people who consider themselves more sophisticated or advanced than those who signed the Declaration of Independence are inclined to shrug or snicker at its claims. Such shrugging and snickering—often accompanied by an overpowering belief in the moral superiority of one's own preferences and opinions, and by an ill-disguised will to power—does not constitute a refutation of the Declaration's principles. Nor does it answer a genuinely sophisticated defense of the Declaration, like the one offered by President Coolidge. After a discussion of the Declaration's intellectual antecedents, which focused on its religious sources, Coolidge said:

> It is often asserted that the world has made a great deal of progress since 1776, that we have had new thoughts and new experiences which have given us a great advance over the people of that day, and that we may therefore very well discard their conclusions for something more modern. But that reasoning can not be applied to this great charter. If all men are created equal, that is final. If they are endowed with inalienable rights, that is final. If governments derive their just powers from the consent of the governed, that is final. No advance, no progress can be made beyond these propositions. If anyone wishes to deny their truth or their soundness, the only direction in which he can proceed historically is not forward, but backward toward the time when there was no equality, no rights of the individual, no rule of the people. Those who wish to proceed in that direction can not lay claim to progress. They are reactionary. Their ideas are not more modern, but more ancient, than those of the Revolutionary fathers.

Calvin Coolidge, *The Inspiration of the Declaration*, in Calvin Coolidge, *Foundations of the Republic: Speeches & Addresses* 441, 451-52 (1926). A self-satisfied intellectual and historical relativism can prevent one from understanding

But are they?

Self-evident truths certainly do exist. For example: all human beings are animals. But how obvious is it really that every human being "inherently" has a right to life and property, let alone to happiness and safety, as the Virginia Declaration proclaims? Our most obviously inherent qualities are the ones we share with other animals, and few of us believe that other animals have such inherent rights. Think for a moment about the films most of us have seen of life among the animals of the Serengeti plain. When a pride of lions attacks a wildebeest, I don't suppose anybody objects that the lions have violated the victim's "right" to life and liberty. And when a pack of hyenas comes along and drives the lions from their kill, I don't suppose that anyone would seriously maintain that the lions have a "right" to the property they acquired by mixing their labor with the wildebeest's flesh. The reason we don't say that beasts have "rights" that are good against other beasts is the same reason that we don't think any of them has a "right" to be safe from lightning strikes. Similarly, we don't think that human beings have a "right" to be spared by a hungry lion, or by a lightning bolt. In ordinary usage, a right implies a correlative obligation to respect that right, and thus at least the possibility of that obligation's being enforced, and we don't believe that it makes any sense to impute obligations to beasts or to thunderstorms. The rights that we actually see enforced—especially but not only legal rights—arise from human institutions. And, of course, countless cultures other than our own have lived for long periods without our notions of inherent rights and natural equality. None of this disproves the claims in the Declaration of Independence and the Virginia Declaration, but it surely suggests that their truth is a long way from being self-evident.[18]

Rights could, of course, be "inherent" without necessarily being natural, if they were given to us by God. We find this suggestion in the Declaration of Independence—which holds that we are self-evidently endowed by our Creator with unalienable rights—but that approach cannot resolve the difficulty. The language used in the Declaration could be another way of saying that such rights are natural, in which case the reference to the Creator adds nothing at all to the claim that the existence of natural rights is self-evident. Or, it could be a way of saying that the existence of a God who endows us with unalienable rights is self evident. This is manifestly false, as one can easily recognize by considering the great difficulty that many people have in maintaining their belief in God even when they strongly desire to keep their faith. Under

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Coolidge's argument, but it cannot refute it. In what follows, I will try to take seriously Coolidge's statement, including its very prominent "ifs."

[18] Near the end of his life, Thomas Jefferson commented: "The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God." Letter to Roger C. Weightman, June 24, 1826, *in The Portable Thomas Jefferson*, Merrill D. Peterson, ed. (1975). This surely is a palpable truth, but it is equally true and palpable that horses are not born with saddles on their backs either.

either interpretation,[19] I think we are forced to deny that the existence of natural or inherent rights is self evident, no matter how strongly we may desire it to be true.

B. Hobbes

If that is admitted, we have to ask whether such a truth can be established by evidence or argument. For two reasons, I begin with Hobbes. First, he was an early and relatively forthright opponent of the classical approach to which our liberalism offers an alternative. Second, Rousseau seems to have taken Hobbes as a particularly useful and important exponent of the principles to which he himself wishes to offer an alternative. Here is what Hobbes says:

> The RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.
>
> By LIBERTY is understood, according to the proper signification of the word, the absence of externall impediments; which Impediments may oft take away part of a mans power to do what hee would; but cannot hinder him from using the power left him, according as his judgement, and reason shall dictate to him.[20]

These statements, of course, do not constitute either argument or evidence. They are definitions. The definition of natural right, moreover, is at variance with normal usage—in which a right in one person implies a correlative obligation on the part of others to respect that right—and thus seems to include a tacit claim that normal usage is based on some kind of misunderstanding. Under Hobbes' definition, the natural right of human beings becomes difficult to distinguish from the natural liberty of other animals, who seem to be as free as we are to act for the preservation of their own lives except to the extent that they are constrained by external impediments.[21]

This leads to a two-fold puzzle. Hobbes does not say that brutes have natural rights, but it is not clear why they wouldn't, if such rights are nothing more than a particular example of "the absence of

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[19] The ambiguity between the two interpretations is reinforced by the Declaration's reference to an entitlement bestowed by "the Laws of Nature and of Nature's God."

[20] *Leviathan*, ch. 14 (small caps and italics in original). All quotation from the *Leviathan* are taken from Oxford Press's 1909 reprint of the 1651 edition.

[21] Although the quotation above contains a reference to judgment and reason, qualities that may be peculiar to human beings, that reference occurs only in a statement that is said to be a *consequence* (and maybe not the only consequence) of the definition of the right of nature.

externall impediments." On the other hand, if natural rights belong peculiarly to human beings, why does Hobbes seem to declare that there is only one natural right, namely that of self-preservation? Why wouldn't he recognize additional natural rights as well, including those specified in the Virginia Declaration of Rights, but also the right to do things that are often inconsistent with self preservation, such as pursuing glory and honor?

Hobbes must have been aware of these questions. With respect to the second, for example, he indicates elsewhere that the human good extends beyond mere life, which suggests that natural right should also cover more than mere self preservation.[22] With respect to the first, Hobbes indirectly suggests the possibility that beasts may indeed have natural rights: "But from this reason, that in all free gifts and compacts, there is an acceptance of the conveyance of right required, it follows that no man can compact with him who doth not declare his acceptance. And therefore we cannot compact with beasts, neither can we give or take from them any manner of right, by reason of their want of speech and understanding."[23] If other animals simply lack natural rights, Hobbes could simply have said so, and explained why, rather than declaring that our inability to exchange rights with them arises from their lack of speech and understanding. But if natural rights are such that even animals might have them, what do they add to a true understanding of political obligation? Maybe very little.

> But it was the least benefit for men [in the state of nature] thus to have a common right to all things. For the effects of this right are the same, almost, as if there had been no right at all. For although any man might say of every thing, *this is mine*, yet could he not enjoy it, by reason of his neighbour, who having equal right and equal power, would pretend the same thing to be his.[24]

Why does Hobbes say that the effects are "almost" the same, rather than simply the same? We are not told, and are thus left to wonder whether his assertions about the natural right to do anything and everything for one's own preservation are more than a kind of play on words. The following passage reinforces that suspicion:

> For every man is desirous of what is good for him, and shuns what is evil, but chiefly the chiefest of natural evils, which is death; and this he doth by a certain impulsion of nature,

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[22] *See, e.g.*, *Leviathan*, ch. 13 ("The Passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them."); *id.* ch. 17 (the end for which men relinquish natural liberty and enter civil society "is the foresight of their own preservation, and of a more contented life thereby").

[23] *De Cive* II.12. All quotations from *De Cive* are taken from the Hobbes translation in Thomas Hobbes, *Man and Citizen*, Bernard Gert, ed. (1972).

[24] *De Cive* I.11 (italics in original).

> no less than that whereby a stone moves downward. It is therefore neither absurd nor reprehensible, neither against the dictates of true reason, for a man to use all his endeavours to preserve and defend his body and the members thereof from death and sorrows. But that which is not contrary to right reason, that all men account to be done justly, and with right. Neither by the word *right* is anything else signified, than that liberty which every man hath to make use of his natural faculties according to right reason. Therefore the first foundation of natural right is this, that *every man as much as in him lies endeavour to protect his life and members*.[25]

I suppose one could say that a stone has a "right" to move downward in the sense that it is at liberty to do so in the absence of external impediments. Such downward movements are obviously neither absurd nor reprehensible, nor contrary to the dictates of true reason. But nobody would say that the stone moved downward "justly, and with right." Assuming, plausibly enough, that the human desire to avoid death is analogous to the downward motion of a stone, it is only by invoking "true reason" or "right reason" that Hobbes can draw the conclusion that using all our endeavors to avoid death is done justly, and with right. Rather than actually present the reasoning needed to connect this "impulsion of nature" with justice and right, however, Hobbes claims that the connection he asserts is universally acknowledged. But it is not true that the unrestrained pursuit of self-preservation is something that "all men account to be done justly, and with right." Many people have denied this, and some have sacrificed their lives for what they thought was a just cause. Indeed, some people even deny justice can be defined by human reason rather than God's will. In any event, this entire passage is very hard to reconcile with Hobbes' statement elsewhere that "injustice against men presupposeth human laws, such as in the state of nature there are none."[26]

In light of this last statement, and of the strangeness of the definition of natural right with which we began, it should not be surprising that Hobbes offers a separate political argument that rests on contentions about the utility of certain human institutions rather than, or at least rather more than, on his forceful but puzzling and equivocal claims about natural right or justice.

This alternative argument may be summarized very briefly as follows. Unrestrained human passions—especially but not only the natural desire to avoid the worst of natural evils, namely death—will lead to a horrible war of all against all, until people choose and agree to improve their prospects for self-preservation by mutually relinquishing a great portion of their original natural liberty. Operating in the service of the passion for self preservation, reason tells us that we can enhance our prospects for self-preservation by seeking peace. Thus, it is in everyone's self-interest:

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[25] *De Cive* I.7 (italics in original).

[26] *De Cive* I.10 n.‡. *See also Leviathan*, ch. 13: "The Desires, and other Passions of man, are in themselves no Sin. No more are the Actions, that proceed from those Passions, till they know a Law that forbids them: which till Lawes be made they cannot know: nor can any Law be made, till they have agreed upon the Person that shall make it."

> *That a man be willing, when others are so too, as farre-forth, as for Peace and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.*[27]

The resulting social contract, whose terms are supposed to be exactly specified by the need to escape from the state of nature, is an agreement to choose by majority vote a sovereign (which may consist of one or more people) who will have an incentive to keep the peace by virtue of possessing complete authority to rule the entire group.[28] Alternatively, an agreement to submit to a conqueror who offers to rule you rather than kill you can equally serve one's interest in peace and self-preservation.[29] This analysis enables Hobbes to promote the doctrine that consent to any existing political order under which we happen to live is dictated by everybody's self-interest because submission to a standing authority that has an interest in keeping the peace is unambiguously preferable to the state of nature into which we would otherwise fall. And therefore every existing political order is just, in the sense that everybody has either consented to that order, or is so outside it that the parties to the social contract have themselves not consented to recognize any duties toward him.[30]

This argument is inconsistent with ordinary notions of natural right, in which one person's right implies a correlative duty in someone else. Hobbes confirms this by defining natural law in a way that renders it subordinate to a right of nature that excluded any element of duty or obligation:

> A LAW OF NATURE (*Lex Naturalis*,) is a Precept, or general Rule, found out by

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[27] *Leviathan*, ch. 14 (italics in original).

[28] *Leviathan*, chs. 17-18.

[29] *Leviathan*, ch. 20.

[30] *See Leviathan*, ch. 18:

> [B]ecause the major part hath by consenting voices declared a Soveraigne; he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else justly be destroyed by the rest. For if he voluntarily entered into the Congregation of them that were assembled, he sufficiently declared thereby his will (and therefore tacitely covenanted) to stand to what the major part should ordayne: and therefore if he refuse to stand thereto, or make Protestation against any of their Decrees, he does contrary to his Covenant, and therfore unjustly. And whether he be of the Congregation, or not; and whether his consent be asked, or not, he must either submit to their decrees, or be left in the condition of warre he was in before; wherein he might without injustice be destroyed by any man whatsoever.

See also the last paragraph of chapter 18, where Hobbes explains why he thinks it always advantageous to submit to an existing sovereign.

> Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound *Jus*, and *Lex*, *Right* and *Law*; yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbeare; Whereas Law, determineth, and bindeth to one of them: so that Law, and Right, differ as much as Obligation, and Liberty; which in one and the same matter are inconsistent.[31]

Doesn't this render Hobbes' definition of the law of nature "inconsistent" with his definition of the right of nature?[32] Hobbes confirms at the end of his presentation of the laws of nature that it is indeed inconsistent, saying: "These dictates of Reason [i.e. the laws of nature], men use to call the name of Lawes; but improperly: for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves; wheras Law, properly is the word of him, that by right hath command over others."[33]

Although the moral language of natural right and natural law is retained by Hobbes, justice, right, and law end up being based on human conventions. Thus, for example, Hobbes offers a lengthy discussion of nineteen "laws of nature," one of which is "justice." Justice, however, is defined as keeping one's promises, and Hobbes specifically notes that absent a covenant that one has made, "every man has a right to everything" and nothing can be unjust.[34] It is true that Hobbes contends that some human conventions are more conducive than others to promoting the natural goal of self preservation, and thus one might call those conventions "natural" in a certain sense of the word. And it may well be true that these preferred conventions are more likely to be accepted if people come to believe that they are rooted in something called natural right. But even if one were to grant the utility of such beliefs, that would not establish that they are true. Hobbes therefore does not seem to establish, by adequate argument or evidence, the claims about natural or inherent rights that we find in the Virginia Declaration of Rights and the Declaration of Independence.

C. Locke

Locke accepts Hobbes' essential claim that the preeminent human desire for self-preservation is

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[31] *Leviathan*, ch. 14 (small caps and italics in original).

[32] The passage just quoted follows immediately after the definitions of the right of nature and of liberty quoted *supra* text accompanying note –.

[33] *Leviathan* ch. 15, at 122-23. Hobbes goes on to mention that if these theorems are considered "as delivered in the word of God," they can properly be called laws.

[34] *Leviathan* ch. 15.

so frustrated in the state of nature that it drives us to leave that condition by agreeing to the institution of political rule. By emphasizing the role of poverty, rather than bare mutual hostility, as the trigger for this change,[35] Locke was able to draw significantly different conclusions about what kind of political institutions are most useful.

We are all familiar with his principal conclusions, which are briefly and fairly summarized in the Virginia Declaration of Rights. Legitimate government depends on the consent of the governed, who can only be supposed to consent to be governed for the common good by settled laws (not the arbitrary whims of the governor), and who always retain the right to change the form of government.

Like the Virginia Declaration, Locke's presentation strongly suggests that these political conclusions are not only useful, but that they are also just because they are derived from the natural or inherent rights of human beings. But how does Locke establish this claim, which is different from the claim that the principles he advances are useful?

Locke makes two different statements about this issue. The first statement contrasts sharply with what we find in Hobbes:

> But though this [state of nature] be a state of liberty, yet it is not a state of license; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker—all the servants of one sovereign master, sent into the world by his order, and about his business—they are his property whose workmanship they are, made to last during his, not one another's, pleasure; and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us that may authorize us to destroy another, as if we were made for one another's uses as the inferior ranks of creatures are for ours. Every one, as he is bound to preserve himself and not quit his station wilfully, so by the like reason, when his own preservation comes not in competition,

[35] Compare, for example, Hobbes, *De Cive* I.12 (referring to "this natural proclivity of men, to hurt each other, which they derive from their passions") with Locke, *Second Treatise* § 19 (distinguishing the state of nature from the state of war, and characterizing the former as "a state of peace, good-will, mutual assistance, and preservation"); *id.* § 32 (referring to the "penury" of the state of nature); and *id.* § 123 (contending that the motive for the institution of political society is "the mutual preservation of [men's] lives, liberties, and estates, which I call by the general name 'property.'").

> ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice to an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.[36]

Soothing as this statement is, it is not self-evident,[37] or even generally acknowledged: "[F]or though the law of nature be plain and intelligible to all rational creatures, yet men, being biased by their interest as well as ignorant for want of studying it, are not apt to allow of it as a law binding to them in the application of it to their particular cases."[38] How exactly can we be so sure that we are not accepting Locke's comforting assertions about the law of nature because we are "biased by [our] interest"?

Later, in introducing his extended argument for the labor theory of property, Locke makes a statement that is significantly different from his earlier claim that we are all the property of our Maker:

> Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his.[39]

This is almost as soothing, and perhaps even more flattering, than Locke's earlier assertion that the will of our Maker obliges others to respect our claims to life and to the means of self preservation. It would be hard to deny that everyone has a strong interest in *claiming* for himself an inherent, or natural, or God-given right to life, liberty, and wealth. That was what Burke suggested when he said that "[t]he little catechism of the Rights of Men is soon learned; and the inferences are in the passions."[40] However natural it may be to want or claim such rights, however, wanting and claiming are not enough to establish that we do have such rights by nature. Thus, Locke appears not to have established what the Declaration of Independence says is self-evident. Like the Declaration, Locke just asserts it.

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[36] *Second Treatise*, § 6.

[37] Nor does Locke base it on revelation. *See, e.g.*, § 136 ("the law of nature being unwritten, and so nowhere to be found but in the minds of men . . .").

[38] *Second Treatise*, § 124. *See also id.* § 23 (apparently endorsing suicide as a means of escaping from slavery.).

[39] *Second Treatise* § 27. Contrast Hobbes, *Leviathan*, ch. 14 (in the state of nature, "every man has a Right to every thing; even to one anothers body").

[40] Edmund Burke, *Thoughts on French Affairs* (1791), in *Selected Writings of Edmund Burke* 446 (Modern Library 1960).

II. Rousseau on Direct Democracy and Political Legitimacy[41]

Locke's principles underlie the institutions into which we are born. Rousseau indignantly rejected the liberal political vision to which we are heirs, believing that it could lead only to cynical interest group politics in which the rich would always outfox the poor, to societies dominated by money-grubbing hypocrites and courtiers, and ultimately to a culture that would produce the kind of degraded and hollow souls that Nietzsche later called "the last men."[42] Rousseau confidently pointed to an alternative that was not based on theory, but rather on recorded fact: the great souls and patriotic political vigor of classical civilization, especially Sparta and Rome.

If Rousseau were merely nostalgic for Plutarch's world, he might easily be dismissed. But he did not think that political societies like Sparta and Rome could or should be reconstructed in modern times. Leaving aside the question of Rousseau's response to ancient philosophy, a matter that is well beyond the scope of this paper,[43] what makes him especially significant for us is that he accepted the basic premise of Hobbes and Locke—the centrality of self preservation as the basis for politics and the denial of man's political nature—but contended that a correct understanding of those principles leads to radically different political conclusions.

A. *Discourse on Inequality*

Rousseau believed that his distinctive political insight, to which he consistently adhered, is "that man is naturally good, and that it is solely by [our] institutions that men become malicious."[44] The full meaning of this deceptively simple formulation emerges only from the entire body of Rousseau's almost unbelievably diverse and complex body of work. For our purposes here, it may be useful to begin by extracting the

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[41] Except where otherwise noted, citations to Rousseau's works refer to the translations in *Rousseau: The Discourses and other early political writings*, Victor Gourevitch, ed. (1997), and *Rousseau: The Social Contract and other later political writings*, Victor Gourevitch, ed. (1997).

[42] Frederick Nietzsche, *Thus Spoke Zarathustra*, Zarathustra's Prologue § 5.

[43] Rousseau does not dismiss classical philosophy (as Hobbes, for example, does). But Rousseau's stance is cryptic and ambiguous. In the *Discourse on Inequality*, for example, he appears to align himself with the Socratic tradition by taking for his epigraph a quotation from Aristotle's discussion of natural slavery and by imagining that he is speaking in Aristotle's school with "Platos and Xenocrates" for his judges. *See Discourse on Inequality*, at 113, 132-33 (I have altered the translation). On the other hand, the ancient text to which the *Discourse* bears the greatest surface resemblance is the latter part of Book V of the poem of Lucretius.

[44] Letter to M. de Malesherbes, Jan. 12, 1762, 5 *Collected Writings of Rousseau*, Christopher Kelly, Roger D. Masters, and Peter G. Stillman, eds., at 575 (I have altered the translation). A thorough and intelligent discussion of this unifying theme can be found in Arthur M. Melzer, *The Natural Goodness of Man: On the System of Rousseau's Thought* (1990). Although I find myself in disagreement with Melzer on certain points, I am greatly indebted to his commentary.

theoretical critique of Hobbes in Rousseau's most openly philosophic work, the *Discourse on the Origins and Foundations of Inequality Among Men*.

Near the beginning, Rousseau summarizes his principal argument as follows:

> The Philosophers who have examined the foundations of society have all felt the necessity of going back as far as the state of Nature, but none of them has reached it. Some have not hesitated to ascribe to Man in that state the notion of the Just and the Unjust, without bothering to show that he had to have this notion, or even that it would have been useful to him; Others have spoken of everyone's Natural Right to keep what belongs to him without explaining what they understood by belong; Others still, after first granting to the stronger authority over the weaker, had Government arise straightway, without giving thought to the time that must have elapsed before the language of authority and of government could have meaning among Men: Finally, all of them, continually speaking of need, greed, oppression, desires, and pride transferred to the state of Nature ideas they had taken from society; They spoke of Savage Man and depicted Civil man.[45]

A little later, Rousseau praises Hobbes by name, saying that he "very clearly saw the defect of all modern definitions of Natural right. . . ."[46] By this he means that Hobbes did not make the common mistake of those who work out elaborate systems of socially useful moral obligation, and then attribute those moral obligations to nature.[47] But whereas he thinks that Hobbes was right to say that human passions rather than

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[45] *Discourse on Inequality* at 132.

[46] *Discourse on Inequality* at 151

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> The Moderns, since they allow the name of Law only for a rule prescribed to a moral being, that is to say to a being that is intelligent, free, and considered in its relations with other beings, restrict the province of natural Law to the only animal endowed with reason, that is to say to man; but while each one of them defines this Law in his own fashion, all of them base it on such metaphysical principles that even among us there are very few people capable of understanding these principles, let alone of discovering them on their own. So that all the definitions by these learned men, which in every other respect are in constant contradiction with one another, agree only in this, that it is impossible to understand the Law of Nature and hence to obey it without being a very great reasoner and a profound Metaphysician. Which precisely means that in order to establish society men must have employed an enlightenment which develops only with much difficulty and among very few people within society itself.
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> . . . . One begins by looking for the rules about which it would be appropriate for men to agree among themselves for the sake of the common utility; and then gives the name natural Law to the collection of these rules, with no further

natural obligation must be at the root of all human justice, Rousseau claims that he went astray by attributing to human nature passions that only arise in and through society.[48]

Rousseau devotes a great portion of the *Discourse on Inequality* to establishing which passions are natural, in the sense that human beings must have had them in the actual state of nature. He means this inquiry to be as scientific as possible, and accordingly consults all the literature available to him about primitive peoples and the great apes. In the genuine spirit of science, Rousseau read these reports skeptically and expected that corrections to many of them would become necessary in the future. More dramatically, he leaves open the possibility of *physical* evolution, a question that he expects might be settled by future advances in comparative anatomy, and he even suggests experimental attempts to cross-breed humans with primates.[49] When Rousseau distinguishes the physical or natural from the moral, and philosophy or science from soothing political sermons, he is apparently not kidding around.[50]

Freely acknowledging that scientific certainty about the natural condition is not and may never be available,[51] Rousseau concludes that natural man must have been essentially indistinguishable from other animals. The principal reason for drawing this conclusion is that language is not natural but acquired, and it is the acquisition of language that makes possible all of the most significant differences between us and the beasts. The argument is essentially as follows. First, because language is acquired rather than natural, there must have been a time when human beings lived without language. And because all human societies (apart perhaps from the most primitive kind of families) are inseparable from language and impossible without it, this suggests that our kind is naturally and profoundly apolitical. That does not imply a Hobbesian war of all against all because we are physically designed so as to permit a solitary existence in the mild and fecund climate where the human race originated, and there is no reason to assume that humans originally had any passions except those required for such an existence: the desire for food, drink, and other

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> proof than the good which, in one's view, would result from universal compliance with them. That is certainly a very convenient way of framing definitions, and of explaining the nature of things by almost arbitrary conformities.

Discourse on Inequality at 126.

[48] "Above all, let us not conclude with Hobbes that because he has no idea of goodness man is naturally malicious, that he is vicious because he does not know virtue, that he always refuses to those of his kind services which he does not believe he owes them, or that by virtue of the right which he reasonably claims to the things he needs, he insanely imagines himself to be the sole owner of the entire Universe." *Discourse on Inequality*, at 151 (I have altered the translation).

[49] *Discourse on Inequality*, at 124-25; note 10, at 208.

[50] *See, e.g.*, *Discourse on Inequality* at 131.

[51] *Discourse on Inequality* at 125.

necessities of self-preservation, along with an inclination for sexual intercourse and the mother's instinctual care for her offspring.[52] Second, while human beings obviously must have had the *potential* to acquire language and all the other distinctively human characteristics that we observe, this potential would have been unleashed only as a result of natural accidents (such as earthquakes and droughts) that pushed humans into environments where the solitary existence of the first ages was not practicable. Once that happened, a train of events was set in motion that would lead eventually to something like the Hobbesian war of all against all, and thus to the necessity of founding civil society.

This is what Rousseau means when he claims that man is naturally good: our ancestors originally enjoyed the psychic simplicity of a solitary animal because they had no needs or passions beyond that required of such an animal. And they became malicious solely because they entered into relations of interdependence with other people, relations of which they are obviously capable but for which they are not naturally well-suited. The narrowness of "natural goodness" as Rousseau understands it deserves the utmost emphasis.

One consequence that Rousseau draws from this analysis is that nature does not divide man against himself by giving him duties that are odd with his inclinations. "Natural law" therefore becomes a kind of contradiction in terms: "All we can very clearly see about [natural] Law is not only that for it to be law the will of him whom it obligates must be able to submit to it knowingly; But also that for it to be natural it must speak immediately with the voice of Nature."[53] Accordingly, Rousseau takes the issue in the *Discourse* to be: "To mark in the progress of things, the moment when, Right *replacing* Violence, Nature was *subjected* to Law; . . . ."[54]

Notwithstanding this contrast between violence and nature on the one hand and right and law on the other, Rousseau sometimes uses the language of natural right in the Hobbesian sense of whatever one

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[52] Rousseau repeatedly asserts that human beings originally had one additional passion: pity or compassion, understood as a natural repugnance at the sight of suffering by other sentient beings. *E.g.*, *Discourse on Inequality*, at 127, 152. The proofs that are offered, however, are manifestly unsatisfactory by Rousseau's own standards. First, Rousseau purports to prove the existence of natural pity partly on the basis of the behavior of civilized people, thus violating the cardinal analytical principle of the book. *Discourse on Inequality*, at 152-54. Second, Rousseau's alternative argument, which is based on the behavior of other animals, comes after he severely criticized Locke for trying to establish the naturalness of the family on the basis of the behavior of other animals. *Id*. at 152; Note XII, at 212-16. Third, Rousseau's one genuinely plausible example of natural compassion—maternal affection for the woman's own children—is expressly *not* relied upon, perhaps because it obviously is not evidence of a quality natural to the species as such. *Id.* at 152. A complete account of the role of natural pity in the *Discourse on Inequality* is beyond the scope of this paper, but some additional detail can be found in Nelson Lund, *Sex and Language in Rousseau's Account of Human Origins* (unpub. doctoral diss. Harvard University 1981).

[53] *Discourse on Inequality* at 127.

[54] *Discourse on Inequality* at 131 (italics added).

thinks one needs for self-preservation. Rather than accepting the straightforward logic by which Hobbes purports to found political obligation on natural right, however, Rousseau emphasizes the difficulty in reconciling natural selfishness with political obligation. Thus, for example, he says that "moral inequality, authorized by positive right alone, is contrary to Natural Right whenever it is not directly proportional to Physical inequality."[55]

This is most conspicuous in Rousseau's description of the moment when right and law replaced nature and violence. Following Locke, Rousseau treats the cultivation and division of land as the critical development that led to the need to establish political institutions.[56] And he seems at first to accept Locke's labor theory of property: "Since labor alone gives the Cultivator the right to the produce of the land he has tilled, it consequently also gives him a right to the land, at least until the harvest, and thus from one year to the next, which as it makes for continuous possession, is easily transformed into property."[57] Rousseau, however, recognizes that this kind of right actually conflicts with another kind of right that has a much more obvious claim to be called natural: "A perpetual conflict arose between the right of the stronger and the right of the first occupant, which only led to fights and murders."[58] Rather than paper over this problem, as Locke did,[59] Rousseau concludes that the labor theory of property does not quite hold good:

> The rich, above all, must soon have sensed how disadvantageous to them was a perpetual war of which they alone bore the full cost, and in which everyone risked his life while only some also risked goods. Besides, regardless of how they painted their usurpations, they realized well enough that they were only based on a precarious and abusive right, and that since they had been acquired solely by force, force could deprive them of them without their having any reason for complaint. Even those whom industriousness alone had enriched could scarcely base their property on better titles. No matter if they said: It is I who built this wall; I earned this plot by my labor. Who set its boundaries for you, they could be answered; and by virtue of what do you lay claim to being paid at our expense for labor we did not impose on you? Do you not know that a great many of your brothers perish or suffer from need of what you have in excess, and that you required the express and unanimous consent of Humankind to appropriate for yourself anything from the common subsistence above and beyond your own? Lacking valid reasons to justify and sufficient strength to defend himself; easily crushing an individual, but himself crushed by troops of

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[55] *Discourse on Inequality* at 188.

[56] *Discourse on Inequality* at 169.

[57] *Discourse on Inequality* at 169.

[58] *Discourse on Inequality* at 171-72.

[59] *See Second Treatise* § 32 (arguing that God commanded man to improve the world by cultivating the earth).

> bandits; alone against all, and unable, because of their mutual jealousies, to unite with his equals against enemies united by their common hope of plunder, the rich, under the pressure of necessity, at last conceived the most well-considered project ever to enter the human mind; to use even his attackers' forces in his favor, to make his adversaries his defenders, to instill in them other maxims and to give them different institutions, as favorable to himself as natural Right was contrary to him.[60]

This passage not only says that robbers have no obligations to other robbers, but also seems to imply the right of the first occupancy depends on the impossible condition of the express and unanimous consent of mankind. Nor does Rousseau say that the industrious first occupant lacks a valid answer only to those who are themselves perishing or suffering from need of what he has in excess. A well fed robber, no less than a starving one, could say that he neither imposed any labor on the first occupant nor agreed to refrain from taking whatever he found on the land in question.

This passage brings out most clearly what Rousseau considered the latent implications of the apolitical nature that he believes Hobbes and Locke correctly attributed to human beings. The most natural "right" is the right of the stronger, and "the first rules of justice" only *follow* from the recognition of property.[61] Nature lacks a moral component, and the projection of our notions of right or justice back into the state of nature is anachronistic. Nor would the original social contract have been a reasonable agreement among reasonable people.[62] Whatever the usefulness of political society—and Rousseau acknowledges that by the time governments were instituted, there must really have been no practical alternative[63]—it did not incorporate any principle of natural right or justice. "The first man who, having enclosed a piece of ground, to whom it occurred to say *this is mine*, and found people sufficiently simple to believe him, was the true founder of civil society."[64] The origin of laws "transformed a skillful usurpation into an irrevocable right, and for the profit of a few ambitious men henceforth subjugaged the whole of

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[60] *Discourse on Inequality* at 172-73 (italics added). *See also Social Contract* I.9, at 54 (denying that the right of first occupancy is a true right).

[61] *Discourse on Inequality* at 169. *See also id.* at 174 (after the spread of political society, "the Law of Nature no longer obtained except between different Societies where, under the name of Right of nations, it was tempered by a few tacit conventions in order to make commerce possible").

[62] Hobbes goes so far as to present the acquisition of sovereignty by conquest as a reasonable agreement in which the conqueror offers to spares the lives of the conquered in return for submission to his rule, and the conquered reasonably agree to accept the offer. *See Leviathan* ch. 20.

[63] *See Discourse on Inequality* at 173.

[64] *Discourse on Inequality* at 161. *See also Social Contract* I.1, at 41 (asserting that the social order is a right that does not come from nature, and that it provides the basis for *all* other rights), and *id.* II.6, at 66 (denying that there are any obligations in the state of nature).

Mankind to labor, servitude and misery."[65]

The conclusions drawn by Rousseau from the liberal premise of man's apolitical nature caused him to regard two questions as far more challenging than they appear to be in Locke and Hobbes. First, if the original social contract must have been a trick, rather than the reasonable agreement among reasonable people, how can we distinguish between legitimate and illegitimate political rule today? Second, if human beings are not naturally fitted for political life, can nature provide us with guidance in designing political institutions? Rousseau takes up these questions in the *Social Contract*.

B. *Social Contract*

The difficulty of the question of legitimacy is reflected in the famous (and famously paradoxical) formulation that occurs near the beginning of the *Social Contract*:

> "Man was [and/or is] born free, and everywhere he is in chains. One believes himself the others' master, and yet is more a slave than they. How did this change come about? I do not know. What can make it legitimate? I believe I can solve this question.[66]

Thus, whereas the *Discourse on Inequality* constituted an effort to explain how this change could have come about,[67] the *Social Contract* is devoted to explaining how our chains can be made legitimate. The very formulation suggests that this is a problem that cannot be solved in a completely satisfactory manner.

As is well known, Rousseau's solution to the problem of legitimacy is a social contract, which becomes necessary once it has become impossible to remain in the state of nature, consisting of the following terms:

> *Each of us puts his person and his full power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of*

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[65] *Discourse on Inequality* at 173.

[66] *Social Contract* I.1, at 41. Because of an ambiguity in the French, which Rousseau undoubtedly took advantage of, he could mean that human beings "were" born free, or that they "are" born free, or both.

[67] In the *Discourse on Inequality*, Rousseau emphasizes that the train of events that led the human race out of the original state of nature can only be a matter of conjecture. What he is sure about is only that human beings must originally have been mere animals, and that they are no longer mere animals. *Discourse on Inequality*, at 159-60. Thus, the conjectural nature of the human history that he describes in that book does not undermine its argument, and it is not inconsistent with the statement from the *Social Contract* quoted in the text just above.

the whole.[68]

Rousseau does not say that this contract has ever been expressly entered into anywhere, but he insists that it is tacitly recognized everywhere.[69] Notwithstanding the obvious similarities with the social contract doctrines of Hobbes and Locke, this legitimizing contract differs from theirs in several respects. I will focus on just one of the differences.

Every right—or, in more precise terms, every bit of force and freedom[70]—that the individual relinquishes as an individual is completely retained by the same individual in his capacity as a member of the new body formed by the contract. Precisely because the alienation is both complete and completely mutual, everybody gains additional force and freedom, and in a formal sense no party to the contract loses any force or freedom. The completeness of the alienation is necessary, Rousseau explains, because any reservation of rights (or force and freedom) would leave room for disputes between the whole and its parts, which in turn would lead to a breakdown in the direction of tyranny or anarchy.[71]

Unlike the social contracts in Hobbes and Locke, this contract implies very little about the goals and characteristics of the political institutions that will be instituted. Whereas Hobbes and Locke both

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[68] *Social Contract* I.6, at 50 (italics in original).

[69] *Social Contract* I.6, at 50.

[70] *See Social Contract* I.6., at 49. The *Social Contract* contains a few passages that, read in isolation, might suggest that Rousseau believes there are natural or pre-political rights that imply natural or pre-political obligations. See *Social Contract* I.4, at 46; I.7, at 50; I.8, at 53-54; I.9, at 54; II.4, at 61; III.10, at 108. I believe this inference is incorrect, and that Rousseau's actual teaching in the *Social Contract* is quite consistent with the implications that I drew from the *Discourse on Inequality*. First, a close look at the references to natural or pre-political rights in the *Social Contract* shows that Rousseau never says that pre-political rights are accompanied by pre-political obligations. Second, Rousseau specifically says that conventions and laws are "necessary to combine rights with duties." *Social Contract* II.6, at 66. Third, when Rousseau specifies the content of man's pre-political rights, he uses the Hobbesian formulation which, as we have seen, does not imply correlative duties toward other people. *See Social Contract* I.8, at 54 (referring to "an unlimited right to everything that tempts [a human being] and he can reach"). Thus, Rousseau's apparent appeals to natural right, like the parallel appeals in Hobbes and Locke, are potentially misleading.

[71] *Social Contract* I.6, at 50. The power of this argument was acknowledged even by Locke, who declared that no political society can exist if any of its members retains the power to defy its decisions:

> And thus *all* private judgment of *every* particular member being excluded, the community comes to be umpire by settled standing rules, indifferent and the same to all parties, and by men having authority from the community for the execution of those rules decides *all* the differences that may happen between *any* members of that society concerning *any* matter of right . . . .

Second Treatise § 87 (italics added).

contend that the goal of all civil society is the peace and safety needed for self preservation,[72] and that reason instructs us to give our consent to political institutions that serve this goal, Rousseau's more indefinite formulation is less tethered to the pressing needs of early societies and thus more open to goals that are substantially more expansive.

Rousseau does agree that peace and safety, and the wealth that conduces to self-preservation, probably did provide the motivation for the first political societies, and he agrees that these goods always constitute the irreducible minimum goals of any legitimate polity.[73] Nonetheless, Rousseau's formulation of the social contract has a liberating quality that seems to arise from his decision not to focus as much as Locke and Hobbes did on the moment of transition from the state of nature to civil society: whatever the actual origins of any political regime may have been, its current legitimacy has to be measured by the general will of all the current members of that political society. In a different sense, however, Rousseau suggests that Hobbes and Locke offered a false promise of liberation because they neglected the constraints, imposed by nature and circumstance, that might require a people to pursue goals beyond peace and safety in order to attain even those more basic goods.[74] In both these senses, the *Discourse on Inequality*'s analysis of the long road out of the original state of nature prepared the way for the political analysis in the *Social Contract*.

The strength of Rousseau's formula for the social contract lies in its perfect formalism. How could one not consent to an exchange in which one gives up everything only to get it all back and more besides? The harder question is whether such a tacit contract can have much of anything to do with the real world. The natural place to begin considering that question is with the much discussed concept of the general will.

Notwithstanding the air of mystery that infuses many discussions of Rousseau's general will, I do not believe that the concept itself is particularly difficult to understand. The general will is just what the name implies: it is a will and it is general. This means nothing more than the desire for the common interest, which is something everyone wants wherever people are cooperating in pursuit of their common interests. We all have personal experience with the general will, and with the difference between it and what Rousseau calls the "particular will," which is an individual's desire for what he thinks is in his own best interest. In order to see why there is nothing at all mysterious about this, one need only recognize that any individual person can have conflicting wills or desires. We all want what is good for every community that we're a part of, because whatever is good for the community as such is also good for us. And that is true even if we *also* want something else which is not good for the community but which is good for ourselves.

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[72] *See, e.g., Leviathan* ch. 17 (first paragraph); *Second Treatise* § 134. The disagreements between Hobbes and Locke primarily concern the means that are most apt to lead to this end.

[73] *See Social Contract* III.9, at 109; IV.1, at 121.

[74] *See, e.g., Social Contract* II.11.

Consider a simple illustration based on a nuclear family consisting of a father, a mother, and their child. At dinnertime, each of the individuals may have different preferences about what to eat. The mother's perfectly selfish choice might be to go out to a Thai restaurant thirty miles away. The father, who dislikes Thai food, has just driven home from the office through horrendous traffic, does not want to go back out on the roads, and would prefer to have his wife cook an Italian dinner for the family to eat at home. The child's first choice, as always, is the nearby McDonald's.

Since the selfish preferences are all in conflict, this group has a problem that needs to be solved. And we have all seen the problem solved innumerable times. The family might end up deciding to go to McDonald's, on the understanding that they will have Italian food at home tomorrow, and go to the Thai restaurant on Saturday. Or they might decide to have a pizza delivered in, which is acceptable to everyone even though it is not anyone's first choice. Such solutions are driven by a simple fact: each member of the family wants the whole group to end up reasonably happy. And that desire to make everybody happy, even if only reasonably happy, is the general will.

Of course, the general will may not prevail. The child, for example, might decide that he wants McDonald's more than he wants everybody to be reasonably happy. So he might refuse to agree to anything else, and try to get his own way through the usual techniques, such as whining and cajoling. This selfish behavior does not mean the general will has ceased to exist. He probably does want everybody to be reasonably happy, and he might honestly say so if he were asked. It's just that he wants McDonald's *more* than he wants to achieve the common interest in a mutually satisfactory resolution of the family members' conflicting desires.

Why doesn't each member of this family behave like the selfish child, and try hard to get his own first choice satisfied every time? I think the answer has two parts. First, they sometimes (indeed frequently) overcome or suppress their selfish desires in favor of the common interest. Second, they can do that because the common interest is also in each of their individual interests. And that is ultimately because they think they're better off maintaining their cooperative arrangement rather than going their separate ways. If that ceased to be true, the family would dissolve, as of course families sometimes do.

Another possibility is that one member of the family could acquire sufficient power to consistently impose his individual preferences on the others. This could happen, for example, if the mother and child were economically dependent on the father, and his affection for them was relatively weak. In that case, we might observe something analogous to an illegitimate government, where people are subjected to a particular will other than their own, rather than to the general will.

One last point, which is important for understanding Rousseau. The general will has to be understood as aiming at something that the members of an association actually want, which is not necessarily what is best for them. If the people in my hypothetical illustration really knew what was best for themselves, they might end up making a completely different choice, like having alfalfa sprouts and yogurt

for dinner. Rousseau emphatically does not claim that legitimate rule is the rule of wisdom.[75] At the same time, Rousseau recognizes the need for political leadership that will induce people to want what is good for them: legitimacy is not a sufficient criterion, and in some sense not even the most important criterion, for evaluating political institutions.[76]

If the concept of the general will is easy to understand from our ordinary experience, it is also not so difficult to understand why one might regard the general will as the unique basis for political legitimacy. Once one concludes that human beings are naturally apolitical, convention or agreement is the only possible basis other than force for any enduring political association. And without some common interest, there could be no basis for an uncoerced agreement to enter or remain in a durable association.[77]

What is much more difficult to see is how political societies could actually operate under what Rousseau calls "the supreme direction of the general will." I believe that is impossible for any polity to be always and exclusively under the direction of the general will, and that this standard of legitimacy therefore looks like the spurious mirror image of the spurious standard in Hobbes. Whereas Hobbes drains legitimacy of its normal meaning by claiming to show that no ruler is illegitimate, Rousseau's standard is one that cannot be met by any ruler.

Perhaps one can say, however, that some societies are guided by the general will more often, or more consistently, or on more important matters than other societies. Legitimacy then becomes a matter of more and less, rather than yes or no, and takes on the nature of a goal or aspiration. This seems to me to give Rousseau's approach a certain intuitive plausibility, but it leads him to challenge some of our liberal assumptions about the meaning of political freedom. Above all, Rousseau takes much more seriously than liberal thought usually does the inherent and unceasing conflict between the common interests that we share

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[75] *See Social Contract* II.12, at 80 ("[A] people is in any case always master to change its laws, even the best of them; for if it pleases it to harm itself, who has the right to prevent it from doing so?"); I.7, at 52 (denying that even the social contract itself can be obligatory on the people as a body).

[76] *See, e.g.*, *Social Contract* III.5, at 93, where Rousseau acknowledges the force of the classical view that the wise should rule for the benefit of the ruled, but then immediately dismisses this line of analysis on grounds of practicability:

> In a word, the best and most natural order is to have the wisest govern the multitude, so long as it is certain that they will govern it for its advantage and not for their own; institutions and procedures should not be multiplied needlessly, nor should twenty thousand men be employed to do what a hundred well chosen men can do even better. But it must be noted that here the corporate interest [of the governors] begins to guide the public force less in accordance with the standard of the general will, and that another inevitable decline deprives the laws of a portion of the executive power.

[77] *Cf. Social Contract* II.1, at 57 ("[W]hile the opposition of particular interests made the establishment of societies necessary, it is the agreement of these same interests which made it possible").

and the naturally selfish interests we all have, and the extreme difficulty of reconciling them through an objective or natural concept of justice.[78] He therefore rejects the notion that political life should concern itself only with aggregating the private preferences of the citizenry, or channeling our naturally selfish desires into pathways that will produce greater wealth and material comfort for everyone. The liberal faith in the beneficent effects of unleashed human selfishness, whether in markets or in pluralist politics, Rousseau regarded as a prescription that could only aggravate the disease. What he saw there were people whose disposition:

> engenders so much indifference to good and evil together with such fine discourses on morality; [where] everything being reduced to appearances, everything becomes factitious and play-acting: honor, friendship, virtue, and often even vices in which one at length discovers the secret of glorying; [where], in a word, forever asking of others what we are, without ever daring to ask it of ourselves, in the midst of so much Philosophy, humanity, politeness, and Sublime maxims, we having nothing more than a deceiving and frivolous exterior, honor without virtue, reason without wisdom, and pleasure without happiness.[79]

One can and should ask whether subsequent history has shown that Rousseau was wrong to regard the liberal faith as misguided. But before making a judgment about that, perhaps one should ask what alternative he proposed. The most important element of his proposed alternative involves the need for active political measures aimed at inducing citizens to subordinate their selfish interests to the common interest by suppressing their selfish impulses. We all know, from experience in our families, that it is perfectly possible for such mutually beneficial self-suppression to occur. But whereas families are held together in part by natural ties of affection, this is not true of political associations.[80] Rousseau denies that arguments based on self-interest, like the arguments we find in Hobbes and Locke, are sufficient to produce any real community. In order to prevent what Rousseau thought would inevitably become nothing more than a complex and ultimately self-defeating system of mutual exploitation, he concluded that it is necessary to create *unnatural* ties of affection among citizens through a thoroughly politicized system of education. That is what Sparta did preeminently well, and Rousseau contends that it is not altogether impossible even in modern bourgeois societies, like his own Republic of Geneva.

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[78] *See, e.g.*, *Social Contract* II.6, at 66 ("All justice comes from God, he alone is its source; but if we were capable of receiving it from so high, we would need neither government nor laws. No doubt there is a universal justice emanating from reason alone; but this justice, to be admitted among us, has to be reciprocal. Considering things in human terms, the laws of justice are vain among men for want of natural sanctions; they only bring good to the wicked and evil to the just when he observes them toward everyone while no one observes them toward him."). *See also Government of Poland* ch. 12, at 233 ("The most inviolable law of nature is the law of the stronger. No legislation, no constitution can exempt from this law.").

[79] *Discourse on Inequality*, at 187.

[80] For an elaboration of this point, see *Social Contract* I.2; *Discourse on Political Economy*, at 3-6.

We children of liberalism tend to be scandalized by such proposals, whether we meet them in Rousseau or in Plato, but perhaps for the wrong reasons. According to Rousseau, the self-discipline that is required for political life must overwhelmingly be the product of an education that arises from a shared social consensus, not from the kind of coercive reeducation projects that we observed in the totalitarian regimes of the last century. It is true that a highly politicized form of public education can be used as an instrument of oppression (in violation of the general will), or as an instrument that makes possible the most ferocious behavior toward outsiders (perhaps in accord with the general will). But it is not as clear as we sometimes think that these phenomena are necessarily concomitants of a highly politicized civic life. Nor is the absence of the kind of educational institutions favored by Rousseau a sure guarantee against internal oppression or outward aggression. Ancient Athens, for example, was surely more aggressive toward its neighbors than modern Geneva. And countless despotic regimes have been quite content to oppress their subjects without making any effort to educate them at all.

The consensus underlying the kind of civic education favored by Rousseau can be affected only indirectly, though decisively, by political or governmental actions. The real spring of genuine social cohesion, where it exists, is not in institutional mechanisms, but rather in the influence of those who shape public opinion, either at a founding moment or in the course of a people's history.[81] In the most practically important respects, it is not the social contract itself that produces freedom, but rather the leadership of those who mold a people so as to make it capable of adhering to the social contract. A Moses, a Lycurgus, or a Calvin, not a crowd of would-be bourgeois desperate to escape the state of nature, is the indispensable element in establishing the social contract.[82]

Rousseau's focus on the importance of shared political sentiments as a prerequisite for political self government also leads him to revive another commonplace of classical political thought, namely skepticism about the possibility of maintaining free or republican institutions in large polities. This skepticism did not lead Rousseau to the conclusion that large republics were strictly and necessarily impossible, and he believed that federalism might provide a way to combine the advantages of small republics with those of a large state.[83] This aspect of Rousseau's thought, along with his attention to cultivating public virtue, produces a real kinship between him and our Anti-Federalists (who might better have been called the Anti-

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[81] *See, e.g., Social Contract* II.12, at 81.

[82] *See, e.g., Social Contract* II.7; *Discourse on Political Economy*, at 12-13. In the *Confessions*, Rousseau reports that his experience while serving as an assistant to the French ambassador to Venice, combined with subsequent historical research, had led him to this fundamental insight: "I had seen that everything depends radically on politics, and that, from whatever aspect one considers it, no people ever would be anything other than what it was made into by the nature of its Government; thus this great question of the best possible Government appeared to me to be reduced to this one. What is the nature of Government suited to forming a people that was the most virtuous, most enlightened, most wise, in sum, the best, taking this word in its most extended sense." *Confessions*, bk. IX, at 340.

[83] *See, e.g., Social Contract* III.15, at 115-16 & n.*.

Centralizers).

To the extent that one believes that the Anti-Federalist position was not completely defeated by the adoption of our federal Constitution and by the Civil War, a belief consistent with the recent upsurge in serious attention to the principles of federalism, Rousseau's political analysis may still have relevance for Americans today. What makes this particularly true, and particularly relevant to this symposium, is Rousseau's discussion of the fundamental difference between what he calls the "sovereign" and what he calls the "government."

Perhaps surprisingly, given what I have already said about the perpetual conflict between the general will and particular wills, Rousseau concluded that the greatest obstacle to the effective political expression of the general will is competition from *other general wills*, or in terminology more familiar to us, the problem of faction.

In the *Social Contract*, Rousseau defines sovereignty as the exercise of the general will, and the product of an exercise of the general will as a "law" in the strict sense of that term. For the will to be general, it must not only be general in its source (reflecting what everybody without exception wants) but also general in its object:

> [W]hen the whole people enacts statutes for the whole people it considers only itself, and if a relation is then formed, it is between the entire object from one point of view and the entire object from another point of view, with no division of the whole. . . .
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> . . . . [S]ince the law combines the universality of the will and that of the object, what any man, regardless of who he may be, orders on his own authority is not a law; what even the Sovereign orders regarding a particular object is not a law either, but a decree, nor is it an act of sovereignty but of magistracy.[84]

One consequence of this analysis is that no society can actually be governed by the sovereign. Legislative power, or the power to make law in the strict sense, belongs and can only belong to the people as a whole. The power to carry out these laws, which Rousseau calls the "executive" power, necessarily has particular objects and therefore cannot constitute an exercise of sovereignty. Accordingly, there must be what Rousseau calls "government," a body of people whose function is to act as intermediary between the people in their sovereign capacity and the people in their individual capacities. Even if the members of the sovereign and the government were precisely identical (what we might call pure democracy), they would

[84] *Social Contract* II.6 at 67.

still be performing different functions.

The distinction between the sovereign and the government may be the most important in the *Social Contract*, for it encapsulates what Rousseau regarded as the most enduring and intractable practical problem of political organization. That problem can be articulated in the following way. Pure democracy, which in theory might seem capable of carrying out the social contract most perfectly, in fact cannot do so because the people's constant and repeated attention to particular objects will inevitably stimulate the activity of their particular wills, and thus will result in the corruption of the sovereign. Thus, even aside from the practical impossibility of keeping people who must work for a living constantly assembled, pure democracy is an inherently self-destructive form of self-governance.[85] That means that the sovereign must delegate the business of government to a smaller portion of the citizenry. But once that is done, this smaller body will itself generate a general will of its own, corresponding to the common interest of the members of the government, and this *esprit de corps* will act as a particular will in relation to the sovereign. Because the concentration of wills increases their relative force, governments will always tend to undermine the sovereign:

> In a perfect legislation, the particular or individual will [of the magistrates, or members of the government] should be null, the Government's own corporate will should be very subordinate, and consequently the general or sovereign will should always be dominant and the sole rule of all the others.
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> According to the natural order, on the contrary, the more concentrated these different wills are, the more active they grow. Thus the general will is always the weakest, the corporate will occupies second place, and the particular will the first place of all: so that in the Government each member is first of all himself, and then Magistrate, and then Citizen. A gradation that is the direct opposite of that required by the social order.[86]

A number of consequences follow from this analysis, some of which are quite compatible with our

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[85] "If there were a people of Gods, they would govern themselves democratically. So perfect a Government is not suited to men." *Social Contract* III.4, at 92.

[86] *Social Contract* III.2, at 87-88. *See also id*. III.10, at 106:

> Just as the particular will incessantly acts against the general will, so the Government makes a constant effort against Sovereignty. The greater this effort grows, the more adulterated does the constitution get, and since there is here no other corporate will to resist the will of the Prince [i.e. the governors] and so to balance it, it must sooner or later come to pass that the Prince ends up oppressing the Sovereign and breaking the Social treaty. This is the inherent and inevitable vice which relentlessly tends to destroy the body politic from the moment of its birth, just as old age and death destroy a man's body.

liberal presuppositions and traditions, and some of which are not. Perhaps most obviously, the inherently usurpatious tendencies of all governments point toward the need for devices like the separation and balancing of powers, and periodic elections.[87] Rousseau endorses the use of such devices, without claiming that any of them are matters of principle, or more than matters of expedience. This puts him in substantial agreement with the *Federalist Papers* on what may seem to be a surprising range of issues. And, if the *Social Contract* is not infused with the spirit of Montesquieu, it as least suffused with many points of agreement and many debts to *The Spirit of the Laws.*

With respect to the topic of this symposium, however, Rousseau departs dramatically from our tradition:

> It is not enough for the people assembled to have once settled the constitution of the State by giving sanction to a body of laws: it is not enough for it to have established a perpetual Government or to have provided once and for all for the election of magistrates. In addition to extraordinary assemblies which may be required by unforeseen circumstances, there must be fixed and periodic assemblies which nothing can abolish or prorogue, so that on the appointed day the people is legitimately summoned by law, without need of any further formal convocation.[88]

Rousseau devotes several chapters of the *Social Contract* to exploring this proposition and to defending it against obvious objections about its practicality.[89] The theme of this extended treatment essentially boils down to the strong claim that political legitimacy, or what we might call political liberty, has a real price, particularly in terms of what might be called private or personal liberty. In what looks like a direct slap at us, Rousseau writes:

> Any law which the People has not ratified in person is null; it is not a law. The English people thinks it is free; it is greatly mistaken, it is free only during the election of Members of Parliament; as soon as they are elected, it is enslaved, it is nothing. The use it makes of

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[87] *See, e.g.*, *Social Contract* III.5; III.7. *See also Government of Poland* ch.7, at 198-200; ch. 8, at 215.

[88] *Social Contract* III.13, at 111.

[89] *Social Contract* II.1-2; III.12-15; III.18. For a very thorough discussion of Rousseau's various statements about direct democracy, see Richard Fralin, *Rousseau and Representation* (1978). Fralin ably identifies a number of seemingly inconsistent statements and inadequate arguments on this topic in Rousseau's various writings. In the end, he concludes that Rousseau's views changed over time and that Rousseau never escaped from the grip of a fundamental ambivalence about the value of direct citizen participation in the political process. For reasons that I will sketch out below, I disagree with these conclusions.

> its freedom during the brief moments it has it fully warrants its losing it.[90]

This denunciation of our representative form of legislature is matched by a contemptuous dismissal of our reasons for adopting that form:

> It is the hustle and bustle of commerce and the arts, it is the avid interest in gain, it is softness and love of comforts that change personal services into money. One gives up a portion of one's profit in order to increase it at leisure. Give money, and soon you will have chains. The word *finance* is a slave's word; it is unknown in the City. In a truly free State the citizens do everything with their hands and nothing with money: Far from paying to be exempted from their duties, they would pay to fulfill them themselves. I am very far from the commonly held ideas; I believe corvées to be less at odds with freedom than taxes.[91]

From these and other passages, it is easy to conclude that Rousseau would regard the United States as much more like the Roman Empire than the Roman Republic, and that his political science has about as much to teach us about how to conduct our affairs as his description of the state of nature does. Just as Rousseau clearly taught that the human race could not return to the state of nature, he also taught that the corruption and decline of free societies was inevitable. Thus, it might seem, we might as well enjoy our bread and circuses, leaving Rousseau's lessons—if they have any truth in them—to be learned by those who live in circumstances happy enough to permit their implementation.

I think this conclusion would be a mistake. It is true that Rousseau, like Montesquieu and many others before them, believes that political liberty is impossible in many circumstances.[92] But I think it is

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[90] *Social Contract* III.15, at 114.

[91] *Social Contract* III.15, at 113 (italics in original).

[92] *See, e.g.*, *Social Contract* III.8, at 100 (citing Montesquieu for the proposition that "[f]reedom, not being the fruit of every Clime, is not within the reach of every people."). In *Letters Written from the Mountain*, a lengthy polemic about Genevan politics written after the *Social Contract* was condemned by the authorities in his native city, Rousseau warned against efforts to model institutions for modern bourgeois societies directly on those adapted to ancient peoples. 9 *Collected Writings of Rousseau*, Christopher Kelly & Eve Grace, eds., Ninth Letter, at 292-93. But he did not conclude that freedom has now become impossible. Instead he argued that institutional mechanisms must be adapted to the changed situation:

> Not being idle as the ancient Peoples were, you [Genevans, who are always occupied with private and commercial interests] cannot ceaselessly occupy yourselves with the Government as they did: but by that very fact that you can less constantly keep watch over it, it should be instituted in such a way that it might be easier for you to see its intrigues and provide for abuses. Every public effort that your interest demands ought to be made all the easier for you fulfill since it an effort that costs you and that you do not make willingly. For to wish to unburden yourselves of them completely is to wish to cease

equally true that Rousseau believed that *perfectly* legitimate political institutions are *always* impossible. The root of the problem lies in the unnaturalness of political society, which requires that a conventional or legal equality replace the natural inequalities of physical and mental power among people, and which requires the cultivation of unnatural affections for one's fellow citizens. The impossibility of winning this war against nature is reflected in Rousseau's rejection of the possibility of pure democracy. *All* other institutional arrangements are necessarily compromises that have to be evaluated in practical terms: Do they increase or decrease the likelihood that political outcomes will reflect the general will? That means that there can be *no* absolute affirmative requirements about institutional arrangements,[93] although there can of course be many institutions whose illegitimacy is manifest. Notwithstanding Rousseau's statement, quoted above, that the English are not free, he elsewhere says that they "are closer to freedom than all the others," referring apparently to other bourgeois nations.[94]

Rousseau reminds us rather dramatically that perfect legitimacy is impossible right in the middle of his extended discussion of the need for direct enactment of all laws by the assembled people. Sparta—which Rousseau throughout all his writings treats as the freest people that ever existed—was able to maintain itself only through the use of slavery, an institution which Rousseau argued is always and everywhere illegitimate.[95] Thus, Rousseau believes that he can, without being inconsistent, offer the highest

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being free.

Id. at 293.

[93] It is sometimes said that Rousseau objects to representative legislatures on the purely theoretical ground that will by its nature cannot be represented. *See, e.g.*, Fralin, *Rousseau and Representation*, *supra* note –, at 81-82. The very passage in which Rousseau makes this argument against the possibility of the general will's being alienated, however, goes on to add: "This is not to say that the commands of the chiefs may not be taken for general wills as long as the sovereign is free to oppose them and does not do so." *Social Contract* II.1, at 57-58. It is certainly true that will, unlike power, cannot be alienated in the technical sense of the term. But so long as representatives are understood as agents of the sovereign rather than as possessors of sovereignty itself, this theoretical objection to representative legislatures disappears. Although Rousseau does say that agents of the sovereign "cannot conclude anything definitively," *Social Contract* III.15, at 114, he later makes it clear that the real theoretical touchstone of legitimacy is consistency with the general will, not such formalities as in-person ratification. *See Social Contract* IV.2, at 124 & n.* (discussing the conditions under which tacit consent is given to the laws).

[94] *Social Contract* I.6, at 51 n.*.

[95] *E.g.*, *Social Contract* I.4; III.15, at 115. Rousseau's precise argument against the legitimacy of slavery is that it would have to be based on an absurd agreement in which one party gives up everything and receives nothing in return. It is therefore a kind of mirror image of what Rousseau presents as the genuine social contract. In both cases, Rousseau's argument is highly formalistic, with a connection at best ambiguous to any substantive claims about natural rights. For example, he says: "To renounce one's freedom is to renounce one's quality as man, the rights of humanity, and even its duties." *Social Contract* I.4, at 45. As we know from the *Discourse on Inequality* and from other passages in the *Social Contract*, Rousseau denies that the duties of humanity, perhaps even humanity itself, could exist prior to social institutions.

praise for a polity that includes, and indeed is founded on, a fundamentally illegitimate institution.

One might belittle the significance of Rousseau's remarks condemning slavery on the ground that slaves (like foreigners and domestic animals) are outside the polity and therefore cannot affect the legitimacy of the relations among those who have contracted to form the polity. Whatever the force of this objection may be, Rousseau gave other indications in the *Social Contract* that his insistence on what we call direct democracy was overstated. In the course of his discussion of Roman institutions (one of only two parts of the book that he emphasized must be read with special care), Rousseau strongly approves of an extreme form of malapportionment (adopted by Servius under a military pretext) that effectively gave a hugely disproportionate share of legislative power to the wealthiest elements in the society and effectively deprived the urban poor of any power at all.[96]

Rousseau's approval of this trick designed to concentrate political power in the more stable elements of society, while maintaining a kind of formal equality that gave every citizen the vote, is a striking indication that we should not take at face value his statement that legitimate laws can only be enacted by the assembled people. If we go back to Rousseau's conception of the social contract itself, its crucial feature is that legitimate political rule consists of rule "under the supreme direction of the general will." Rousseau's later claim that the only legitimate laws are those adopted by the people in person is not a necessary consequence of the terms of the social contract, for the general will *could* guide a representative assembly or even a single representative like a monarch.[97] A representative body might not be as likely to adopt measures dictated by the general will as often or as consistently as an assembly of the people, but it is not inherently precluded from doing so. And, as Rousseau acknowledges, even the assembled people is perfectly capable of *failing* to follow the general will.[98]

This last point leads to another reason for not treating popular assemblies as the *sine qua non* of legitimate laws. Rousseau is fond of saying that the people can never be corrupted, but can easily be deceived.[99] One obvious implication of this is that the government can, and can be expected to, make efforts to deceive the people into adopting or going along with measures that are good for the government and bad for the community. Hence, Rousseau's emphasis on the usefulness of convening the people

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[96] *Social Contract* IV.4, at 130-31.

[97] Rousseau expressly acknowledges this point in the *Discourse on Political Economy*, which was published several years before the *Social Contract*. *See Discourse on Political Economy* at 12.

[98] *E.g.*, *Social Contract* IV.1.

[99] *E.g.*, *Social Contract* II.3,at 59; II.6, at 68; *Government of Poland* ch. 7, at 201.

regularly for what amount to votes of confidence or no-confidence in the government.[100] A less obvious implication, however, is that the government will have the ability to deceive the people and manipulate them into adopting measures that are *good* for the community, but which would likely not be adopted except for this manipulative behavior.

The most dramatic examples of this phenomenon occur when a people receives its formative laws from one of those rare founding legislators like Lycurgus, who obtain consent by falsely claiming that the laws they have invented and are promulgating were actually dictated by the gods.[101] But the same kind of thing can happen later, in more routine circumstances, as when governments design tax systems that are meant to prevent excessive economic inequality from arising.[102] This example is particularly revealing because it calls attention to an important feature of Rousseau's discussion of sovereignty and government, namely that he never draws a really clear distinction between those matters that must be governed by law (and thus supposedly require direct action by the assembled people) and those matters that may and should be handled by decrees, or acts of the government.

At the extremes, it is clear that some matters fall into one category or the other. The basic constitutive decisions of the society, such as whether to adopt an aristocratic or monarchic form of government, would require action by the sovereign (though even here substantive consistency with the general will, rather than the formality of a popular assembly, is more important, as the Lycurgus example suggests). At the other extreme, Rousseau tells us that decisions directed at particular individuals, such as

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[100] *Social Contract* III.18, at 119-20. In *Letters Written from the Mountain*, Rousseau provides a more general theoretical statement that explains why periodic popular assemblies can be important, though not absolutely indispensable:

> The Legislative power consists in two inseparable things: to make the Laws and to maintain them; that is to say, to have inspection over the executive power. There is no State in the world in which the Sovereign does not have this inspection. Without that, all connection, all subordination lacking between these two powers, the latter would not depend on the other at all; execution would have no necessary relation to the Laws; the *Law* would only be a word, and this word would signify nothing.

9 *Collected Writings of Rousseau*, Christopher Kelly & Eve Grace, eds., Seventh Letter, at 247-48 (italics in original).

[101] *Social Contract* II.7.

[102] *See, e.g.*, *Discourse on Political Economy*, at 19 ("It is, therefore, one of the most important tasks of *government* to prevent extreme inequality of fortunes not by taking their treasures away from those who possess them, but by depriving everyone of the means to accumulate treasures, nor by building poorhouses, but by shielding citizens from becoming poor." (italics added)). *See also id.* at 37, where Rousseau argues that luxury taxes do not require the consent of the sovereign because they are really voluntary contributions to the public fisc by people who choose to acquire things that they don't need; this sophistry has a kinship with Lycurgus' much bigger lie about the divine origin of the laws he promulgated.

the condemnation of a criminal, can only be taken by the government.[103] But in many cases it will not be clear which category a certain matter belongs in, as for example when a tax system is adopted that uses general rules that will have foreseeable effects on particular people.[104]

Perhaps even more strikingly, Rousseau advocates the adoption of laws that provide the government with authority to convene assemblies of the people and to set the agenda for such assemblies, and that forbid the people from convening without authorization from the government. He purports to make an exception for the regularly scheduled assemblies, but he qualifies this exception by praising the Roman practice of holding assemblies only when the auguries were favorable, which enabled "the Senate [to hold] in check a proud and restless people and, when necessary, tempered the ardor of seditious Tribunes."[105] In other words, the Roman Senate tricked the people about the appropriate occasions for assemblies, using the same technique that Lycurgus adopted in persuading the Spartans to adopt his laws. And rightly so, according to Rousseau.[106]

The appropriate conclusion to draw, I think, is that Rousseau's principles do require that what we would call direct democracy—namely, the adoption of general laws by the entire people—always has to be recognized as a desirable possibility, and that real efforts ought to be made to put it into actual practice as a check on the usurpatious nature of all governments. Contrary to certain exaggerated statements in the *Social Contract*, however, I do not think that Rousseau's principles require us to conclude that what we call representative government—where a legislature is delegated the authority to adopt general laws—is necessarily illegitimate. Popular assemblies are desirable as a prudential check on governments, not as a strict demand of principle, for the same reason that checks on popular assemblies are desirable in order to guard against demagogues who would mislead the citizenry into making decisions that are actually contrary to the general will and the common good.

In this sense, Rousseau's principles seem consistent with the claim in the Virginia Declaration of Right that members of the community cannot be bound by laws to which they have not "by their own consent, *or* that of their representatives freely elected," assented for the public good.[107] Representative

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[103] *Social Contract* II.5, at 65.

[104] Another example involves the creation of classes of citizens. Rousseau declares that the law can set the qualifications for membership in a particular class, but cannot nominate particular individuals for membership. *Social Contract* II.6, at 67. Whoever sets the qualifications will likely have a very good idea as to which individuals will meet those qualifications.

[105] *Social Contract*, IV.4, at 132.

[106] In the *Discourse on Political Economy*, at 11, Rousseau says that "the greatest talent of chiefs consists in disguising their power in order to render it less odious."

[107] Virginia Declaration of Rights ¶ 6 (italics added) (quoted in full *supra* text accompanying note –).

legislatures may in some or many circumstances provide the best alternative that can practicably be adopted, but they are not a "solution" the problem of legitimacy. The more a people relies on such shortcuts to self-governance, the more likely it becomes that its claims to be self-governing will become illusory.

C. *Government of Poland*

This interpretation—according to which the *Social Contract*'s statements about direct democracy should be understood as a warning against unnecessary or excessive reliance on representative institutions—is supported by Rousseau's later analysis in *Considerations on the Government of Poland and on its Projected Reformation*. This book was written in response to a request from a group of Polish politicians who sought Rousseau's advice about political reform during a moment of crisis in Polish affairs, and it provides his only detailed effort to apply his political theory to a large, modern state.[108]

In addition to being militarily impotent against her neighbors, Poland was cursed with a political system that was seriously dysfunctional, most notably because of an ancient and notorious institution (the "*liberum veto*") that required unanimous votes in the national Diet. One might have expected any reformer to suppose that the first task would be to secure the nation from foreign invasions and to introduce majority rule in order to make it possible for things actually to get done. Rousseau, however, did not think these were Poland's most serious problems. Instead, he identified Poland's sheer geographic size as the most severe obstacle to any salutary political reform.[109]

Although Rousseau repeatedly indicates that the *Government of Poland* is meant to be an application of the principles set out in the *Social Contract*,[110] he casually refers to the national Diet—a representative legislature—as the lawgiver or the sovereign authority.[111] What's more, he expressly acknowledges that "[o]ne of the greatest inconveniences of large States, the one which more than any other makes it most difficult to preserve freedom in them, is that in them the legislative power cannot show itself as such, and can act only by delegation."[112] Because Rousseau did not throw up his hands and declare that Poland was therefore incapable of maintaining republican institutions, I think we must conclude that his principles do allow a nation to legitimately have a legislature consisting of elected representatives, notwithstanding what he said about England in the *Social Contract*. This conclusion is further confirmed

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[108] Rousseau was not the only political theorist whose views were solicited, and no action was taken in response to his suggestions. Poland was partitioned by her neighbors before he submitted his manuscript.

[109] *Government of Poland* ch. 5.

[110] *See, e.g.*, *Government of Poland* ch. 7, at 199, 200, 203, 209, 210; ch. 15, at 255.

[111] *Government of Poland* ch.7, at 197, 203.

[112] *Government of Poland* ch. 7, at 200-201.

by the *Government of Poland*'s more precise criticism of England: the real problem with England's Parliament, he now tells us, is that the terms of the legislators are too long, not that the Parliament is a representative institution.[113]

The reform that Rousseau proposes for Poland, stated in the most general terms, is federalism. The version of federalism that he outlines here is different from what we have in America (an inevitable consequence of Poland's preexisting institutions being different from the ones that existed here in 1787[114]), but it is no less complex and sophisticated.

Rousseau's proposals are aimed at strengthening both national institutions and local institutions, and then at enabling each to control the other. At the national level, his main aim is to promote patriotism through a highly politicized system of public education. The key element is to create incentives for politically ambitious adults to spend a significant and successful part of their careers as schoolteachers. Not the least important effect of this project would be to diminish the disadvantages of the Poland's military weakness: "You may not be able to keep [your neighbors] from swallowing you, do at least see to it that they cannot digest you."[115]

Somewhat more surprisingly, given the analysis in the *Social Contract*, Rousseau recommends that the national executive power be strengthened by concentrating it in fewer hands.[116] Rousseau recognizes, of course, that this will aggravate the natural tendency of the executive to oppress the sovereign, and therefore insists in the end that the real key must lie in strengthening the operation of the sovereignty. But how can this be done, given Rousseau's acknowledgment that a large country like Poland must necessarily employ a representative legislature?

Rousseau's principal suggestion for addressing this key problem is to strengthen an existing, but underappreciated, Polish institution. The so-called Dietines were local assemblies that chose the members

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[113] *Government of Poland* ch. 7, at 197-98.

[114] A cardinal principle of Rousseau's approach to practical politics is to take full account of existing institutions and circumstances, and to aim at very small changes that are apt to produce large effects. *See, e.g.*, *Government of Poland* ch.1, at 177, 178-79; ch. 7, at 206-07; *Social Contract* III.18, at 119.

[115] *Government of Poland* ch. 3, at 183. Rousseau goes on to explain: "The virtue of Citizens, their patriotic zeal, the distinctive form which its national institutions may give their souls, this is the only rampart that will stand ever ready to defend it, and which no army could subdue by force. If you see to it that a Pole can never become a Russian, I assure you that Russia will never subjugate Poland." Id. Later, Rousseau supplements this recommendation with more specific suggestions about national defense, the most important of which is reliance on a system of local militia rather than a professional, national army. This recommendation parallels the American preference for militia over standing armies at the time of our founding, especially among the Anti-Federalists.

[116] *Government of Poland* ch. 7, at 198-99.

of the national Diet, and these Dietines were small enough that all citizens (who at that time were exclusively members of the nobility) could participate in person in their deliberations. Adapting an existing practice, Rousseau proposes that the Dietines not only elect representatives to the national legislature, but also issue instructions to those representatives and then require the representatives to report back and be held accountable for any departure from the instructions. Significantly, Rousseau insists that laws adopted by the Diet as a result of its members disobeying their instructions must be treated as legitimate and scrupulously enforced. The mechanism of accountability must be to punish personally, even with death, those representatives who disobey their instructions.[117]

Rousseau provides a number of more detailed suggestions about executive-legislative relations, about the abolition or modification of the *liberum veto*,[118] and numerous other matters. But for our purposes here, the most important point is that his suggestions about the reform of Poland's political institutions are much more practical and flexible than one would expect from some of the *Social Contract*'s more sweeping statements about sovereignty, law "in the strict sense," and legitimacy. His most radical proposal to the Poles has little to do with the formalities of legitimacy. Rather, he advocates that the Polish nobility begin, very gradually and incrementally, to *expand* the sovereign by granting citizenship to the bourgeois classes and that they aim ultimately even to free the serfs.[119]

This expansion of the citizenry would necessarily *aggravate* many of the most serious problems that Poland faced in devising political institutions that could reliably reflect the general will, and thus is almost the last thing one might expect to see advocated by the philosopher who airily proclaimed in the *Social Contract* that "[t]he abuse of large States should not be urged as an objection to someone who wants only small ones."[120] It thus confirms, in yet another way, that Rousseau subordinates the choice of institutional forms to the overriding principle that politics accomplishes the most that it can accomplish when it raises people above their private interests. In thus rejecting the teachings of Hobbes and Locke, Rousseau draws inspiration not only from Plutarch's world but from the most obviously hard-headed of all modern philosophers. In the *Social Contract* itself, Rousseau proclaims that "[o]ne should focus less on apparent repose and on the chiefs' tranquility than on the well-being of entire nations and above all of the most

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[117] *Government of Poland*, at 201-03.

[118] Rousseau suggests three different alternatives for dealing with this problem: (1) abolish the *liberum veto*; (2) restrict its use to the most fundamental elements of the constitution, which by "the natural right of societies" must have been adopted by unanimous consent and which might therefore be thought to be alterable only by unanimous consent; and (3) preserve the *liberum veto* but require that anyone who uses it be put on trial six months later, with only two possible verdicts: death or a reward and public honors for life. *Government of Poland*, at 216-18. Rousseau appears to prefer the first option, and the fact that he did not insist on the second option is one of many examples of his refusal to allow theoretical arguments about legitimacy to become the decisive means of evaluating political institutions.

[119] *Government of Poland*, at 243-48.

[120] *Social Contract* III.13, at 111.

numerous estates."[121] Rousseau goes on to invoke the authority of Machiavelli as he concludes: "A little agitation energizes souls, and what causes the species truly to prosper is not so much peace as freedom."[122]

III. A Note on Rousseau and the Supreme Court's *Term Limits* Decision

Extreme caution is always required in any effort to draw "lessons" from a philosopher like Rousseau, who emphasized the foolishness of trying to apply pat formulas to politics.[123] Two related themes in his work, however, seem to me to be particularly relevant to this symposium. First is his stress on the incessant tendencies of governments to develop interests of their own contrary to that of the public. The most dangerous faction of all is the government itself. Second is Rousseau's attention to the need for political leaders to take affirmative steps to cultivate the public sentiments that are required for self-government.

I propose to provide an illustration of the use that we might make of these aspects of his thought by attempting to take a kind of Rousseauean look at a Supreme Court decision that touches on direct democracy. I call this section of the paper a "note" in order to emphasize (1) that I do not believe that recourse to Rousseau or any other philosopher is needed in order to evaluate the *legal* validity of the Court's decision; and (2) that I do not mean to suggest that the principal utility of Rousseau's political thought lies in whatever light it might throw on so comparatively trivial a matter as a judicial opinion. With Rousseau's help, however, this judicial decision may be used to clarify some of what is at stake in contemporary debates about direct democracy.

At the general election in 1992, the people of Arkansas adopted an amendment to their state constitution that had been put on the ballot through a citizen initiative procedure.[124] That amendment provided that any person who had been thrice elected to the federal House of Representatives or twice elected to the Senate would no longer be eligible to have his or her name on the ballot for that office. In *U.S. Term Limits, Inc. v. Thornton*,[125] the Supreme Court held by a vote of 5-4 that this provision of the

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[121] *Social Contract* III.9, at 105-06 n.*.

[122] *Id*.

[123] *See, e.g.*, *Social Contract* II.11.

[124] *See* U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349 (1994). While Rousseau was enthusiastic about the use of what we call referendums, he was consistently skeptical of mechanisms that allow the people to initiate legislation directly. For the reasons set out in the preceding section of this paper, I do not believe that the fundamental principles of his analysis dictate a hard and fast ban on citizen initiatives.

[125] 514 U.S. 779 (1995).

Arkansas constitution violated the Qualification Clauses of the Constitution, which the majority interpreted to create not only the minimum but also the exclusive qualifications for election to Congress.[126]

The majority opinion, written by Justice Stevens, and the dissenting opinion, by Justice Thomas, are lengthy and complex.[127] Much of the debate between them revolved around the proper inferences to be drawn from the text and structure of the Constitution, its legislative history, and early practice. None of these standard sources provided an absolutely and conclusively compelling answer to the precise issue in the case. Boiled down to the simplest possible terms, Thomas takes the position that because the Constitution is silent on the issue of state-imposed term limits, "it raises no bar to action by the States or the people."[128] Stevens, on the other hand, concludes that the imposition of any term limits "would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States."[129]

Thomas' legal arguments, from historical sources and especially from the text and structure of the Constitution, seem to me substantially more powerful than those offered by Stevens, primarily because I agree with Thomas that the only constitutional constraints on the states are those that the Constitution imposes expressly or by clear implication.[130] Rather than rehearse the details here, however, I want to focus

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[126] U.S. Const. art. I, § 2, cl. 2 provides:

> No Person shall be a Representative who shall not have attained to the Age of twenty fiver Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. Const., art. I, § 3, cl. 3 provides:

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[127] Justice Kennedy also wrote a concurring opinion.

[128] 514 U.S. at 845.

[129] 514 U.S. at 783.

[130] This statement refers only to the evidence and arguments put forth in the opinions by Stevens and Thomas, for I have not undertaken a comprehensive survey of the academic commentary or performed any significant independent research. Because it was discussed at the symposium, however, I do want to offer a few remarks about Daniel Hays Lowenstein, *Are Congressional Term Limits Constitutional?*, 18 Harv. J. L. & Pub. Pol'y 1 (1994). Professor Lowenstein's article, which was published before the Supreme Court's decision, effectively demolishes many of the arguments that had at that time been offered in favor of the constitutionality of terms limits, and concludes instead that the Qualifications Clauses establish the exclusive qualifications for members of Congress. Professor Lowenstein, however, does not respond (and in fairness perhaps should not have been expected to respond) to what I regard as

on several aspects of Stevens' opinion that seem to me particularly troubling when considered in light of Rousseau's analysis of political legitimacy.

Justice Thomas' most fundamental argument: Congress has only those powers delegated to it by the Constitution, whereas the states have all those powers that have not been taken away from them by the Constitution (or by Congress acting pursuant to the Constitution).

The importance of this point can be illustrated by a close look at what Professor Lowenstein offers as his decisive legislative history argument. Freely and correctly conceding that the text of the Qualifications Clauses does not necessarily imply exclusivity, and acknowledging that the remarks of various speakers at the Convention do not establish that there was a consensus on this question, Professor Lowenstein contends that the formal action of the Convention on August 10, 1787 firmly establishes that a consensus on the exclusivity question did in fact exist.

Briefly stated, this is what happened. The Committee of Detail had recommended provisions very similar to what became the Qualifications Clauses, and *also* a provision providing: "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." On August 10, the Convention began debating this latter proposal. Charles Pinckney proposed inserting specific property qualifications, thus removing all congressional discretion, but his proposal was rejected. Debate on the Committee's proposal then continued, and Gouverneur Morris proposed that the words "with regard to property" be stricken, which would have given Congress *complete* discretion. The Morris proposal was also rejected. Finally, the Convention voted on the Committee's original proposal, and rejected it. Throughout the debate, discussion focused on the advantages and disadvantages of giving Congress the power to determine the qualifications of its own members.

Professor Lowenstein concludes that this legislative history firmly establishes that the Qualifications Clauses were meant to establish the exclusive qualifications for members of Congress:

> The convention rejected *both* the Committee of Detail's proposal that Congress be given authority to set property qualifications *and* Morris' proposal that Congress be given authority to set any kind of qualifications. The strenuous debate on this subject proves beyond doubt that the delegates believed they were debating matters of substance and not mere questions of surplus language. If the delegates to the convention did not assume that the qualifications stated in the Constitution were exclusive, then their defeat of Morris' motion would have been meaningless. The *only* way to give substantive meaning to the August 10 actions of the convention is to interpret the Qualifications Clauses as exclusive.

Lowenstein, 18 Harv. J. L. & Pub. Pol'y at 17-18 (italics in original). Professor Lowenstein is certainly right that the actions taken on August 10 establish that the delegates believed that the defeat of both motions implied that *Congress* would lack authority to supplement the qualifications set out in the Qualifications Clause. Professor Lowenstein is wrong, however, to assume that the delegates must have believed that this lack of authority was the result of an implication of exclusivity in the Qualifications Clauses. On the contrary, the delegates could have believed, and I think they reasonably would have believed, that Congress' lack of authority to create additional qualifications arose from the simple fact that the Constitution nowhere provided Congress with any such authority. And if that is what they believed, then they could easily have also believed that the states *would* have the authority to add additional qualifications for the simple reason that the Constitution nowhere denied that authority to the states. Thus, the legislative history on which Professor Lowenstein relies provides very strong support for the result reached in *Powell v. McCormack* (discussed below), but it does not offer much support, if any, for the result in the *Term Limits* case.

First, and apparently in tacit recognition of the inconclusiveness of the textual and legislative history arguments that he advances, Stevens takes as the centerpiece of his argument the proposition that it is a "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'"[131] This language is taken from *Powell v. McCormack*,[132] and the internal quotation is taken from a statement by Alexander Hamilton at the New York ratifying convention.[133] As a statement of "democratic principles," Stevens' application of this slogan to the term limits issue is nothing short of silly. As Thomas rightly points out, the people of Arkansas simply "chose to be governed" by people who had not served more than a specified length of time in Congress.[134] There is no "democratic principle" that requires the people to express their choices only at elections rather than in their constitution, or at least no principle for which Stevens provides any argument. The silliness of his assumption is particularly dramatic because the Qualification Clauses themselves, which are the provisions of the Constitution that he thinks the people of Arkansas violated in this case, *are themselves in violation* of the very same proposition that Stevens claims is a "fundamental principle of our representative democracy": the people are not permitted to choose to be governed by twenty-four year olds, or by recently naturalized citizens, or by inhabitants of other states.

One might without too much trouble find other examples of appallingly simple-minded expressions of democratic theory in the Court's precedents, especially during the era during in which *Powell v. McCormack* was decided. What makes the Stevens opinion especially egregious is that the *Powell* Court's use of the Hamilton quotation made perfectly good sense in that case, which dealt with the authority of one house of *Congress* to exclude a member who satisfied the Qualification Clauses and had been elected by the people of his district. A democratic theorist who cannot see a meaningful difference between Congress taking away the people's right to "choose whom they please" to send to Congress and the people making their own choice not to be governed by certain classes of people is someone who really ought not be engaging in such theorizing.

A related aspect of Justice Stevens' opinion, which is also troubling if one looks at it with Rousseau's analysis in mind, is the Court's refusal to give any consideration to the fact that the Arkansas

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[131] 395 U.S. 486, 547 (1969). Stevens repeats this quotation, or parts of it, at least six times. 514 U.S. at 783, 793, 796 (twice), 796 n.12 (without quotation marks), 819. The context makes it clear that Stevens regards this as his principal argument. Other than the Qualification Clauses themselves, for example, it is the only authority cited in the introductory summary at the beginning of the majority opinion.

[132] *See* 395 U.S. 486 (1969).

[133] *Id.* at 547.

[134] Technically, the Arkansas provision only kept these long-term incumbents off the ballot, while allowing them to be reelected to office as write-in candidates. For purposes of my discussion, this distinction is unimportant, and for convenience I will treat the Arkansas provision as though it imposed true term limits.

constitutional provision had been approved directly by the voters, rather than indirectly through the state legislature. The reason Stevens gives for paying no attention to this fact is the standard rule of law according to which state legislation that violates the federal Constitution is equally invalid no matter what its process of adoption was. I have no dispute with this rule of law, but Stevens' use of it here assumes the conclusion that the Qualification Clauses impose exclusive rather than minimum qualifications. As Thomas points out, one could plausibly conclude that state legislatures are forbidden to impose term limits, not because of the Qualifications Clause but rather because the Constitution confers the choice of federal representatives on "the people" rather than their state legislatures.[135] But this conclusion would leave completely open, indeed would even point toward, the further conclusion that term limits adopted directly by the people themselves are perfectly constitutional.

Apart from this legal argument, although related to it, is the failure of Stevens to recognize the possibility that democratic theory, properly understood, should have suggested a rule of interpretation under which the federal Constitution should not be held to constrain the operation of direct democracy unless it clearly so specifies.[136] Based apparently on hostility to direct democracy—the actual source of which may be either his thoughtless invocation of *Powell*'s statement that the people should "choose whom they please to govern them" or something else—Stevens draws every possible inference, no matter how weak or strained or equivocal, in favor of finding a ban on the Arkansas term limits lurking unexpressed among the actual words of the Constitution and of those who created it. The fundamental democratic principle that the people are sovereign, if one took it seriously, would seem to suggest just the opposite approach.

Rousseau's analysis of democratic principles offers a powerful theoretical reason for a presumption in favor of upholding the citizenry's direct participation in lawmaking. The natural course of political evolution is strongly in the direction of reducing the role of the citizenry in legislation, and the natural conclusion of that evolution is the abolition of citizen participation. Precisely because there are innumerable efficiencies and conveniences that promote this trend, the spirit of statesmanship should be to resist it. In our predominantly representative system, this suggests at least a stronger presumption that direct acts of the people are constitutionally valid than that acts of their representatives are valid. By straining so hard to find arguments for invalidating the directly expressed will of the people of Arkansas, the *Term Limits*

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[135] *See* U.S. Const. art. I, § 2; amdt. XVII.

[136] This rule of interpretation would, of course, be perfectly consistent with the general rule that state legislation that violates the federal Constitution is equally invalid no matter what its process of adoption was. One could quite consistently conclude that term limits adopted directly by the people are constitutional (because the Constitution does not expressly or by very clear implication forbid the people from adopting them) whether or not one also concludes that state legislatures may adopt term limits. One could hold either that state legislatures are permitted to impose terms limits (because the Constitution does not expressly or by clear implication forbid them to do so) or that state legislatures are forbidden to do so (because the Constitutions expressly requires that members of Congress be chosen by "the people"): whichever interpretive decision one settled on with respect to this question would be consistent with the separate interpretive decision that term limits adopted directly by "the people" are not forbidden by the Constitution.

majority contributed unnecessarily, or even perversely, to the enervation of popular sovereignty.

What makes the *Term Limits* decision really shocking from a Rousseuan point of view is that the particular measure that the Court invalidated was one designed to counter the deepest vice in even the most legitimate political institutions: the tendency of governments to develop a will of their own, which is general with respect to its members and particular with respect to the sovereign people. The term limits movement was consciously and deliberately aiming to address exactly this problem. The multitude of incumbent protection devices that Congress had piled one on top of another for many years finally became so notorious that a genuine nationwide grass roots movement arose that was devoted to countering the perceived development of a kind of self-perpetuating congressional oligarchy. The imposition of term limits was a perfectly sensible device for reducing or partially counteracting the tendencies in government toward this vice, and there were extremely good reasons for any rational citizen to heavily discount the hand wringing objections from members of Congress and their Washington and statehouse courtiers.[137]

The plainest form of self-interest made it virtually inconceivable that Congress would impose term limits on its own members, even if the Constitution would have permitted it to do so.[138] And state legislatures would likely have been reluctant to do so, even if there were no constitutional obstacle to their doing so.[139] It was thus only through direct action of the people that term limits could be used to curb Congress' self-interested promotion of incumbent-protection devices, and it would be hard to think of a goal more appropriate for direct action by the people. It was in just this almost perfect case for the operation of direct democracy that the Supreme Court chose to reach out to stifle the people's action. That Justice Stevens' opinion for the Court relied primarily on what he claimed was a fundamental principle of democratic theory that protects the people's right to choose pushes the irony of the *Term Limits* decision to the breaking point.

Although the *Term Limits* opinion is a remarkably extreme example of judicial disregard for what Rousseau regarded as core principles of democratic theory, it is also a decision of relatively limited reach. The Court's interpretation of the Qualification Clauses snuffed out one of the more promising and easily defended devices through which the people have recently sought to reduce the inherent tendencies of Congress to pursue the common interests of its own members at the expense of the common interests of

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[137] For a detailed explanation of why term limits were a highly rational response by citizens to the problem of incumbent protection strategies, see Einer Elhuage, John R. Lott, Jr. & Richard L. Manning, *How Term Limits Enhance the Expression of Democratic Preferences*, 5 Sup. Ct. Econ. Rev. 59 (1997).

[138] Under *Powell*, which I believe was probably a correct decision, the Constitution would not permit this.

[139] At the time of the *Term Limits* decision, 21 of the 22 states with some type of term limit provision had gotten them through a direct vote of the people. See 514 U.S. at 917 n.39 (Thomas, J., dissenting). As Justice Thomas pointed out, Article I, § 2 and the Seventeenth Amendment at the very least raised serious constitutional questions about state legislatures enacting term limits for federal representatives. *Id*. at 884.

the nation. But this is only one such device, and the *Term Limits* decision does not necessarily imply that every attempt by the people to participate directly in its own governance will meet with the same hostility from the Court.

Unfortunately, the misuse of democratic theory by the Court in this case suggests at least the possibility that a majority of the Justices have or may be susceptible to a deep hostility toward institutions of direct democracy. If that is so, the Court might eventually work its way toward eliminating these institutions from our political life.[140] The most direct path to that goal would run through the Guarantee Clause, whose language is at least as ambiguous as that of the Qualifications Clauses.[141] It is not impossible to imagine an opinion of the Court that would bootstrap the *Term Limits* analysis in much the same way that *Term Limits* bootstrapped *Powell v. McCormack*.

Recall that the *Powell* Court invoked Alexander Hamilton's statement "that the people should choose whom they please to govern them," in order to bolster its entirely plausible conclusion that the Constitution does not permit *Congress* to make up its own criteria for who is eligible to govern the people. *Term Limits* took the Hamilton quote out of its context in *Powell*, and misread it to mean that *the people* are forbidden to adopt laws establishing criteria for who is eligible to govern them. Once one accepts that misreading, why not also interpret Hamilton's statement to mean that because the people should choose whom they please to govern them, they may not choose to govern themselves? Apply that interpretation of what *Term Limits* called a "fundamental principle of our representative democracy" to the textually ambiguous Guarantee Clause, and the conclusion will easily follow: a republican form of government is exclusively a representative form of government. All forms of direct democracy in the states will then be unconstitutional, and we will have taken a significant step toward what Rousseau would regard as the death of legitimacy.[142]

Conclusion

Rousseau draws no fundamental distinction between the judicial function and the other functions of what he calls the government or the executive. Nor does the concept of the independent judiciary, a device that he knew was considered important by Montesquieu, get any attention in his writings. There is,

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[140] This may seem unlikely, at least in the immediate future. But stranger things have happened when the Court decided that the political environment invited or demanded innovations in constitutional law. *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, – S. Ct. – (2003).

[141] U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government").

[142] *See Social Contract* III.11, at 109 ("Yesterday's law does not obligate today, but tacit consent is presumed from silence, and the Sovereign is assumed to be constantly confirming the laws which it does not abrogate *when it can do so*." (italics added)).

however, one passage in which he describes an institution that bears a certain resemblance to the role that the Supreme Court plays in our system.

This body, which Rousseau calls the "Tribunate," can serve either to protect the sovereign from the government, or to uphold the government against the people, or to maintain an appropriate balance between the government and the people. This special body should have neither legislative nor executive functions, he says, and its power should consist entirely in defending the fundamental laws by exercising a kind of constitutional veto.[143]

At least in general terms, and whether or not it would be considered part of the judicial function by Montesquieu, this is similar to the most significant political role that our Supreme Court has claimed for itself. Notwithstanding the occasional dissent, we have an extremely strong tradition that takes as its starting point the notion that the Court's main function is to act as a great constitutional umpire that keeps the active elements of the political system each within its assigned sphere. For that reason, our strong belief in the vital importance of the independent judiciary seems quite consistent with Rousseau's claim that "[a] wisely tempered Tribunate is the firmest bulwark of a good constitution . . . ."[144] But Rousseau immediately adds a warning: ". . . but if it has even a little too much force it overthrows everything," and he says that the republics of Sparta and Rome themselves (and Venice as well) perished because of usurpations carried out by their versions of this institution.[145]

Rousseau offers what he considers a novel device for preventing usurpations by this useful but dangerous institution. He argues that the Tribunate should not be a permanent body. Instead, it should periodically be suspended for a legally prescribed period of time, after which it should be reconstituted with entirely new members. "This means seems to me free of inconveniences because the Tribunate, since, as I have said, it is not part of the constitution, can be removed without harming it; and it seems to me efficacious because a newly installed magistrate starts out not with the power his predecessors had but with the power which the law grants him."[146]

If one were to apply this suggestion to our system, it might mean that the power to render judicial decisions about the meaning of the Constitution would be taken away from the ordinary courts and reposed in a special body that would sit only occasionally and always with a new set of members. To the extent that the *Term Limits* decision is typical of the Court's approach to law and democracy, perhaps such an idea

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[143] *Social Contract* IV.5.

[144] *Social Contract* IV.5, at 137.

[145] *Id.*

[146] *Social Contract* IV.5, at 138.

is not quite so outrageous as it may initially appear. But perhaps, in the spirit of the *Government of Poland*, it would better to suggest only a little tinkering with our present arrangements, such as the abolition of life tenure and of the rule of stare decisis in constitutional cases.