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POWER, RESPONSIBILITY, AND REPUBLICAN DEMOCRACY

Marci A. Hamilton*

POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION. By *David Schoenbrod*. New Haven: Yale University Press. 1993. Pp. xii, 260. \$28.50.

INTRODUCTION

The U.S. Constitution's plan for representative democracy can be summarized by this aphorism: hope for the best, but expect — and plan for — the worst. Framers James Wilson, a principal architect of the Constitution's scheme of representation,¹ most plainly captured this seemingly mixed message when he stated that while “[g]oodness should inspire and animate the intention [of laws properly designed and properly framed],”² a unicameral legislature is “impossible to restrain in its operations.”³ Good representative government is possible, he asserted, but a single legislature may be subject to “sudden and violent fits of despotism, injustice, and cruelty.”⁴

Wilson believed that the sovereign people must transfer substantial power to the representative for government to be efficient

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1. As one of the major figures of the Constitutional Convention, James Wilson deserves more attention than he has received. Legal scholars' almost exclusive reliance on *The Federalist Papers*, to which James Wilson did not contribute, has led them to neglect Wilson's important contributions. See Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 488 n.41 (1994). I do not offer Wilson's views on representation for the purpose of advancing an originalist agenda. Rather, his concepts, in the history of ideas on representative democracy, stand out as having strong explanatory and justificatory powers for the American representative system.

2. James Wilson, *Lectures on Law: Of government* [hereinafter Wilson, *Of government*], in 1 THE WORKS OF JAMES WILSON 284, 290 (Robert G. McCloskey ed., 1967) [hereinafter WORKS].

3. *Id.* at 291.

4. *Id.*

and successful.⁵ Although he strongly believed that popular sovereignty must be the philosophical source of representative democracy, he believed with equal conviction that the people must transfer actual lawmaking authority to others. History, he understood, teaches that this transfer of power creates the possibility — though not the necessity — of tyranny. Liberty requires representatives who can and will serve the people rather than oppress them.

To explain the capacities of the representative, Wilson forged a theory of the synthesis of the will and the understanding. Representatives *can* serve, according to Wilson, because man is not merely a self-serving will. Rather, will is always intertwined with understanding or knowledge, which can take the representative beyond simple self-service into a relationship of trust with his constituents.⁶ Representatives *will* serve — i.e., resist the temptation to tyrannize — because the Constitution, and the people, will check their attempts to stray beyond the boundaries of their powers.⁷ Constitutional limits on a representative's power such as a bicameral legislature, the enumeration of powers, the separation of powers, limited terms of power, and regular elections were crafted to minimize the chances for positions of power to corrupt legislators and to facilitate opportunities for representatives to act in the best interests of their constituents.

The necessity of delegating broad power to representatives stood at the foundation of Wilson's theory of democratic government. The concepts of understanding and will further shaped his specific model of representation, a model largely adopted by the Convention. Contemporary discourse on representation generally focuses on the latter two of the three notions Wilson laid down, neglecting the foundation of the Constitution's scheme of representation — the inevitability and necessity of independent legislative responsibility.⁸ Civic republicans tend to emphasize the representative's capacity for understanding and wisdom while public choice theorists emphasize the representative's self-serving will.⁹

5. James Wilson, Speech on choosing the members of the senate by electors; delivered on 31st December, 1789, in the convention of Pennsylvania [hereinafter Wilson, Speech on December 31, 1789], in 2 WORKS, *supra* note 2, at 781, 791.

6. See James Wilson, Lectures on Law: Of man, as an individual, in 1 WORKS, *supra* note 2, at 197, 199.

7. See, e.g., Wilson, Of government, *supra* note 2, at 289-90; Wilson, Speech on December 31, 1789, *supra* note 5, at 792.

8. Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 719 (1994) ("A common fallacy confuses the framers' principle of popular sovereignty, the principle that legitimate power must be derived from the governed, with its exercise through unmediated direct lawmaking.").

9. Compare Abner J. Mikva, *Foreword: Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 167 (1988) (describing public choice theorists' vision of legislators as "rent-seeking" egoist[s]) with Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 57 (1985) (depicting the representative's role under the classic republican concep-

Although the debate between or about public choice theory and civic republicanism has been valuable, its dichotomous nature has impoverished discourse on authority and power. The Constitution's design to limit the power of the representative for the sake of the people has gained such ascendancy in political and legal theory that self-rule or self-government has come to be mistaken as the touchstone for our constitutional scheme.¹⁰ Concomitantly, leadership, responsibility, and power, which were at the center of the Framers' — especially Wilson's — conception of representation have become quasi-taboo subjects.¹¹

Although the Framers decidedly did not endorse a scheme of self-rule or direct lawmaking,¹² and instead single-mindedly attempted to craft the best possible scheme of republican democracy, self-rule has become the implicit value underlying much of the current debate over the legislative process.¹³ A wide array of legal scholars has attempted to turn the representative process into one that approximates self-rule through various schemes of judicial review.¹⁴ The literature reads as though it would deny the fundamental premise of representation — that real power is transferred from the people to their representatives. Such denial cloaks the reality that those who govern are truly distinct from the governed.¹⁵ During the term of representation, self-rule on matters of public import is subordinated to the goals of efficiency and efficacy. The nostalgic

tion as one that "deliberate[s] on the public good," not one that "mechanically [responds] to existing social conceptions"); see also Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-16 (1984) (describing the purpose of the legislative process as an aggregation of preferences — a bargain between the legislature and interest groups); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 36-37 (1991) (arguing that the pursuit of self-interest is opposed by the altruistic norm).

10. Hamilton, *supra* note 1, at 493-95. See *id.* at 479 & n.2 for a definition of "self-rule."

11. See, e.g., Wilson, Speech on December 31, 1789, *supra* note 5, at 783-93.

12. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522-25 (1990) (noting that the Framers' fear of tyranny by the majority resulted in constitutional limits on majority preferences that are absent in direct democracy).

13. Hamilton, *supra* note 1, at 494-95.

14. *Id.* at 502-19.

15. The colonial generation plainly understood this core aspect of representation. The Declaration of Independence, which was intended to reject the British rule definitively, did not reject the necessity of a government distinct from the people, but rather explicitly recognized the distinction between those who govern and those who are governed: "Governments are instituted among Men, deriving their just powers from the consent of the governed . . ." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). In 1787, Benjamin Rush elaborated upon the point as follows:

It is often said that "the sovereign and all other power is seated in the people." This idea is unhappily expressed. It should be — "all power is derived from the people." They possess it only on the days of their elections. After this, it is the property of their rulers, nor can they exercise it or resume it, unless it is abused.

GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 373-74 (1969) (citation omitted). James Wilson also emphasized this point. See Hamilton, *supra* note 1, at 530-32; *infra* notes 43-57 and accompanying text.

turn toward self-rule permeates the literature even in the face of an enormous and ever-more complex society for which comprehensive self-rule can be no option. This nostalgia flies in the face of the Framers' conscious rejection of direct lawmaking and of their conscientious attempts to craft a republican form of government on both the federal and — through the Guarantee Clause — the state levels.¹⁶

David Schoenbrod's book, *Power Without Responsibility: How Congress Abuses the People Through Delegation*,¹⁷ goes a long way toward vigorously reintroducing the subject of legislative responsibility into the discourse on representation. His central theme is that representatives have a constitutional duty to make policy choices and that therefore delegation of that duty to administrative agencies is unconstitutional. His goal is to craft a feasible means by which the Supreme Court can revive its flagging nondelegation doctrine (Chapters One, Nine, and Twelve), a project for which I have already expressed support.¹⁸ In this review, I will take a different tack and focus on the philosophical underpinnings of his more pragmatic project. As a result of misplaced emphasis, Schoenbrod appears to bring together the two sides of the cognitive dissonance that attends the current debate over representation without reconciling them. On the one hand, he seems to speak from the side of the civic republicans and condemns representatives for failing to shoulder the difficult and demanding decisionmaking responsibilities entrusted to them (pp. 10-12, 14, 20-21, 58-59, 72-75, 102-05). He accuses them of taking the self-interested route rather than the altruistic or empathetic route (pp. 20-21, 46, 102). On the other hand, much of the book is devoted to empirical examples of representatives failing to be virtuous.¹⁹ Thus Schoenbrod sets a high standard by which to judge a representative, but then leaves the impression that this standard is not likely to be attainable. Yet, his theory of nondelegation does not deserve to be ignored but rather requires adjustment.

In a nutshell, representation rests upon a voluntary delegation of power from the people to their chosen representatives. Hope and high expectations are necessary adjuncts to such a scheme. As Wilson eloquently stated:

When I reflect, that the laws which are to be made may affect my own life, my own liberty, my own property, and the lives, liberties, properties, and prospects of others likewise, who are dearest to me, I con-

16. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government. . ."); see Eule, *supra* note 12.

17. David Schoenbrod is Professor of Law, New York Law School.

18. Hamilton, *supra* note 1, at 551-54.

19. Chapter 2 is entitled "The Vain Search for Virtuous Lawmakers."

sider the trust, which I place in those for whom I vote to be legislators, as the greatest that one man can, in the course of the business of life, repose in another. . . . I console myself, that the same trust, which is committed by me, is also committed by others, who are as deeply interested in its exercise as I am.²⁰

Rather than tending toward an either-or stand on virtue, Schoenbrod should have focused more on the grant of power from the public to its representatives and, in particular, the implicitly optimistic chord struck by such a voluntary and broad delegation. At the same time, and to justify his argument for constitutional limits on the representatives' exercise of their delegated authority, he should have contemplated the dangers attending such a delegation of power. In the absence of such a two-pronged analysis, his high expectations for representatives seem unrealistic and even unfair, and his argument that the Court should provide incentives for responsible behavior seems futile. The constitutional system is properly understood as a synthesis of high expectations and realistic hedging. One loses the fullness of the Constitution's scheme for representation by insisting that either one is more important or necessary than the other.

Schoenbrod's central thesis is that Congress has shirked its constitutionally mandated responsibility to make the hard policy choices. To counter the imminent objection that Congress can do no more work than it is already doing, he suggests that there are a number of governing decisions that might be better made by the state and local governments. He fails, however, to explain how or why local decisionmaking would be preferable to national decisionmaking. Given his devotion to the desirability of responsible representation, one might have expected him to express reservations about the delegation of such powers at the state level and to have explored the contemporary phenomenon of direct lawmaking that displaces representative lawmaking through direct initiatives.

In Parts I and II of this review, I rely upon the views of James Wilson — which provide both guidance and support for Schoenbrod's project — to illuminate both of these issues: the relationship between virtue and power and the desirability and pitfalls of direct lawmaking. In Part III, I contrast Schoenbrod's proposals with the views of Jürgen Habermas, a contemporary political philosopher and the author of *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*.²¹ Both Schoenbrod and Habermas respond to the development of the administrative state. The differences and similarities between their respective responses

20. Wilson, Speech on December 31, 1789, *supra* note 5, at 782.

21. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., forthcoming 1995) (manuscript on file with author).

signal the contemporary fork in the road facing representative democratic theory.

I. VIRTUE AND POWER

Using concrete examples of Congress's delegation of its decisionmaking authority to executive agencies, Schoenbrod argues that Congress has breached its constitutional obligation to make "the hard policy choices" far too often (pp. 4-9, 38, 49-55). He urges the Supreme Court to invalidate legislation that results from congressional shirking of its decisionmaking responsibilities (Chapters Ten to Twelve).

Schoenbrod is opposed to the delegation of policy choices to the executive branch because delegation frustrates accountability, thereby endangering liberty (Chapters Six and Seven). Legislators who delegate their substantive policy choices to the administration can take public stands that are popular but that do not solve the particular problem posed. The public is mollified by the stand taken, leaving the administration to work on the problem in relative obscurity. In essence, delegation short-circuits the communication pathway between representatives and their constituents that is necessary to limit legislators' exercise of their power.²²

A tension at the base of Schoenbrod's theory, however, calls into question the entire edifice. On the one hand, he repeatedly faults Congress for failing to shoulder its burden to make hard policy decisions.²³ Representatives should, on his terms, engage their best judgment to solve the difficult and complex national problems facing the country. Such high expectations of representatives tacitly require a belief in the capacity of individuals to do good on behalf of those they represent. On the other hand, his emphasis on factual examples of congressional failure and his rhetoric seem to discount the possibility of such an authentic relationship of trust: "The enduring hope for public virtue is understandable but childish. Most individuals have enough trouble truly loving those with whom they are intimate, so that truly loving the public seems unlikely. We should choose our means of making law without listening to protes-

22. James Wilson espoused this view. See, e.g., James Wilson, Speech delivered on 26th November, 1787 [hereinafter Wilson, Speech on November 26, 1787], in 2 WORKS, *supra* note 2, at 759, 763-64.

23. See p. 4 ("[D]elegation shields Congress and the president from blame for harming their constituents"); p. 8 ("Delegation allows our elected lawmakers to disclaim any responsibility for harm done to consumers."); p. 10 ("Congress ducks the key conflicts."); p. 12 ("[D]elegation renders [representatives] less responsible to the people and less responsive to their interests."); p. 14 (Delegation permits "lawmakers to hide behind unelected agency officials."); p. 105 ("Delegation allows the president to avoid personal involvement in law-making."); p. 139 ("The reason for a federal law on asbestos in the schools is to enable our elected lawmakers to strike a pose in favor of children's health without having to take the blame for the great bulk of the cleanup cost.").

tations of virtue."²⁴ This apparent concession to public choice theory robs his theory of the philosophical basis necessary to justify his call to responsibility. If virtue is irrelevant, or impossible to expect, then the "means of making law" are nothing more than machinery attached to dysfunctional operators.

Acknowledging that humans have the capacity to act honorably in the best interests of others is absolutely essential to a theory of representation based upon the presumption that representatives serve the represented. Empathy, altruism, and a measure of objectivity are indispensable qualities for a representative. If individuals cannot be expected to have these traits, then criticizing representatives for their lack of responsibility is wasted breath. In a world without the possibility of virtue, the representative's standard of care should be correspondingly low or a representative system ought to be scrapped altogether.

Schoenbrod's focus upon empirical examples of virtue unrealized takes his argument away from the most important element of his thesis, a theme adverted to in the title of the book and intimated in his call to representatives to make policy choices but never directly addressed: the element of power. Rather than taking on the theme of virtue, a capacity that must be presumed in order to justify his exhortations to responsibility, he would do better to wrestle with this underexamined aspect of the representative relationship. Absent a delegation of power virtually irrevocable for the term of office, there is no need to exhort representatives to act responsibly, no need for the Constitution's scheme to limit the exercise of the representative's power, and no need for the Supreme Court to check the legislators' exercise of their power through the nondelegation doctrine, which is the heart of Schoenbrod's proposal. It is the scope of legislative power that justifies Schoenbrod's concern about representative trustworthiness, not a necessary lack of virtue.

Under the constitutional design, and by means of free elections, the people delegate to chosen representatives the power to make binding decisions about every permissible subject of public life during the term of office. Although those representatives are accountable in the American system through the mechanisms of the First Amendment and the electoral process, once elected they hold the power to make the law independent of the people.²⁵ Wilson characterized the power given to representatives as necessarily broad in order to achieve an efficient and successful state.²⁶ The Framers

24. P. 46; see also p. 26 ("I proceed on the premise that public officials . . . are unlikely to be more virtuous than the rest of us."); p. 27 (noting that the Constitution is designed to "protect individual liberty from the people's lack of virtue").

25. See generally Hamilton, *supra* note 1.

26. Wilson, Speech on December 31, 1789, *supra* note 5, at 791.

rejected direct lawmaking — in which decisionmaking power over public issues remains with the people — because they believed it to be unworkable.²⁷ As Schoenbrod rightly notes, one of the charges to the Constitutional Convention was to craft a system of government “better able to meet national needs than that created by the Articles of Confederation.”²⁸

The necessary power transfer creates a chasm between the people and their representatives.²⁹ It creates the opportunity for representatives to abuse such power, and therefore to oppress the people. Representatives must have the capacity to be virtuous to make the representative system worthwhile, but the institution of a system of representation immediately poses a *choice* between fulfilling the trust relationship set up by the constitutional design and abusing the substantial degree of power delegated. Schoenbrod correctly reads in the constitutional design a call to responsibility that is directed precisely at the moment when representation comes into being. The responsibility arises because real power has changed hands.

The desire for efficient and good government, implicit in the constitutional structure, and the necessity of delegating decision-making responsibility to a small number of citizens justify Schoenbrod’s charge to representatives to “make the hard policy choices” (pp. 10-12, 14, 17, 19, 58-59, 72-75, 102-05). Representatives can be held to a high standard of virtue because virtue is possible, but we still can be suspicious of their actions, because they are delegated such broad powers. It is misleading, therefore, to permit oneself to be forced to choose between self-interest and virtue as models of human behavior if one is to understand the Constitution’s scheme of representation. Neither one adequately could account for the system of representation contemplated by the Constitution. Were virtue a guaranteed quality, the Constitution’s thoroughgoing suspicion of those in power would be superfluous, and its mechanisms to check the exercise of power would be bars to efficiency. Were self-interest the only motivating force for human existence, the Constitution’s scheme for the delegation of broad and expansive powers would be foolhardy. Only in a world where both virtue and self-interest are immanent does it make sense to craft a representative democratic system wherein the people simultaneously delegate broad power and employ as many means as necessary to check its exercise.

27. Wilson, Speech on November 26, 1787, *supra* note 22, at 771-72.

28. P. 27; *see also* Wilson, Speech on November 26, 1787, *supra* note 22, at 769.

29. *Cf.* Eule, *supra* note 12, at 1514 (“The gap between the will of the majority and the voice of the legislature, it turns out, is there by constitutional design.”).

Schoenbrod's call to legislative responsibility is both apropos and important. The cognitive dissonance in his explanation of the foundation of his theory is not fatal. Rather, it requires a shift in emphasis and movement from the dichotomous debate created by the coexistence of the public choice and civic republican theories to a vision of how virtue and selfishness can interplay in a healthier lawmaking system.

II. REPRESENTATION IN THE STATES

Schoenbrod emphasizes federal representatives' duty to make hard policy choices and argues that their failure of responsibility is of constitutional magnitude. He acknowledges, however, that his theory increases the workload of an already burdened Congress. His proffered remedy is to relieve the national legislature of its national policymaking responsibilities on particular issues and to shift the locus of decisionmaking back to the state and local governments. He does not explain, however, how shifting the locus of decisionmaking to the states serves the people's interest in being truly served by their representatives (pp. 136-37). Shifting decisionmaking responsibility to the states from the federal government does not necessarily cure the problem of abusive delegation. Rather, it simply changes the geographical context. Delegation is as much a problem at the state level as it is at the federal: indeed, some state constitutions delegate legislative decisionmaking responsibilities to administrative agencies, and even back to the voters themselves.³⁰

Having taken the tack of resorting to state decisionmaking to render his theory of congressional responsibility feasible, Schoenbrod then fails to grapple with one of the most intriguing and underexamined constitutional issues in contemporary America — the constitutionality of popular initiative or referendum lawmaking. The Guarantee Clause states that the "United States shall guarantee to every State in this Union a Republican Form of Government."³¹ Popular lawmaking undermines the republican, or representative, form of government.³² While the issue has not been completely ignored,³³ it has yet to receive widespread attention and

30. State constitutions delegate authority back to the voters by reserving to the people the initiative and referendum powers, *see, e.g.*, ARIZ. CONST., art. IV, pt. 1, § 1; CAL. CONST., art. IV, § 1; OR. CONST., art. IV, § 1; WASH. CONST., art. II, § 1, or by reserving the people's right to instruct their representatives and petition the legislature for redress, *see, e.g.*, CAL. CONST., art. I, § 3; FLA. CONST., art. I, § 5; IND. CONST., art. I, § 31; MASS. CONST., pt. 1, art. XIX, § 20; VT. CONST., ch. 1, art. XX.

31. U.S. CONST. art. IV, § 4.

32. *See* Eule, *supra* note 12, at 1545.

33. *See generally* Eule, *supra* note 12; Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Hans A. Linde, *When is Initiative Lawmaking not "Republican*

has not sparked a significant amount of debate among legal academics. This is a remarkable lacuna in contemporary discourse given the prevalence of popular lawmaking in the states³⁴ and the interest in civic republicanism.

James Wilson's statements regarding the Guarantee Clause provide a cogent framework within which to consider the issue of whether the Constitution permits the states to bypass legislative decisionmaking in favor of popular decisionmaking.³⁵ If the constitutional argument against popular lawmaking is strong enough, then it suggests two conclusions about Schoenbrod's project. First, his shifting of decisionmaking responsibility to the states must be limited to a shifting of subject matter, not the means of decisionmaking. Second, his modeling of legislative responsibility may have application well beyond the confines of Congress to the state governments.

Wilson made two explicit references to the Guarantee Clause in his lectures on law.³⁶ The lectures were delivered after the Constitutional Convention and should be considered in the same vein as *The Federalist Papers*, that is, as an attempt by one who was a major force during the Convention to explain and justify the grand constitutional scheme and each of its parts.³⁷ Neither of Wilson's remarks on the Guarantee Clause provides positive proof that he believed that direct lawmaking was inappropriate for the states. These remarks, however, when read together with his writings on representation in general,³⁸ strongly indicate that he did not support direct democracy for the states.

His lecture entitled *Of man, as a member of a confederation*³⁹ strongly implies that state republican governments should reflect

Government?, 17 HASTINGS CONST. L.Q. 159 (1989); Hans A. Linde, *When Initiative Lawmaking is not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Linde, *supra* note 8; Ira C. Rothgerber, Jr., *Conference on Constitutional Law: Guaranteeing a Republican Form of Government*, 65 U. COLO. L. REV. 709 (1994); Symposium, *Governing by Initiative*, 66 U. COLO. L. REV. 13 (1995); Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208 (1987); Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988); Comment, *Constitutional Constraints on Initiative and Referendum*, 32 VAND. L. REV. 1143 (1979).

34. See Eule, *supra* note 12, at 1509 n.22, 1510 nn.23-25, app. A.

35. Julian Eule has already delineated James Madison's views in some detail, implicitly concluding that direct democracy is contrary to the constitutional scheme of government and the Guarantee Clause, though he has avoided taking an explicit stand on the constitutionality of popular lawmaking measures. See *id.*

36. James Wilson, *Lectures on Law*, in 1 WORKS, *supra* note 2, at 67.

37. See CHARLES PAGE SMITH, JAMES WILSON 221-55 (1956).

38. See *supra* notes 1-7 and accompanying text (discussing Wilson's views on representation).

39. James Wilson, *Lectures on Law: Of man, as a member of a confederation* [hereinafter Wilson, *Man as a member*], in 1 WORKS, *supra* note 2, at 247.

the federal republican scheme embodied in the Constitution: "A confederate republick should consist of states, whose government is of the same nature; and it is proper that their government should be of the republican kind."⁴⁰ Granted, Wilson's declaration in favor of a republican form of state government was not presented as a repudiation of direct lawmaking, but rather as a repudiation of the notion that particular states should be permitted to establish separate monarchies.⁴¹ Yet, his larger discussion indicates that his theory of republican government was not only a rejection of monarchical government.⁴² Wilson explicitly expects that state governments will be similar. He does not demand of them "precise and exact uniformity in all their particular establishments and laws,"⁴³ but "the fundamental principles of their laws and constitutions [should] be consistent and congenial."⁴⁴ The similarity Wilson envisions between the various state governments requires some restraint on their choice of government — namely, the essentials of republican government found in the federal scheme and echoed in the Guarantee Clause. It counsels against the legitimacy of direct lawmaking.

Wilson also draws a parallel between the Constitution's federal form of republican government and the expected forms of state governments when, in a later lecture, entitled, *Of the constitutions of the United States and of Pennsylvania — Of the legislative department*,⁴⁵ he states that the "national government . . . has embarked itself on the same bottom with the governments of the different states."⁴⁶ He characterizes the Guarantee Clause as a "political necessity,"⁴⁷ because it aligns the potentially antagonistic governments of the nation and the states by placing them "on the same bottom."⁴⁸ For him, the unity of the country and the republican nature of the national government "depends on" the states' forms of republican government.⁴⁹

The provision for twin republican governments in the states and the federal government, Wilson argues, proves the national govern-

40. *Id.* at 264.

41. *Id.*

42. Cf. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 *COLO. L. REV.* 849, 868 (1994) ("There is no doubt that a 'republican government' — both from the perspective of the framers and its contemporary desirable content — includes more than just protection from monarchical governments.").

43. Wilson, *Man as a member*, *supra* note 39, at 264.

44. *Id.* at 264-65.

45. James Wilson, *Lectures on Law: Of the constitutions of the United States and of Pennsylvania — Of the legislative department* [hereinafter Wilson, *Legislative department*], in 1 *WORKS*, *supra* note 2, at 399.

46. *Id.* at 407.

47. *Id.*

48. *Id.*

49. *Id.* ("Its own existence, as a government of this description, depends on theirs.").

ment's "determination to sink or swim with th[e states]."⁵⁰ The sink-or-swim metaphor is a telling one. Wilson believed that the Constitutional Convention had crafted a new form of representative government, one that had never before been conceived or attempted.⁵¹ The Federal Constitution's scheme for a republican form of government was a grand experiment, one for which Wilson had great hopes. It was a form of government that carried within it the rejection of ancient direct democracies, monarchies, and aristocracies, and expanded upon the less comprehensive forms of representation found, for example, in Britain.⁵² Although Wilson never directly says it, it seems reasonable to conclude — given his insistence that the states develop similar forms of government, his support for the "republican form of government" language in the Guarantee Clause, and his comparison between the federal government and the states' republican forms of government — that he expected the states to replicate to a significant degree the federal experiment in republican democracy. As opposed to direct democracy, Wilson believed that republican democracy on the state level would result in uniformity, national unity, and efficiency.

A speech that Wilson made in 1789,⁵³ when read in conjunction with his endorsement of a republican form of state government in *Of man, as a member of a confederation*, supports my tentative conclusion that Wilson, in favoring a republican form of government, meant to exclude forms of direct lawmaking. Although Wilson may not have been opposed to direct democracy per se, he believed that it would not promote efficiency and freedom in any state in which the people were too numerous to assemble for deliberation on the particular issues, a situation he apparently attributed to every American state in existence at the end of the eighteenth century. More than once, and again in a 1789 speech, Wilson made the point that the delegation of decisionmaking power should occur only when it is a necessity.⁵⁴ The circumstance giving rise to the necessity of delegation is the fact that the citizens "can neither assemble nor deliberate together in one place."⁵⁵ Direct lawmaking is ac-

50. *Id.*

51. *Id.* at 402; Wilson, Speech on December 31, 1789, *supra* note 5, at 783.

52. James Wilson, Comparison of the constitution of the United States, with that of Great Britain [hereinafter Wilson, Comparison of the constitution], in 1 WORKS, *supra* note 2, at 311; Wilson, Legislative department, *supra* note 45, at 405; Wilson, Speech on November 26, 1787, *supra* note 22, at 762-63; Wilson, Speech on December 31, 1789, *supra* note 5, at 783.

53. Wilson, Speech on December 31, 1789, *supra* note 5, at 781.

54. *Id.* at 782 ("When I am called upon to appoint other persons to make laws for me, I do it because such an appointment is of absolute necessity."); see also Wilson, Legislative department, *supra* note 45, at 405.

55. Wilson, Speech on December 31, 1789, *supra* note 5, at 782; Wilson, Legislative department, *supra* note 45, at 405 ("[I]n large states, the people cannot assemble together. As they cannot, therefore, act by themselves, they must act by their representatives.").

ceptable to Wilson only in a state in which the people can assemble and deliberate face-to-face, as in particular governments of ancient Greece or Rome or Germany.⁵⁶ Moreover, he presumes that in large republics, representatives will likely have more information on issues of public governance than do the people, who cannot convene to hear evidence or discuss problems.⁵⁷ The impossibility of assembly, which contributes to an information differential between the people and their representatives, thus supports republican decisionmaking rather than direct lawmaking at the state level. From Wilson's perspective, therefore, it would appear that popular lawmaking that displaces legislative decisionmaking would be unconstitutional.

The policy reasons against direct lawmaking are also strong. First, because only a portion of the overall population participates in the voting process, the final decisions singlehandedly reached by this subgroup may not accurately reflect the preferences of the majority of the citizenry, assuming they had formed such preferences.⁵⁸ Unlike the representative system in which legislators are required to vote on every proposed law, a direct lawmaking system permits voters to vote anonymously and thereby to select certain issues upon which to exercise their decisionmaking privilege.⁵⁹ Additionally, because many issues are complex and intertwined with other issues, and because citizens have many obligations beyond their civic responsibilities, much of the general population may lack the knowledge and ability to cast an informed vote, and may thereby misunderstand the significance of their votes.⁶⁰ Such voter confusion, which can be alleviated in the representative system through debate and deliberation, increases the potential for results that do not serve the public's interest. The large number of people involved in direct lawmaking in the states frequently precludes discourse and limits the ability to refine and redefine issues, creating the possibility of individually coherent choices becoming collectively incoherent.⁶¹ Unlike the collective consensus that can be reached at the end of legislative debate and deliberation,⁶² popular

56. Wilson, Legislative department, *supra* note 45, at 405.

57. Cf. *id.* at 406 ("[R]epresentatives should express the same sentiments, which the represented, if possessed of equal information, would express.") (emphasis added).

58. See Eule, *supra* note 12, at 1514.

59. *Id.* at 1555-56; Linde, *When is Initiative Lawmaking not "Republican Government"?*, *supra* note 33, at 169.

60. Eule, *supra* note 12, at 1516; Linde, *When is Initiative Lawmaking not "Republican Government"?*, *supra* note 33, at 169.

61. Eule, *supra* note 12, at 1519 n.60; Linde, *supra* note 8, at 721 (describing shortcomings of direct lawmaking systems).

62. Hamilton, *supra* note 1, at 484 (quoting Carl Schmitt's discussion of true parliamentary deliberation).

lawmaking achieved through anonymous voting results in little more than an aggregation of conflicting preferences. Finally, initiative ballots, which are cast anonymously and in private, invite citizens to vote according to their personal self-interest.⁶³ Unlike a representative, whose substantive votes are matters of public record and whose votes carry consequences such as public criticism and reelection implications, a citizen voting on a state initiative is not required to justify her decision in light of the public interest. In short, because of the many obligations citizens have beyond public engagement and due to the sheer number of citizens involved, direct lawmaking does not lead to satisfactory or legitimate results. It simply does not serve the tandem constitutional values of effective government and safeguarded individual liberties.

If the Constitution does require republican forms of lawmaking, and if, as a policy matter, representation is a better means to effective, efficient, and successful government than is direct lawmaking, two conclusions follow. First, Schoenbrod's suggestion that the federal government can lighten its workload by letting the states decide more issues requires significant elaboration. If the federal government and the states share the work of government, it cannot be because one form of government employs more self-rule than the other. Both rely on republican forms of government, with their peculiar mix of deep responsibility and the temptation to inappropriate delegation. If there is to be a division of responsibilities between the states and the federal government, it must occur on areas of subject matter. Were the nondelegation doctrine revived, a reinvigorated enumerated powers doctrine limiting the scope of Congress's authority under Article I and the Civil War Amendments could lighten Congress's burden and focus its attention on the hard policy choices. The Court recently took a step in this direction with its decision in *United States v. Lopez*.⁶⁴

Second, and to his credit, Schoenbrod's project is not merely a project properly limited to Congress. Rather, his subject — legislative responsibility — applies to state government as well. Once the patina of romanticism has been rubbed off direct lawmaking, one can more critically investigate popular initiatives, which often permit state representatives to avoid making the hard policy choices themselves. Popular initiatives can be to state representatives what delegation is to federal representatives. Thus, Schoenbrod's repre-

63. Linde, *supra* note 8, at 725 (stating that an initiative "invites voters to legislate for their own financial self-interest at will").

64. 115 S. Ct. 1624 (1995) (holding that the Gun-Free School Zones Act, Pub. L. No. 101-647, § 1702(b1), 104 Stat. 4789, 4844-45 (1990) (codified at 18 U.S.C. § 922(q) (Supp. V 1993)), exceeds Congress's power under the Commerce Clause and involves a subject more properly addressed by the states).

sentation theory may hold promise for the constitutional examination of state lawmaking.

III. SCHOENBROD AND HABERMAS: TWO RESPONSES TO THE ADMINISTRATIVE STATE

Many in the American legal academy have sought to downplay the legislator's substantial power, to devalue the representative's active role made necessary by a republican form of democracy, and to fill the concomitant power void with proposals to increase citizen participation and decisionmaking authority vis-à-vis the legislature.⁶⁵ Jürgen Habermas extends this trend with his recently published and philosophically sophisticated book detailing his "discourse theory of democracy."⁶⁶ Others have sought to explicate aspects of Habermas's multifaceted theory.⁶⁷ For purposes of this review, I will limit my comments regarding Habermas's theory to those elements of his thesis that merit comparison with Schoenbrod's project.

Both Schoenbrod and Habermas are fundamentally concerned with democratic theory, and both craft their theses in response to the burgeoning administrative state. They both believe that a state dominated by an administrative bureaucracy cannot, under existing conditions, fulfill democracy's promise of liberty and accountability.⁶⁸ Schoenbrod sees in the administrative state a shift in governmental power that takes government even further from the people than does the system of legislative representation. Although he seems to harbor a sentiment in favor of direct democracy — at least at the state level — he endorses a federal system of representation as a feasible means to liberty. Tracing the Supreme Court's delegation jurisprudence to prove that at one time the Court's nondelegation doctrine was more in tune with the ideal of liberty than it is now (pp. 33-46), Schoenbrod does not hearken back to a "heyday" of representation, but rather charts a practical course for the contemporary Court to follow to invigorate its nondelegation doctrine without sending Capitol Hill into chaos (Chapters Nine and Twelve). In short, he would replace the administrative state with a legislative-executive state animated by the principles of service, responsibility, and accountability for the purpose of serving the goal of maximum individual liberty.

65. Hamilton, *supra* note 1, at 502-19.

66. See generally Habermas, *supra* note 21.

67. See, e.g., Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163 (1995) (reviewing Habermas, *supra* note 21).

68. See *supra* text accompanying note 22 (discussing Schoenbrod's theory that administrative delegation undermines liberty and accountability); Habermas, *supra* note 21, at ch. 9.

Habermas, on the other hand, treats the administrative state as ineradicable and argues for a new paradigm of democracy that would favor inclusiveness and comprehensive public decisionmaking. A properly functioning democracy, on his terms, guarantees individual liberty and social equality. Two preceding models of democracy did not properly serve these two goals: free market capitalism led to wealth redistribution that increased inequities, and the social welfare paradigm that followed it operated under the concept of equality but robbed individuals of the capacity to achieve liberty.⁶⁹ Habermas's new paradigm — the discourse paradigm — unites liberty and equality by testing the results of democratic processes according to the following formula: "Only those norms of action are valid to which all possibly affected persons could assent as participants in rational discourses."⁷⁰ Central to this conceptualization is his contention that government actions taken in the administrative state can be validated on democratic grounds only if there is an identity between the law's "addressees" and its "authors."⁷¹

Schoenbrod's and Habermas's approaches partially overlap. Schoenbrod's occasional and implicit resort to preference aggregation to overcome the problems presented by representation and Habermas's assent formula both testify to the pull of the self-rule ideal.⁷² At another level, however, Schoenbrod's and Habermas's approaches are radically different. Schoenbrod accepts as a given the necessity of representation and would not judge the quality of representation according to whether, hypothetically, the people would have assented to the *same decision*. Instead, he would have the Supreme Court judge the legislators' decisions according to whether the legislators embraced the hard task given them. If they fulfilled their appointed role, then the results of their efforts should stand (pp. 155-91).

More than any other contemporary democratic theorist captured by the self-rule ideal, Habermas acknowledges the important notion that representatives have *power* that the public does not.⁷³ Like so many others before him, however, and like Schoenbrod, he elides the power issue to a significant degree. Despite his concession regarding the relevant power between government officials

69. Habermas, *supra* note 21, at ch. 9, pp. 27-30.

70. *Id.* at postscript, p. 19. To a significant degree, Habermas's formula is actually Rawls's original position modified to accommodate the presence of a community of thinkers rather than a lone figure. See JOHN RAWLS, A THEORY OF JUSTICE 118-22 (1971).

71. Habermas, *supra* note 21, at ch. 9, pp. 28-29.

72. James Wilson also advocated the ancient practice of direct lawmaking where possible. See Wilson, Legislative department, *supra* note 45, at 405. But he saw little scope for such a scheme in the American system. *Id.*

73. See Habermas, *supra* note 21, at ch. 7, p. 55; ch. 8, pp. 35, 44, 46, 57-58.

and citizens, Habermas would judge law according to whether one could construct — out of his counterfactual requiring universal assent to the government's decision — an equation between the law's addressees and its authors. Having acceded to the fact that there is a power differential between the "public sphere" and the government's decisionmaking bodies, he holds fast to the possibility of erasing the power divide. He claims to have found the bridge between addressee-ship and authorship in particular instances of intersubjective, public discourse:

I would like to render plausible the claim that *under certain circumstances* civil society can acquire influence in the public sphere, have an effect on the parliamentary complex (and the courts) via public opinions of its own, and compel the political system to convert to the official circulation of power.⁷⁴

He acknowledges, however, an unbridgeable gap between discourse and *authorship*, a term that adds linguistic gloss to what he really means: decisionmaking power. In attempting to ameliorate the brute fact that this gap exists, he idealizes the structure and function of discourse. In effect, he asks of discourse what it cannot provide: a definitive decision.

As Professor Michel Rosenfeld has noted, Habermas's counterfactual proposition breaks down in the face of social problems over which there is deep and principled disagreement — in situations in which action cannot be taken without a decision that is at least partially arbitrary.⁷⁵ For example, it would not be profitable to apply Habermas's formula to government regulation of abortion, an issue on which it is highly unlikely that all possibly affected persons could assent to the regulation as participants in rational discourse.⁷⁶ Dialogic, intersubjective communication may work for certain issues, but the issues most threatening to social unity — one of Habermas's overriding concerns — must be resolved by representatives who are required to take a leap from the dialogue toward a particular decision. Even when communication results in an understanding among all those participating in the discourse, there is no requirement that the resultant "understanding" be equivalent to agreement. Moreover, even if all interested speakers were to come to substantive agreement through meaningful intersubjective discourse, the agreement would not have societal force without the action of a designated decisionmaking body. Habermas has articulated a persuasive portrait of discourse in the public sphere in the sense that he has attempted to break down the unwarranted belief that there is an unbridgeable divide between the spheres of private

74. *Id.* at ch. 8, p. 60.

75. See Rosenfeld, *supra* note 67, at 1176-79.

76. *Id.*

and public discourse. He has failed, however, to grapple adequately with the degree of decisionism necessary in any democratic government.

Even when the people as a whole effectively mobilize and prevail upon their elected representatives to follow a particular path, those representatives retain the power to make a decision at odds with the people. Their contrary decision is legitimate, even though it may fail as a matter of good judgment. In the face of public pressure, the legislative result is more *likely* to reflect the consensus than not, but there is still no identity between the views expressed by the public movement and the ultimate governing decision or between the addressees and the authors. In fact, mobilization by the public does not necessarily prove that its decision is superior to a contrary decision by its elected representatives. Only history, perspective, and judgment can make that call.

There is a gap between discourse, even prevalent popular discourse, and governmental decisionmaking that cannot be bridged by further discourse. It can only be bridged by increasing the decisionmaking power of citizens, a suggestion that Habermas does not pursue, and decreasing the decisionmaking power of the representative. No matter how one analyzes a society's dialogic, intersubjective process, twentieth-century philosophy has yet to explain away or to transcend the essentially Hobbesian point that government requires decision.⁷⁷

It is most difficult for Habermas to swallow the necessary core of arbitrariness at the heart of representative democracy. James Wilson understood it and accordingly called for as many means as possible to keep the legislator tied to his constituents. Happily, Schoenbrod's theory reintroduces this fixed aspect of representative democracy into the discourse on republican democracy. He does not suggest that we increase citizen involvement in the complex decisions of governing the state, either through the courts or legislative reform. Nor does he suggest that we test the decisions reached by representatives according to an ideal state of discourse. Rather, he advocates a renewed regime wherein representatives take upon themselves this burden of arbitrariness. He advocates not decisionism *per se*, but the decisionism most clearly envisioned by Wilson, a decisionism fenced in by accountability and the core democratic value of liberty.

As democratic as Habermas's formula may sound, it is a formula that cannot justify or explain rights of individual liberty. For Habermas, the decision is acceptable *on democratic grounds* so long as the people would have assented to it. When Habermas

77. See David Dyzenhaus, "Now the Machine Runs Itself": Carl Schmitt on Hobbes and Kelsen, 16 CARDOZO L. REV. 1, 5-10 (1994) (discussing Hobbes's theory of public order).

closes the gap between government and its citizens by making a perpetual loop between law's addressees and its authors, he reduces and transforms rights of individual liberty, which protect against bad or poorly reached government decisions, into rights of participation or authorship. For Schoenbrod — and myself — a legislative decision should stand only if the government reached the decision in an appropriate way *and* if it does not tread into rights-territory, defined by the Bill of Rights. It is only the *gap* between the discursive public sphere and its representatives that justifies a system of fundamental rights.

For James Madison, rights were necessary to protect the minority from the majority.⁷⁸ Madison's presupposition that representatives' decisions would reflect majority preferences was the first step down the slippery slope toward misconstruing representation as self-rule.⁷⁹ Habermas slides all the way down the slope as he argues for inclusive public discourse so that minority interests will be authors of the law as well as its addressees. He uses universal inclusiveness to justify his willingness to judge all laws solely according to procedural standards.⁸⁰ Madison and Habermas, however, over-emphasize the majority-minority or insider-outsider distinction in a republican democracy. The fact of the representatives' decision-making independence makes it necessary to protect all combinations of the people — whether individual or grouped in minorities or majorities — against potential tyranny. Even when all of the people have joined together to support a particular cause, contrary legislative decisions are constitutionally legitimate. Thus, substantive rights are necessary to protect the people from their representatives. The lacuna between the representative and the represented that motivated James Wilson's many contributions to the framing of the American system of representative democracy, underlies Schoenbrod's conclusions, and deserves further, careful study.

Finally, the same reasons that make direct lawmaking unattractive also make Habermas's formula unattractive.⁸¹ The individual acting without constitutional safeguards and acting only on behalf of herself is less likely to operate in the public's interest than a representative explicitly charged with the public's trust and cabined by constitutional structures.⁸² The role adopted by those who must "assent" — an issue not addressed by Habermas — determines in

78. THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

79. Wilson saw more clearly the independence of representatives during the term of representation, even from majorities. See Hamilton, *supra* note 1, at 532-34. Mancur Olson has reinforced the insight that majorities do not readily capture legislative decisionmaking. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (2d ed. 1971).

80. See Habermas, *supra* note 21, at postscript, pp. 2-4.

81. See *supra* Part II.

82. See Eule, *supra* note 12.

large degree whether the assent is acceptable. If the role is determinative, then Habermas's discourse theory is decidedly less helpful in crafting a theory of a legitimate representative democracy than is Schoenbrod's nascent elaboration of the duties of the democratic representative.

CONCLUSION

If the contemporary debate over democracy is any indication, representative democracy faces a crisis. No one defends the system as it now stands. Two choices are becoming increasingly apparent: take the representative system back to first principles with the hope that the liberty-endangering tendencies of the administrative state can be reversed, which is Schoenbrod's prescription; or bid its pre-eminence farewell, accede to the permanence of the administrative state as it exists, and attempt to transform representation into direct lawmaking. This is Habermas's approach. At the heart of the controversy over the diagnosis and cure to be assigned to legislative representation, lies the siren song of public self-rule. That concept, rejected as an acceptable model for American government by the Framers but valued nonetheless in limited circumstances, has gained converts over the intervening two hundred years until now it threatens to undermine the concept of representation altogether.⁸³ David Schoenbrod's book, *Power Without Responsibility*, takes an important step in broadening the debate over the representative system. By posing the problem in terms of legislative responsibility and capacity rather than citizen self-rule, he expands the discourse by reintroducing the fundamental insight that led the Framers to endorse a republican form of democracy rather than a direct democracy: for government to be efficient and effective, power must be delegated to a body of capable individuals entrusted to make independent decisions for the whole. The course of representative democracy depends on securing — or recalling — a philosophical justification for the gap in power between representative and represented that can overcome the intuitive appeal of self-rule.

83. See generally Hamilton, *supra* note 1.