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Washington: The Past and Present Populist State

Hugh D. Spitzer

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The
CONSTITUTIONALISM
of
AMERICAN
STATES

Edited by

George E. Connor and
Christopher W. Hammons

Foreword by

Donald S. Lutz

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WASHINGTON

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Washington

The Past and Present Populist State



Some commentators have asserted that states do not possess, and state constitutions therefore cannot reflect, fundamentally distinct histories or political cultures and values or contain distinct descriptive or aspirational statements about a way of life.¹ It has been argued that reliance on such perceived distinctions in the judiciary's interpretive process would be based on "an anachronism or romantic myth" and that state constitutions contain such a mishmash of provisions reflecting waves of diverse political movements over time that they cannot constitute coherent statements of political theory.² These assertions might be true for some states' basic documents, but they are certainly not true for Washington State's.

Washington's 1889 constitution was, and remains, overwhelmingly "populist" in its orientation, content, and practical effect. Professor Lawrence Goodwyn observes that late-nineteenth-century populism was "something more than a party, something more nearly resembling a mood or, more grandly, an ethos." Vast changes in a state's population, economy, and politics may occur over the course of a century. But the sensibilities, concerns, and ideology entrenched in an original constitution continuously influence court interpretations of that document, the political process, and people's understanding of who they are as a political community. As Robert Schapiro has suggested, when a political ethos becomes enshrined in a state's constitution,

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1. See James A. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90, no. 4 (1992): 761, 816-18; and Paul W. Kahn, "Interpretation and Authority in State Constitutionalism," *Harvard Law Review* 106 (March 1993): 1147, 1162. See also Robert A. Schapiro, "Identity and Interpretation in State Constitutional Law," *Virginia Law Review* 84, no. 3 (1998): 389.

2. Kahn, "Interpretation and Authority," 1160; Gardner, "Failed Discourse," 818-20.

"fundamental values may be derived from the structure and relationships embodied" in that document, and an understanding of the history and meaning of those aspirational values can be of great importance to judges whose responsibility it is to interpret and apply that state's constitution.³

Washington was already fully imbued with the populist ethos when it gained statehood in 1889,⁴ even though farmer and labor activists did not formally create the "People's Party" (a.k.a the "Populist Party") as a national institution until three years later.⁵ The public's distrust of railroad, mining, and other corporations; concerns about special-interest control of government; and general objection to the concentration of power in elites led to a constitution that imposed numerous restrictions on the legislature, scattered executive authority among independently elected officials, intentionally hamstrung corporations, and provided strong protections of individual liberties. The state's anti-special-interest constitution has not changed appreciably during the past century. It accurately reflected majority sentiment in 1889, and, despite the industrialization and urbanization that occurred in the twentieth century, the constitution's provisions have contributed to Washingtonians' sense of themselves and the type of political community that the state remains today.

PROTECTING A SELF-SUFFICIENT WAY OF LIFE

Washington's 1889 constitution confirmed and entrenched an individualistic mentality and a suspicion of established interests. Other than the Native Americans who had survived disease and relocation, the three hundred thousand Washingtonians in 1889 were composed almost entirely of residents who had purposefully cut their family and economic ties, immigrating by ship, wagon train, or (since 1883) rail to homestead or otherwise seek their fortunes in the Pacific Northwest.⁶ David Alan Johnson has empha-

3. Goodwyn, *Democratic Promise: The Populist Moment in America* (New York: Oxford University Press, 1976), x; Schapiro, "Identity and Interpretation," 443, 394-95. Schapiro builds his theory partly on Philip Bobbitt, *Constitutional Interpretation* (Oxford: Basil Blackwell, 1991).

4. The Enabling Act, 25 *U.S. Statutes at Large* 180 (1889): 676, provided for Washington's admission along with Montana and the Dakotas. The proclamation declaring Washington a state appears at 26 *U.S. Statutes at Large* 10 (1889).

5. Goodwyn, *Democratic Promise*, 264-72.

6. Wilfred J. Airey, "A History of the Constitution and Government of Washington Territory" (Ph.D. diss., University of Washington, 1945), 436; Dorothy O. Johansen and Charles M. Gates, *Empire of the Columbia: A History of the Pacific Northwest*, 2d ed. (New York: Harper and Row, 1967), 248, 277; James Leonard Fitts, "The Washington Constitutional Convention of 1889" (master's thesis, University of Washington, 1951), 1.

sized the importance, in evaluating neighboring Oregon's constitution, of early settlers' conscious decisions to leave their former homes and seek independent lives far away from the East's growing commercial economy. Johnson's description of a "growing commitment of nineteenth-century men to a natural-rights liberalism defined in terms of individual self-seeking for economic advantage" can be fairly applied to Washington homesteaders.⁷ The Washington Constitution was drafted three decades after Oregon's, when "natural-rights liberalism" was reaching a fever pitch in the American West.

Of the seventy-five delegates to the constitutional convention, all but one had been born outside Washington Territory—mostly in states that were predominantly agricultural and whose constitutions had in many cases already undergone agrarian reforms or rewrites.⁸ Despite the fact that twenty-two of the convention's members were lawyers and nine were businessmen, they nevertheless reflected the strong populist focus of their mainly farming constituents: protection of a self-sufficient way of life in the face of powerful commercial forces that threatened to manipulate or control the common people.⁹

Agriculturists were concerned about falling prices for farm produce, an insufficient money supply, a huge debt burden, and dependence on monopoly railroads to get their goods to market.¹⁰ Banks were (accurately) blamed for the federal government's tight monetary policy and adherence to gold currency.¹¹ Railroads were viewed as avoiding their fair share of taxes while gouging farmers through high transportation charges.¹² Farmers' concerns in the late nineteenth century are evidenced, for example, by pro-

7. Johnson, *Founding the Far West: California, Oregon and Nevada, 1840-1890* (Berkeley and Los Angeles: University of California Press, 1992), 139.

8. Airey, "History of the Constitution," 440-43; Arthur S. Beardsley, *Notes on the Sources of the Constitution of the State of Washington, 1889-1939* (Seattle: University of Washington School of Law, 1939). See also the discussion of the influence of Iowa's anticorporate "loco-foco" constitution on California in Johnson, *Founding the Far West*, 102. That California 1849 document, as modified in 1879, significantly influenced Washington's constitution.

9. Fitts, "Washington Constitutional Convention," 8-11; Airey, "History of the Constitution," 442.

10. Gordon B. Ridgeway, "Populism in Washington," *Pacific Northwest Quarterly* 39, no. 4 (1948): 284-86; Lawrence Goodwyn, *The Populist Moment: A Short History of the Agrarian Revolt in America* (New York: Oxford University Press, 1978), 9-18; Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999), 101-47. For a detailed history of western Washington populism, focusing particularly on Lewis County, see Marilyn Watkins, *Rural Democracy: Family Farmers and Politics in Western Washington, 1890-1925* (Ithaca: Cornell University Press, 1995).

11. Goodwyn, *Populist Moment*, 10-11.

12. Ridgeway, "Populism in Washington," 288.

nouncements from the Grange—never a particularly radical organization.¹³ In complaining of a corporate takeover of Columbia River shipping, the 1878 Oregon State Grange declared that this critical waterway had “fallen under the control of a grinding and oppressive monopoly.” The 1895 Washington State Grange adopted a resolution urging that the federal government seize the Union Pacific and Central Pacific Railroads “and own and control said roads and run them in the interest of the people.”¹⁴

Throughout the South and the West, these concerns had led to a chain of related political movements involving both farmers and laborers: the Greenback Party in the 1870s, the Union Labor Party and the Farmers’ Alliance in the 1880s, and finally the People’s Party in 1892.¹⁵ The platforms of Washington’s People’s Party in the 1890s reflected what had been the key objectives for the agricultural and labor communities for two decades: liberal monetary policy, mortgage relief, higher taxes on business, a ban on union-busting private detectives, railroad-rate controls, public employment offices, workplace-safety laws, free education, and a ban on monopolies.¹⁶ Just seven years after Washington’s constitution was adopted, the Populists elected a governor and took control of the state legislature through a fusion with the Democrats and “Silver Republicans.”¹⁷

Many of the concerns of this broad populist movement found their way into the text of the Washington Constitution. The convention delegates started work on July 4, 1889, with a draft conveniently provided by W. Lair Hill, a lawyer-judge-newspaperman who had previously lived and worked

13. The Grange was officially a “nonpolitical” organization (Sanders, *Roots of Reform*, 107). In Washington State there was tension between populist organizers and the more conservative Grange movement (Ridgeway, “Populism in Washington,” 292).

14. Harriet P. Crawford, “Grange Attitudes in Washington, 1889–1896,” *Pacific Northwest Quarterly* 30, no. 3 (1939): 249–51.

15. See, generally, Goodwyn, *Populist Moment*, 13–19, 25–32; Goodwyn, *Democratic Promise*, 264–72; and Ridgeway, “Populism in Washington,” 294–95. Urban laborers active in the Populist Movement shared an anticorporate philosophy with their rural counterparts but sometimes focused on different goals. The People’s Party units in Seattle called for public street lighting, a city hospital and morgue, a full-scale fire department, election of all key city officials, the abolition of both private detectives and chain gangs, and enforcement of anti-saloon laws (David Burke Griffiths, “Populism in the Far West, 1890–1900” [Ph.D. diss., University of Washington, 1967], 150).

16. Stephen Henry Peters, “The Populists and the Washington Legislature, 1893–1900” (master’s thesis, University of Washington, 1967), 20, 32, 35, 48–51; Carroll H. Wooddy, “Populism in Washington: A Study of the Legislature of 1897,” *Washington Historical Quarterly* 21, no. 2 (1930): 109–10. See, generally, Russell Blankenship, “The Political Thought of John R. Rogers,” *Pacific Northwest Quarterly* 37, no. 1 (1946).

17. Peters, “Washington Legislature,” 64–70; Ridgeway, “Populism in Washington,” 298–305.

in both California and Oregon.¹⁸ Six weeks later they finished with a version that still bore the marks of his handiwork.¹⁹ That document reflected the aspiration for independence and self-sufficiency shared by most Washingtonians—people whose willingness to engage in collective action was focused mainly on organizing cooperatives and pushing both major political parties to use government against the business corporations that common people feared would control their lives.²⁰ Article I, Section 1, began with a forthright Lockean declaration: “All political power is inherent in the people, and governments . . . are established to protect and maintain individual rights.” That commitment to individual liberties was supplemented by Article I, Section 30, which intoned that the “enumeration . . . of certain rights shall not be construed to deny others retained by the people.”

Many provisions (some tracing their lineage to the Jacksonian period or earlier) were inserted to prevent elected leaders from granting privileges to special interests. Article I, Section 8’s ban on any “law granting irrevocably any privilege, franchise or immunity” was directed at favoritism toward railroads and other corporate concentrations. Similarly, Article I, Section 12, provided that “no law shall be passed granting to any citizen, class of citizens or corporations . . . privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”²¹ Article I, Section 28, barred hereditary privileges or powers.²² Article XII, Section 7, provided that local corporations must be permitted to transact business on the

18. Fitts, “Washington Constitutional Convention,” 21–22. Hill had edited the *Portland Oregonian* between 1872 and 1877 and was asked by that newspaper’s editor to draft a proposed constitution for Washington. The document appeared in the *Oregonian* on the convention’s opening day, July 4, 1889, titled “A Constitution Adapted to the Coming State.” This proposal is generally referred to as the “Hill Constitution.”

19. Beardsley, *Notes on the Sources*. Fitts calculated that fifty-one of Hill’s proposed sections were adopted without alteration, and forty-six of his recommendations were approved with minor changes (“Washington Constitutional Convention,” 22).

20. Ridgeway, “Populism in Washington,” 292–93.

21. Sections 8 and 12 of Article I are both drawn from the 1857 Oregon Constitution and the 1851 Indiana Constitution (Beardsley, *Notes on the Sources*). The Oregon Supreme Court has noted that that state’s privileges and immunities language “reflects early egalitarian objections to favoritism and special privileges for a few” (*State v. Clark*, 630 P.2d 810, 814, 291 Ore. 231, 236 [1981]). That clause can be traced far back into English history, and is often understood to protect equal rights of individuals and minority groups as well as preventing special interests from gaining privileges at the expense of the majority. See, for example, *State ex rel. Bacich v. Huse*, 187 Wash. 75, 83–84, 59 P.2d 1101 (1936), overruled on other grounds; *Puget Sound Gillnetters Assoc. v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979); and *Tanner v. Oregon Health Sciences Univ.*, 157 Ore. App. 502, 519–25, 971 P.2d 435 (1998).

22. The ban on hereditary privileges is a broader, more Jacksonian version of the prohibition on titles of nobility in the U.S. Constitution, Article I, Section 9, and is virtually identical to comparable provisions in Oregon’s 1857 document and in Indiana’s 1851 constitution.

same terms as out-of-state entities, and Article XII, Section 15, required that railroad rates be equal for the same classes of freight or passengers.

Article XII contained twenty-two separate sections designed to oversee private business corporations and regulate business: requiring that corporations be formed under general laws rather than special acts (Section 1), permitting the legislature to alter statutes governing corporations at any time (Section 1),²³ prohibiting stock fraud and other manipulative activity (Sections 4, 6, 8, 11, and 12), enabling condemnation of corporate property (Section 10), and combating monopolies and exploitative rates for moving agricultural products and other goods (Sections 14–22).²⁴ Article II, Section 35, charged the legislature with adopting “necessary laws for the protection of persons working in mines, factories, and other employments dangerous to life or deleterious to health.”²⁵ These were all designed to prevent business elites from maintaining a stranglehold over the state’s farmers and laborers. One striking example of the Washington Constitution’s simultaneously individualistic and anticorporate spirit was Article I, Section 24, which provided that the “right of *the individual citizen* to bear arms in defense of himself, or the state, shall not be impaired, *but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.*”²⁶ That last clause was aimed at the notorious business practice of hiring armed “Pinkertons” to break up labor unions.²⁷

Another anticorporate provision—one with lasting effects—was the ban on state or local government loans, gifts, or credit support to the private sec-

23. This provision is typical of language inserted into state constitutions since the Jacksonian era in order to subject corporations to ongoing legislative control, notwithstanding the U.S. Supreme Court’s holding in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). See Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 197–98.

24. Article XII, Section 13, includes the detailed antimonopoly requirement that if competing railroads of the same gauge intersect, they must provide for switches to permit the transfer of freight from one line to another.

25. See John D. Hicks, “The Constitutions of the Northwest States,” *University Studies of the University of Nebraska* 23 (January–April 1924), 109. Hicks views this worker-protection language as a corollary to the corporate-control provisions of Article XII. Interestingly, the workplace-protection provisions in Washington’s constitution were not effectively implemented until the Progressive Era, when parts of the Populist Movement’s unfinished agenda were finally enacted, including those with a more industrial and urban emphasis (Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* [New York: Vintage Books, 1955], 133).

26. Emphasis added. See, generally, Hugh D. Spitzer, “Bearing Arms in Washington State,” *Proceedings of the Spring Conference, Washington State Association of Municipal Attorneys* (April 1997).

27. Hicks, “Constitutions of the Northwest States,” 116.

tor. This was included in the constitution principally to bar public subsidies to railroads, subsidies that were described by delegates variously as "ill-advised," "vicious," and "entangling people in disastrous schemes."²⁸ The language has resulted in strict limits on the ability of governments to engage in cooperative ventures with business or to promote economic development.²⁹

Hence, the 1889 Washington Constitution set forth the aspirations of the bulk of the population to pursue individual opportunities. At the same time, the delegates' work reflected a popular desire to harness the power of the state to promote opportunity for the "common man" and to reduce the opportunity for special interests to manipulate government for their own ends.

The state's independent ethos was further reflected in the declaration of rights' robust protections of individual freedom. The delegates tended to copy strong rights provisions from other state constitutions rather than the less protective generalities of the U.S. Bill of Rights. The right-to-bear-arms provision quoted above is one example. Another is Article I, Section 7, which granted an express, rather than penumbral, right to privacy: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."³⁰ The rights of the accused were much more explicit than those in the Bill of Rights (Article I, Section 22). And there was an exceptionally strong guarantee of "absolute freedom of conscience in all matters of religious sentiment, belief and worship" and an equally strong admonition that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment" (Article I, Section 11). Indeed, many of the constitutional convention's freethinking delegates believed that a mention of God had no place in a document meant for business purposes and would itself interfere with religious freedom; after a long and heated debate, the most that the body was able to agree upon was a preamble statement that the people of the state were grateful to the "Supreme Ruler of the Universe" for their liberties.³¹

28. Airey, "History of the Constitution," 481-87; Beverly Paulik Rosenow, ed., *The Journal of the Washington State Constitutional Convention, 1889* (1962; reprint, Buffalo: William S. Hein, 1999), 681-82.

29. Robert Utter and Hugh Spitzer, *The Washington State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 2002), 146-49.

30. This section has, since the 1980s, been interpreted quite independently of the search-and-seizure provision of the U.S. Constitution (Utter and Spitzer, *Washington State Constitution*, 20-22).

31. Fitts, "Washington Constitutional Convention," 25; Lebbeus Knapp, "The Origin of the Constitution of the State of Washington," *Washington Historical Quarterly* 4, no. 4 (1913): 227, 269-70. Although many Washingtonians attended church, there were a large number of "freethinkers," an attitude still reflected in the state's current status of having the lowest,

Apart from protecting individual liberties and shielding citizens' way of life from rapacious businesses, the other key instance in which Washingtonians entrusted an activist role to the state was in guaranteeing educational opportunity. Article IX, Section 1, stated, "It is the *paramount* duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex" (emphasis added). This language repeated the nineteenth-century common school movement's doctrine that a democratic republic requires a broad-based and general educational experience, and the idea that each and every child must be provided an equal opportunity to succeed by being provided with a good educational experience.³² A related but less powerful mandate required the state government to provide institutions for physically disabled youth and mentally and developmentally disabled persons of all ages as well as reformatories (Article XIII, Section 1).

Though drawn from similar documents in numerous other states, the Washington Constitution more or less successfully presented the ideal of a community of independent farmers, workers, and small-business people, with the government taking a limited role in individuals' lives, other than protecting them from special interests and providing institutions for education and for the aid of those with special needs.³³

The state's 1889 constitution has seen only modest changes during the past century, perhaps because it is difficult to obtain the required two-thirds approval in each house, plus a majority vote of the electors (Article XXXIII).³⁴ Yet despite the shift of population from farm to city during the twentieth

or close to the lowest, church membership in the entire country (U.S. Census Bureau, *Statistical Abstract of the United States, 2000*, table 65; Julia Duin, "Gallup Poll Finds Washington State Least Churchgoing," *Washington Times*, February 15, 1999).

32. Laurie K. Beale, "Charter Schools, Common Schools, and the Washington Constitution," *Washington Law Review* 72 (April 1997): 535, 538-39. Horace Mann, the father of the nineteenth century's common school movement, "conceived of a symbiotic relationship in which neither the republic nor the school could exist without the other" (Jonathan Messerli, *Horace Mann: A Biography* [New York: Alfred A. Knopf, 1972], 281).

33. Business interests were able to influence some portions of Washington's 1889 constitution, such as the harbor and tideland provisions of Articles XV and XVII. See Charles K. Wiggins, "The Battle for the Tidelands in the Constitutional Convention," *Washington State Bar News* 44, nos. 3-5 (March-May 1990). Sections 5 and 7 of Article VIII bar the application of public funds for loans, gifts, or other support of private business, "except for the necessary support of the poor and infirm."

34. Only ninety-six amendments have been approved in Washington—less than one per year. Perhaps the only amendment that can be said to have had a profound impact on the structure of government was Amendment 7, which introduced the initiative and referendum in 1912.

century, the document's populist character echoes the attitude of many Washingtonians today.³⁵ Washington's constitution reflects little of the social and economic programs of the New Deal, and a component of the state's modern self-image that is absent from the document is a provision entrenching the state's strong outdoor recreation and environmentalist spirit.³⁶ Still, individualism and suspicion of big business (as well as big government) remain strong in Washington State, and in that respect its constitution continues to reflect popular attitudes.

AN EXPANDING CONCEPT OF CITIZENSHIP

Washington State's basic document also plays the other key roles that Donald S. Lutz has proposed as definitional elements of a true constitution. The state's geographical boundaries were fixed by Article XXIV. Those physical limits had been earlier determined by treaties with Great Britain and congressional action after roughly seventy-five years of tugging and pulling over how the vast Columbia River watershed would be divided internationally and among newly formed territories and states.³⁷ But sprinkled throughout the state were many Indian reservations, authority over which the U.S. government expressly retained through the Enabling Act and the "Compact with the United States" enshrined in Article XXVI of the new constitution.³⁸ In Article XXVI, Washington disclaimed any right to unappropriated federal property and to "all lands . . . owned or held by any Indian or Indian

35. In 1900, at the end of the Populist period, Washington's population was roughly 518,100 people, 59 percent of whom were classified as living in rural areas. By 1920, the total population had doubled, but rural residents dropped to 45 percent. According to the 2000 census, rural dwellers represent only 18 percent of Washington's 5.9 million population.

36. See, for example, the Montana Constitution, Article II, Section 3, which since 1972 has declared an inalienable right "to a clean and healthful environment" and in Article IX, Section 1, requires that the "state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Washington's 1889 convention had a difficult time reaching consensus on natural-resource provisions, sidestepping, for example, decisive positions on water rights and tidelands. See Rosénow, *Journal of the Convention*, 76, 327; and Fitts, "Washington Constitutional Convention," 184.

37. Lutz, *Origins of American Constitutionalism*, 16; Johansen and Gates, *Empire of the Columbia*, 197-210, 249, 265-66. A dispute over the international boundary between Washington Territory and British Columbia was not resolved until the end of a twelve-year stalemate (the "Pig War") in 1871. Due to a surveying error, the exact location of the state's northern boundary became the subject of recent litigation, *State v. Norman* 145 Wn.2d 578, 40 P.3d 1161 (2002).

38. Enabling Act, Section 4. It mentions vast other federal lands, too.

tribes." The federal and tribal governments continue to exercise primary control over vast forest-, range-, and other lands—about one-third of the state's area.³⁹

Although the outer geographical limits were fixed by 1889, the boundaries of Washington's political community have widened noticeably since admission to the Union. The general public subject to the power and protection of the state was always conceived broadly—witness the explicit inclusion of women and minorities in the educational provision quoted above. But the yeoman farmers who exercised the franchise in Washington Territory and the new state were just that—*men*, and mainly white men at that. There were no property requirements for voting, so in that respect Washington's constitution reflected the political inclusiveness that pertained in most parts of the United States after the Jacksonian revolution of the 1820s through the 1830s.⁴⁰ But, again, that inclusiveness applied to men only. Nevertheless, the pioneer women who struggled arm in arm with their male counterparts to settle the Pacific Northwest had forced suffrage onto the political agenda since the beginning of the territory. The vote for women was defeated by just one vote at the first territorial legislature in 1854, and the inclusion of females in the franchise went back and forth during the following decades. In 1889, the all-male convention delegates punted this tough issue to the all-male electorate, which defeated women's suffrage by a two-to-one margin.⁴¹ Women did not gain the vote until 1910 (Amendment 5).⁴² The rights of women received an additional boost with the adoption of the state Equal Rights Amendment in 1972 (Amendment 61).

"Indians not taxed" were expressly excluded from the franchise in 1889, and technically remained so until 1975 (Article VI, Section 1).⁴³ But the most noticeable manifestation of ethnic exclusiveness were a provision banning landownership by aliens other than Canadians (Article II, Section 33)⁴⁴ and an 1896 amendment requiring electors to read and speak English (Amend-

39. National Wilderness Institute, "State by State Government Land Ownership," <http://www.nwi-org/Maps/LandChArticle.html>.

40. James Gray Pope, "An Approach to State Constitutional Interpretation," *Rutgers Law Journal* 24 (1993): 985, 991. See also James A. Henretta, "Foreword: Rethinking the State Constitutional Tradition," *Rutgers Law Journal* 22 (Fall 1991): 819, 826–29.

41. Utter and Spitzer, *Washington State Constitution*, 119–20.

42. Women had previously been permitted to vote only for school board elections. See the original Washington Constitution, Article VI, Section 2.

43. This section was adjusted by Amendment 63. In 1924, Congress conferred full citizenship on all Indians by chap. 233, 43 Stat. 253. See Utter and Spitzer, *Washington State Constitution*, 121.

44. This section was repealed by Amendment 42 in 1966. The antialien land provision was criticized by one constitutional convention delegate as "backward" (Knapp, "Origin of the Constitution," 272–73; Rosenow, *Journal of the Convention*, 550–51).

ment 2). These provisions were aimed initially at Asian immigrants, although the English-language requirement was later used against Latinos.⁴⁵ The English-literacy requirement was effectively blocked by the federal 1965 Voting Rights Act, but remained in the constitution's text until 1974, after the vote was expanded to all U.S. citizens over eighteen years who had resided in the state for thirty days (Amendment 63).⁴⁶

The political boundaries have thus expanded—first to women, then to all Native Americans and the non-English-speaking public. Ironically, although Indians have gained an equal footing as members of the state's political community, they have also increased independent political and economic power within tribal lands and traditional fishing and hunting areas, often at the expense of the state government and non-Indians.⁴⁷

POWER DIVIDED AMONG POLITICAL INSTITUTIONS

Reflecting the Populists' distrust of concentrated power, Washington's 1889 constitution scattered political authority among multiple institutions and offices. There was the customary division among three branches, with legislative power exercised by separately elected houses and further shared with the governor through the veto (Article III, Section 12). But the executive was further divided among eight separately elected officials: the governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and commissioner of public

45. Anti-Asian sentiments were ongoing in nineteenth- and twentieth-century Washington. See Murray Morgan, *Skid Road: An Informal Portrait of Seattle* (Seattle: University of Washington Press, 1982), 85–106; and Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* (Seattle: University of Washington Press, 1988), 59, 63. The effect of English-language restrictions on Latino voting rights was challenged in *Mexican-American Federation v. Naff*, 299 F. Supp. 587 (E.D. Wash. 1969), vacated by *Jimenez v. Naff*, 400 U.S. 986 (1971).

46. Earlier provisions had required residency in the state for a full year, within a county for ninety days, and within a city and precinct for thirty days prior to an election at which the franchise was to be exercised.

47. Indians within Washington were accorded 50 percent of the salmon catch by *United States v. State of Washington*, 384 F. Supp. 312 (1974); affirmed and remanded by 520 F.2d 676 (9th cir. 1975). Significant Native rights over the shellfish harvest were gained through three cases, each named *United States v. State of Washington*, 873 F. Supp. 1422 (1994); 898 F. Supp. 1453 (1995); and 157 F.3d 630 (9th cir. 1998). See Jason W. Anderson, "The World Is Their Oyster?" *Seattle Law Review* 23, no. 145 (1999); and Bradley J. Nye, "Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest," *Washington Law Review* 23, no. 175 (1992). See also *State v. Schmuck*, 121 Wn.2d 373, 850 P.3d 1332 (1993), regarding tribal police power on reservations.

lands (Article III, Section 1).⁴⁸ Both the executive branch and the legislature are constrained by judicial review of statutes and the constitution itself. The state supreme court has jealously guarded its authority as the sole arbiter of constitutional disputes and statutory interpretation (Article IV, Section 1).⁴⁹ The elective (rather than appointive) process of choosing judges was seen as a mechanism for protecting their independence from the governor, the legislature, and special interests.⁵⁰

Another example of the constitution's principle of keeping power close to the people is the requirement that municipalities be created by voters pursuant to general laws, rather than chartered directly by the legislature (Article XI, Section 10). In his proposal to the 1889 convention, W. Lair Hill observed that in many states, municipal charters were "the footballs of . . . lobbyists, who are sure to besiege the legislature when there is opportunity for plunder."⁵¹ Counties are the only type of political subdivision required by the constitution, and the legislature effectively controls their formation (Article XI, Sections 1–5).⁵² But all local governments (including counties) must be granted powers by category rather than through special legislation (Article XI, Sections 10–11), and counties and cities have substantial flexibility in organizing their local governments on a "home rule" basis (Article XI, Sections 4, 10, and 16). The state's penchant for diffusing political authority is further reflected in the substantial reliance on separate special-purpose districts (at least fifty-six varieties) and the sheer number of separate municipal and quasi-municipal corporations (more than two thousand).⁵³

48. The state's first legislature entrusted the secretary of state with the responsibility of serving *ex officio* as "insurance commissioner" (Wash. Laws of 1889–90, at 240–49). In 1907, a separately elected insurance commissioner was added by statute (Wash 1907 Laws, chap. 109). See Wash. Rev. Code, chap. 48.02.

49. See *Washington State Highway Commission v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216, 222, 367 P.2d 605, 609 (1961), regarding the courts' exclusive purview over constitutional interpretation. See also *Seattle School District v. State*, 90 Wn.2d 476, 496–97, 957 P.2d 71, 83–85 (1978).

50. Knapp, "Origin of the Constitution," 237–39; Henretta, "Foreword," 834.

51. Hill Constitution, Article 11 commentary. See also note 18 above.

52. *Freedom County v. Snohomish County*, 95 Wn. App. 839, 977 P.2d 612 (1999), review denied, 139 Wn.2d 1022, 994 P.2d 850 (2000).

53. Municipal Research and Services Center of Washington, "Number and Types of Special Purpose Districts in Washington," <http://www.mrsc.org/Subjects/Governance/spd/SPD-Number.aspx>. Together with about seventeen hundred special-purpose districts, Washington has 281 cities and towns and 39 counties (*ibid.*). See also Municipal Research and Services Center of Washington, "Classification of Washington Cities," <http://www.mrsc.org/Subjects/Governance/locgov31.aspx>; and "History of County Government in Washington," <http://www.mrsc.org/Subjects/Governance/locgov6.aspx>.

The single most important mechanism for the dispersion of political power under Washington's constitution was adoption of the initiative and referendum (Amendment 7; Article II, Section 1), under which, since 1912, "the people [have reserved] to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature."⁵⁴ These tools of popular control had been pushed through earlier by the Populists in Oregon, and were finally enacted in Washington after years of pressure from the Grange, labor unions, and progressive organizations.⁵⁵ Although the use of these devices has been cyclical, they have had a significant impact on the political process, with elected lawmakers sometimes fearing the threat of direct legislation.⁵⁶ However, Washington rejected the Oregon and California practice of amending constitutions by initiative, with changes to its basic document still requiring the approval of two-thirds of each house of the legislature and the majority vote of the statewide electorate (Article XXIII).⁵⁷

FURTHER LIMITS ON THE LEGISLATURE

The Washington Constitution contains a number of other provisions placed in other state constitutions after the Jacksonian revolution in order to "safeguard [the] new constitutional order by limiting the power of the state legislatures."⁵⁸ Enumerated in Article II, these provisions include requirements for open legislative meetings and written records of proceedings (Section 11), a requirement that each bill must be limited to a single subject reflected in the bill's title (Section 19),⁵⁹ a ban on salary increases for legis-

54. The recall was also adopted in 1912 (Amendment 8; Article I, Sections 33 and 34).

55. Claudius O. Johnson, "The Adoption of the Initiative and Referendum in Washington," *Pacific Northwest Quarterly* 35, no. 4 (1944): 291.

56. See, for example, "Eyman Shouldn't Scare Lawmakers," *Seattle Post-Intelligencer* editorial, February 8, 2002, B4; and "If Only the Legislature Had Done Its Job," *Seattle Post-Intelligencer* editorial, August 4, 2002, G2. A detailed analysis of the frequency, subject matters, and success of initiatives and referenda appears at the Washington secretary of state's Web site, <http://www.secstate.wa.gov/elections/initiatives/statistics.aspx>.

57. C. Johnson, "Adoption of the Initiative and Referendum," 302.

58. Henretta, "Foreword," 834. The demand for controls on legislatures for fear that they would otherwise be manipulated by business interests constituted a rejection of the "legislative hegemony" that Bernard Schwartz has characterized as "the dominant theme at the outset of the nation's formative era" (*The Law in America* [New York: American Heritage Publishing, 1974], 91). See also James Quayle Dealey, *Growth of American State Constitutions from 1776 to the End of the Year 1914* (Houston: Ginn, 1995), 53-55.

59. The single-subject requirement has led to considerable litigation, including successful challenges to initiatives as well as bills enacted by the legislature. See *Amalgamated Transit Union v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000).

lators during their terms (Section 25), a waiting period before the enactment of bills (Section 36), a bar to amendatory legislation without setting forth the changed section in full (Section 37), and a prohibition against most special legislation (Section 28). The ban on special legislation is related to other provisions requiring government actions based on general rules so that there is less opportunity for lawmaker whims or corruption.⁶⁰

CONCLUSION

Washington's constitution shares many structure-of-government provisions common to American governments, including a governor, a bicameral legislature, and an independent judiciary. The document includes limits on the legislature that have their roots in the Jacksonian era. But half of the constitution's articles—and virtually all of the important ones—exhibit the direct influence of the late nineteenth century's populist movement. It is impossible to properly understand or interpret the document without recognizing the founders' aspirations for an independent lifestyle, their dislike of special privilege, and their profound distrust of large business interests. The populist ethos continues today, both in the state's daily political life and in court decisions construing the state's constitution.

60. See the requirement that municipalities be created locally under general law rather than by legislative charter (Article XI, Section 10), the similar provision for private corporations (Article XII, Section 1), and the general requirement that laws granting privileges be available to all persons and entities within a class (Article I, Section 12).