Chapter 1
Introduction: Fundamental Questions

MY AIM IN THIS BRIEF BOOK IS NOT TO PROPOSE changes in the American Constitution but to suggest changes in the way we think about our constitution. In that spirit, I'll begin by posing a simple question: Why should we Americans uphold our Constitution?

Well, an American citizen might reply, it has been our constitution ever since it was written in 1787 by a group of exceptionally wise men and was then ratified by conventions in all the states. But this answer only leads to a further question.

To understand what lies behind that next question, I want to recall how the Constitutional Convention that met in Philadelphia during the summer of 1787 was made up. Although we tend to assume that all thirteen states sent delegates, in fact Rhode Island refused to attend, and the delegates from New Hampshire didn't arrive until some weeks after the Convention opened. As a result, several crucial votes in June and July were taken with only eleven state delegations in attendance. Moreover, the votes were counted by states, and although most of the time most state delegations agreed on a single position, on occasion they were too divided internally to cast a vote.

My question, then, is this: Why should we feel bound today by a document produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slaveholders, and adopted in only thirteen states by the votes of fewer than two thousand men, all of whom are long since dead and mainly forgotten?

Our citizen might respond that we Americans are free, after all, to alter our constitution by amendment and have often done so. Therefore our present constitution is ultimately based on the consent of those of us living today.

But before we accept this reply, let me pose another question: Have we Americans ever had an opportunity to express our considered will on our constitutional system? For example, how many readers of these lines have ever participated in a referendum that asked them whether they wished to continue to be governed under the existing constitution? The answer, of course, is: none.

Our citizen might now fall back on another line of argument: Why should we change a constitution that has served and continues to serve us well?

Although this is surely a reasonable line of argument, it does suggest still another question: By what standards does our constitution serve us well? In particular, how well does our constitutional system meet democratic standards of the present day? I'll turn to this question in the next chapter.

And if our constitution is as good as most Americans seem to think it is, why haven't other democratic countries copied it? As we'll see in Chapter 3, every other advanced democratic country has adopted a constitutional system very different from ours. Why?

If our constitutional system turns out to be unique among the constitutions of other advanced democratic countries, is it any better for its differences, or is it worse? Or don't the differences matter? I'll explore this difficult question in the fourth chapter.

Suppose we find little or no evidence to support the view that our constitutional system is superior to the systems of other comparable democratic countries, and that in some respects it may actually perform rather worse. What should we conclude?

As one part of an answer, I am going to suggest that we begin to view our American Constitution as nothing more or less than a set of basic institutions and practices designed to the best of our abilities for the purpose of attaining democratic values. But if an important democratic value is political equality, won't political equality threaten the rights and liberties we prize? In Chapter 5, I'll argue that
this view—famously defended by Tocqueville, among others—is based on a misunderstanding of the relationship between democracy and fundamental rights.

Yet the question remains: if our constitution is in some important ways defective by democratic standards, should we change it, and how? As I said, my aim here is not so much to suggest changes in the existing constitution as to encourage us to change the way we think about it, whether it be the existing one, an amended version of it, or a new and more democratic constitution. That said, in my final chapter I'll comment briefly on some possible changes and on the obstacles to achieving them.

Before turning to these questions, I need to dispose of two matters. One is purely terminological. In discussing the formation of the constitution at the Convention in 1787, I shall refer to the delegates as the Framers, not, as is more common, the Founding Fathers. I do so because many of the men who reasonably might be listed among the Founding Fathers—including such notables as John Adams, Samuel Adams, Tom Paine, and Thomas Jefferson—were not at the Convention. (By my count, only eight of the fifty-five delegates to the Convention had also signed the Declaration of Independence.)

The second matter is both terminological and substantive. Some readers may argue that the Founding Fathers (including the Framers) intended to create a republic, not a democracy. From this premise, according to a not uncommon belief among Americans, it follows that the United States is not a democracy but a republic. Although this belief is sometimes supported on the authority of a principal architect of the Constitution, James Madison, it is, for reasons I explain in Appendix A, mistaken.

But even more important, the conclusion does not follow from the premise. Whatever the intentions of the Framers may have been, we would hardly feel bound by them today if we believed that they were morally, politically, and constitutionally wrong. Indeed, more than two centuries of experience demonstrates that whenever a sufficiently large and influential number of Americans conclude that the views of the Framers were wrong, they will change the constitution. Even if the Framers did not intend their constitution to abolish slavery, when later generations concluded that slavery could no longer be tolerated and must be abolished, they changed the constitution to conform with their beliefs.

Even if some of the Framers leaned more toward the idea of an aristocratic republic than a democratic republic, they soon discovered that under the leadership of James Madison, among others, Americans would rapidly undertake to create a more democratic republic, and in doing so they would begin almost immediately to change the constitutional system the Framers had created.
Chapter 2
What the Framers Couldn’t Know

Wise as the framers were, they were necessarily limited by their profound ignorance. I say this with no disrespect, for like many others I believe that among the Framers were many men of exceptional talent and public virtue. Indeed, I regard James Madison as our greatest political scientist and his generation of political leaders as perhaps our most richly endowed with wisdom, public virtue, and devotion to lives of public service. In the months and weeks before the Constitutional Convention assembled "on Monday the 14th of May, A.D. 1787. [sic] and in the eleventh year of the independence of the United States of America, at the State-House in the city of Philadelphia," Madison studied the best sources as carefully as a top student preparing for a major exam. But even James Madison could not foresee the future of the American republic, nor could he draw on knowledge that might be gained from later experiences with democracy in America and elsewhere.

It is no detraction from the genius of Leonardo da Vinci to say that given the knowledge available in his time he could not possibly have designed a workable airplane—much less the spacecraft that now bears his name. Nor, given the knowledge available in 1903, could the Wright brothers have built the Boeing 707. Although like many others I greatly admire Benjamin Franklin, I recognize that his knowledge of electricity was infinitesimal compared with that of a first-year student in electrical engineering—or, for that matter, the electrician who takes care of my occasional wiring problems. In fact, on that famous first experiment with the kite, Franklin was lucky to have escaped alive. None of us, I expect, would hire an electrician equipped only with Franklin’s knowledge to do our wiring, nor would we propose to make a trip from New York to London in the Wright brothers’ aircraft. Leonardo, Franklin, the Wright brothers were great innovators in their time, but they could not draw on knowledge that was still to be accumulated in the years and centuries to come.

The knowledge of the Framers—some of them, certainly—may well have been the best available in 1787. But reliable knowledge about constitutions appropriate to a large representative republic was, at best, meager. History had produced no truly relevant models of representative government on the scale the United States had already attained, not to mention the scale it would reach in the years to come. As much as many of the delegates admired the British constitution, it was far from a suitable model. Nor could the Roman Republic provide much of a guide. The famous Venetian Republic, illustrious though it had been, was governed by a hereditary aristocracy of fewer than two thousand men and was already tottering: a decade after the Convention an upstart Corsican would knock it over in a featherweight military attack. Whatever knowledge the delegates could gain from historical experience was, then, only marginally relevant at best.

Leaping into the Unknown

Among the important aspects of an unforeseeable future, four broad historical developments would yield some potential knowledge that the Framers necessarily lacked and that, had they possessed it, might well have led them to a different constitutional design.

First, a peaceful democratic revolution was soon to alter fundamentally the conditions under which their constitutional system would function.

Second, partly in response to that continuing revolution, new democratic political institutions would fundamentally alter and reconstruct the framework they had so carefully designed.

Third, when democratization unfolded in Europe and in other English-speaking countries during the two centuries to come, constitutional arrangements would arise that were radically different from the American system. Within a generation or two, even the British constitution would bear little resemblance to the one the Framers knew—or thought they knew—and in many respects admired and hoped to imitate.

Fourth, ideas and beliefs about what democracy requires, and thus what a democratic republic requires, would continue to evolve down to the present day and probably beyond. Both in the way we understand the meaning of “democracy” and in the practices and institutions we regard as necessary
to it, democracy is not a static system. Democratic ideas and institutions as they unfolded in the two centuries after the American Constitutional Convention would go far beyond the conceptions of the Framers and would even transcend the views of such early democrats as Jefferson and Madison, who helped to initiate moves toward a more democratic republic.

I shall consider each of these developments in later chapters. But first I want to indicate some of the practical limitations on what the Framers could reasonably achieve.

What the Framers Couldn't Do

The Framers were not only limited by, so to speak, their inevitable ignorance. They were also crucially limited by the opportunities available to them.

We can be profoundly grateful for one crucial restriction: the Framers were limited to considering only a republican form of government. They were constrained not only by their own belief in the superiority of a republican government over all others but also by their conviction that the high value they placed on republicanism was overwhelmingly shared by American citizens in all the states. Whatever else the Framers might be free to do, they well knew that they could not possibly propose a monarchy or a government ruled by an aristocracy. As the Massachusetts delegate Elbridge Gerry put it, "There was not a one-thousand part of our fellow citizens who were not against every approach toward monarchy." The only delegate who was recorded by Madison as looking with favor on monarchy was Alexander Hamilton, whose injudicious expression of support for that heartily unpopular institution may have greatly reduced his influence at the Convention, as it was to haunt him later. Hardly more acceptable was an adaptation of aristocratic ideas to an American constitution. During the deliberations about the Senate, Gouverneur Morris of Pennsylvania explored the possibility of drawing its members from an American equivalent of the British aristocracy. But it soon became obvious that the delegates could not agree on just who these American aristocrats might be, and in any case they well knew that the overwhelming bulk of American citizens would simply not tolerate such a government.

A second immovable limit was the existence of the thirteen states, with still more states to come. A constitutional solution that would be available in most of the countries that were to develop into mature and stable democracies—a unitary system with exclusive sovereignty lodged in the central government, as in Britain and Sweden, for example—was simply out of the question. The need for a federal rather than a unitary republic was therefore not justified by a principle adduced from general historical experience, much less from political theory. It was just a self-evident fact. If Americans were to be united in a single country, it was obvious to all that a federal or confederal system was inescapable. Whether the states would remain as fundamental constituents was therefore never a serious issue at the Convention; the only contested question was just how much autonomy, if any, they would yield to the central government.

The delegates had to confront still another stubborn limit: the need to engage in fundamental compromises in order to secure agreement on any constitution at all. The necessity for compromise and the opportunities this gave for coalitions and logrolling meant that the Constitution could not possibly reflect a coherent, unified theory of government. Compromises were necessary because, like the country at large, members of the convention held different views on some very basic issues.

Slavery. One, of course, was the future of slavery. Most of the delegates from the five southern states were adamantly opposed to any constitutional provision that might endanger the institution. Although the delegates from the other seven states were hardly of one mind about slavery, it was perfectly obvious to them that the only condition on which coexistence would be acceptable to the delegates from the southern states would be the preservation of slavery. Consequently, if these delegates wanted a federal constitution they would have to yield, no matter what their beliefs about slavery. And so they did. Although some delegates who signed the final document abhorred slavery, they nevertheless accepted its continuation as the price of a stronger federal government.

Representation in the Senate. Another conflict of views that could not be settled without a one-sided compromise resulted from the adamant refusal of the delegates from the small states to accept
any constitution that did not provide for equal representation in the Senate. The opponents of equal representation included two of the most illustrious members of the Convention, James Madison and James Wilson, who were also among the chief architects of the Constitution. Both men bitterly opposed what seemed to them an arbitrary, unnecessary, and unjustifiable limit on national majorities. As Alexander Hamilton remarked about this conflict: "As states are a collection of individual men which ought we to respect most, the rights of the people composing them, or the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been sd. that if the smaller States renounce their equality, they renounce at the same time their liberty. The truth is it is a contest for power, not for liberty. Will the men composing the small States be less free than those composing the larger." Let me give you a flavor of the elevated discussion that preceded the victory of the small states. Here is Gunning Bedford of Delaware on June 30:

The large states dare not dissolve the Confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.

To which Rufus King of Massachusetts replied:

I cannot sit down, without taking some notice of the language of the honorable gentleman from Delaware. . . . It was not I who with a vehemence unprecedented in this House, declared himself ready to turn his hopes from our common Country, and court the protection of some foreign hand. . . . I am grieved that such a thought has entered into his heart. . . . For myself whatever might be my distress, I would never court relief from a foreign power.

Faced with the refusal of the small states to accept anything less, Madison, Wilson, Hamilton, and the other opponents of equal representation finally accepted compromise of principle as the price of a constitution. The solution of equal representation was not, then, a product of constitutional theory, high principle, or grand design. It was nothing more than a practical outcome of a hard bargain that its opponents finally agreed to in order to achieve a constitution.

Incidentally, this conflict illustrates some of the complexities of voting coalitions at the Constitutional Convention, for the faction opposed to equal representation in the Senate included four strange bedfellows: Madison, Wilson, Hamilton, and Gouverneur Morris. Although all four generally supported moves to strengthen the federal government, Madison and Wilson usually endorsed proposals that leaned toward a more democratic republic, while Hamilton and Morris tended to support a more aristocratic republic.

Undemocratic Elements in the Framers' Constitution

It was within these limits, then, that the Framers constructed the Constitution. Not surprisingly, it fell far short of the requirements that later generations would find necessary and desirable in a democratic republic. Judged from later, more democratic perspectives, the Constitution of the Framers contained at least seven important shortcomings.

Slavery. First, it neither forbade slavery nor empowered Congress to do so. In fact, the compromise on slavery not only denied Congress the effective power to prohibit the importation of slaves before 1808 but it gave constitutional sanction to one of the most morally objectionable byproducts of a morally repulsive institution: the Fugitive Slave laws, according to which a slave who managed to escape to a free state had to be returned to the slaveholder, whose property the slave remained. That it took three-quarters of a century and a sanguinary civil war before slavery was abolished should at the least make us doubt whether the document of the Framers ought to be regarded as holy writ.

Suffrage. Second, the constitution failed to guarantee the right of suffrage, leaving the qualifications of suffrage to the states. It implicitly left in place the exclusion of half the population—
women—as well as African Americans and Native Americans. As we know, it took a century and a half before women were constitutionally guaranteed the right to vote, and nearly two centuries before a president and Congress could overcome the effective veto of a minority of states in order to pass legislation intended to guarantee the voting rights of African Americans.

**Election of the president.** Third, the executive power was vested in a president whose selection, according to the intentions and design of the Framers, was to be insulated from both popular majorities and congressional control. As we'll see, the Framers' main design for achieving that purpose—a body of presidential electors composed of men of exceptional wisdom and virtue who would choose the chief executive unswayed by popular opinion—was almost immediately cast into the dustbin of history by leaders sympathetic with the growing democratic impulses of the American people, among them James Madison himself. Probably nothing the Framers did illustrates more sharply their inability to foresee the shape that politics would assume in a democratic republic. (I shall say more about the electoral college in a later chapter.)

**Choosing senators.** Fourth, senators were to be chosen not by the people but by the state legislatures, for a term of six years. Although this arrangement fell short of the ambitions of delegates like Gouverneur Morris who wanted to construct an aristocratic upper house, it would help to ensure that senators would be less responsive to popular majorities and perhaps more sensitive to the needs of property holders. Members of the Senate would thus serve as a check on the Representatives, who were all subject to popular elections every two years.

**Equal representation in the Senate.** The attempt to create a Senate that would be a republican version of the aristocratic House of Lords was derailed, as we have seen, by a prolonged and bitter dispute over an entirely different question: Should the states be equally represented in Congress or should members of both houses be allocated according to population? This question not only gave rise to one of the most disruptive issues of the Convention, but it resulted in a fifth undemocratic feature of the constitution. As a consequence of the famous—or from a democratic point of view, infamous—"Connecticut Compromise" each state was, as we have seen, awarded the same number of senators, without respect to population. Although this arrangement failed to protect the fundamental rights and interests of the most deprived minorities, some strategically placed and highly privileged minorities—slaveholders, for example—gained disproportionate power over government polices at the expense of less privileged minorities. (I shall come back to this element in the constitution in a later chapter.)

**Judicial power.** Sixth, the constitution of the Framers failed to limit the powers of the judiciary to declare as unconstitutional laws that had been properly passed by Congress and signed by the president. What the delegates intended in the way of judicial review will remain forever unclear; probably many delegates were unclear in their own minds, and to the extent that they discussed the question at all, they were not in full agreement. But probably a majority accepted the view that the federal courts should rule on the constitutionality of state and federal laws in cases brought before them. Nevertheless, it is likely that a substantial majority intended that federal judges should not participate in making government laws and policies, a responsibility that clearly belonged not to the judiciary but to the legislative branch. Their opposition to any policy-making rule for the judiciary is strongly indicated by their response to a proposal in the Virginia Plan that "the Executive and a convenient number of the National Judiciary, ought to compose a council of revision" empowered to veto acts of the National Legislature. Though this provision was vigorously defended by Madison and Mason, it was voted down, 6 states to 3.

A judicial veto is one thing; judicial legislation is quite another. Whatever some of the delegates may have thought about the advisability of justices sharing with the executive the authority to veto laws passed by Congress, I am fairly certain that none would have given the slightest support to a proposal that judges should themselves have the power to legislate, to make national policy. However, the upshot of their work was that in the guise of reviewing the constitutionality of state and congressional actions or inactions, the federal judiciary would later engage in what in some instances could only be called judicial policy-making—or, if you like, judicial legislation.
Congressional power. Finally, the powers of Congress were limited in ways that could, and at
times did, prevent the federal government from regulating or controlling the economy by means that
all modern democratic governments have adopted. Without the power to tax incomes, for example,
fiscal policy, not to say measures like Social Security, would be impossible. And regulatory actions—
over railroad rates, air safety, food and drugs, banking, minimum wages, and many other policies—
had no clear constitutional authorization. Although it would be anachronistic to charge the Framers
with lack of foresight in these matters, unless the constitution could be altered by amendment or by
heroic reinterpretation of its provisions—presumably by what I have just called judicial legislation—it
would prevent representatives of later majorities from adopting the policies they believed were
necessary to achieve efficiency, fairness, and security in a complex post-agrarian society.

Enlightened as the Framers’ constitution may have been by the standards of the eighteenth
century, future generations with more democratic aspirations would find some of its undemocratic
features objectionable—and even unacceptable. The public expression of these growing democratic
aspirations was not long in coming.

Even Madison did not, and probably could not, predict the peaceful democratic revolution that was
about to begin. For the American revolution was soon to enter into a new and unforeseen phase.

The Framers’ Constitution Meets Emergent Democratic Beliefs

We may tend to think of the American republic and its constitution as solely the product of leaders
inspired by extraordinary wisdom and virtue. Yet without a citizenry committed to republican principles
of government and capable of governing themselves in accordance with those principles, the
constitution would soon have been little more than a piece of paper. As historical experience would
reveal, in countries where democratic beliefs were fragile or absent, constitutions did indeed become
little more than pieces of paper—soon violated, soon forgotten.

The American democratic republic was not created nor could it have been long maintained by
leaders alone, gifted as they may have been. It was they, to be sure, who designed a framework
suitable, as they thought, for a republic. But it was the American people, and the leaders responsive
to them, who ensured that the new republic would rapidly become a democratic republic.

The proto-republican phase. The ideas, practices, and political culture necessary to sustain a
republican government were by no means unfamiliar to Americans. Unlike some countries that have
moved almost overnight from dictatorship to democratic forms, and often soon thereafter to chaos and
back to dictatorship, by 1787 the Americans had already accumulated a century and a half of
experience in the arts of government.

The long colonial period had provided opportunities to both leaders and many men of ordinary
rank to become acquainted with the requirements of self-government, both in the direct form of a town
meeting and through electing representatives to the colonial legislatures. We easily forget that
although in its two famous opening paragraphs the Declaration of Independence laid down some new
and audacious claims, in the rest of that document—the part few people bother to read today—the
authors mainly protested against the British king for violating rights that, with some exaggeration, they
had previously enjoyed as Englishmen.

The republican phase. The next phase, creating a popular republic, had begun with the
astounding declaration on July 4, 1776, “that all Men are created equal.” The Declaration marks the
beginning of a series of events that went much further than simply gaining independence from Britain.
In what the historian Gordon Wood has called the "greatest Utopian movement in American history,”
the Declaration also triggered a democratic revolution in beliefs, practices, and institutions—or better,
an evolution—that has continued ever since. The two decades since independence had provided still
more, and deeper, experience in the practices of self-government. Nor was this experience limited to
a tiny minority. In some of the thirteen states, a fairly high proportion of adult males had acquired the
franchise.

Toward a democratic republic. The lengthy colonial and post-independence experience provided a
sturdy foundation for the efforts that Americans now undertook in the next phase of the revolution,
when the new republic was transformed into a *more democratic* republic. To he sure, at the end of the eighteenth century few Americans were ready to concede that the principles of the Declaration, much less democratic citizenship, applied to everyone. It would take two more centuries of evolution in democratic beliefs before most Americans would be inclined to agree that the famous claim in the Declaration might be rephrased: not just "all men," but "all persons are created equal."

Yet always keeping in mind the huge and persistent exceptions, by the standards prevailing elsewhere in the world the extent of equality among Americans was extraordinary. Alexis de Tocqueville, who observed Americans during his year's visit in 1831-32, opened his famous work with these words:

> Among the novel objects that attracted my attention during my stay in the United States, nothing struck me more forcibly than the general equality of conditions. I readily discovered the prodigious influence which this primary fact exercises on the whole course of society, by giving a certain direction to public opinion, and a certain tenor to the laws; by imparting new maxims to the governing powers, and peculiar habits to the governed.

> I speedily perceived that the influence of this fact extends far beyond the political character and the laws of the country, and that it has no less empire over civil society than over the Government. . . .

> The more I advanced in the study of American society, the more I perceived that the equality of condition is the fundamental fact from which all others seem to be derived, and the central point at which all my observations constantly terminated.

During the three decades before Tocqueville arrived, under the leadership of Jefferson, Madison, and others, supporters of a more democratic republic had already made some changes. The seismic shift from the views of the Framers and the Federalists is symbolized by the changing name of the party that won both the presidency and Congress in the election that Jefferson called—as have later historians—the Revolution of 1800. To defeat the Federalists, win the election, and gain control of the new government, Jefferson and Madison had created a political party that they appropriately named the Democratic-Republican Party. By 1832, with Andrew Jackson as its winning candidate, the Democratic-Republican party became the Democratic Party, plain and simple. The name has stuck ever since.

Conservative delegates among the Framers—later the core of the Federalist Party—had feared that if ordinary people were given ready access to power they would bring about policies contrary to the views and interests of the more privileged classes, which, as the conservative delegates viewed their interests, were also the best interests of the country. These conservative fears were soon confirmed. Within a decade the eminent Federalist leaders were pushed aside and the Federal Party became a minority party. A generation later had seen the demise of both the party and its leaders.

If these changes justified some of the pessimism about popular majorities of many of the Framers, their pessimism proved unjustified in another important respect. A substantial number of the Framers believed that they must erect constitutional barriers to popular rule because the people would prove to be an unruly mob, a standing danger to law, to orderly government, and to property rights. Contrary to these pessimistic appraisals, when American citizens were endowed with the rights and opportunities to support demagogues and rabblerousers, they chose instead to support law, orderly government, and property rights. White male Americans were, after all, mainly farmers who owned their own land; or, where farm land was not easily available because most of it had already been occupied, they could count on the ready availability of good farm land farther west—often obtained, to be sure, at the expense of its earlier inhabitants, the Native Americans.

White Americans in vast numbers bought western land and settled down on their own farms. "Two-thirds of the landless white men of Virginia moved West in the 1790s. . . . Between 1800 and 1820, the trans-Appalachian population grew from a third of a million to more than two million." In foreseeing a democratic republic based on a citizen body consisting predominantly of independent farmers, mainly property owners cultivating their own lands, Jefferson reflected the reality of his
Outside the South, and even in the southern piedmont, a predominant number of American citizens were free farmers who stood to benefit from an orderly government dependent on their votes. Ordinary citizens also revealed strong beliefs in democratic values and procedures. Presented with the opportunity to do so, they would choose leaders who cultivated democratic values and procedures. Just such an opportunity was soon presented by four acts passed in 1798 by the Federalists, who were alarmed not only by the seemingly subversive activities of France but also by the rapidly growing influence of boisterous, irreverent, and sometimes libelous opponents in the new Republican party. In particular, the Federalists employed one of these new laws, the Sedition Act, in an effort to silence Republican critics. Notable among the fourteen who were prosecuted was a bombastic and somewhat unsavory Republican congressman, the Irish immigrant Mathew Lyon, whose only memorable contribution to American history was his conviction for sedition, which carried a fine of a thousand dollars—a huge amount in those days—and four months in jail. To the Republicans, the Sedition Act was a flagrant violation of the newly adopted First Amendment. After they gained the presidency and control of Congress in the election of 1800, the Sedition Act was allowed to lapse, despite the vigorous efforts of the Federalists.

Democratic Changes to the Framers' Constitution: Amendments

The fate of the Alien and Sedition Acts symbolizes a larger change at work in the country. The democratic revolution, fitful and uncertain though it would forever remain, not only helped to democratize the formal constitution itself by amendments, it generated new democratic political institutions and practices within which the constitutional system would operate. The constitutional system that has emerged is no longer that of the Framers, nor is it one they had intended to create. The Bill of Rights. To be sure, the first ten amendments to the Constitution—the Bill of Rights—cannot be attributed to the democratic revolution that followed the Convention. They resulted instead from demands within the Convention itself by delegates who generally favored a more democratic system than their colleagues could then accept. Among the most influential of these was George Mason, who wrote the Virginia constitution and its Declaration of Rights. Responding to the insistent demands of Mason and several others, as well as to similar voices outside the Convention, Mason's fellow Virginian, James Madison, drafted ten amendments that were ratified in 1789-90 by eleven states, more than a sufficient number for their adoption. (Incidentally, the two laggards, Georgia and Connecticut, finally did come around—but not until 1939!) Thus, for all practical purposes the Bill of Rights was a part of the original constitution. In any case, the amendments have proved to be a veritable cornucopia of expanding rights necessary to a democratic order.

Other Amendments

As I have mentioned, the most profound violation of human rights permitted by the original constitution, slavery, was not corrected until the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments between 1865 and 1870. In 1909 the Sixteenth Amendment in 1913 gave Congress the power to enact income taxes. The election of U. S. senators by state legislatures finally gave way to direct election with the adoption of the Seventeenth Amendment in 1913. Women were finally guaranteed the right of suffrage in federal and state elections with the passage of the Nineteenth Amendment in 1919. Although the effort to add an Equal Rights Amendment failed, the Fourteenth Amendment was later interpreted to provide a constitutional basis for eliminating discrimination against women as well as certain minorities whose members suffered from discriminatory practices. The iniquitous poll tax that had continued to bar African Americans from voting in some southern states was finally forbidden in 1964 by the Twenty-Fourth Amendment. Finally, in a move toward a more inclusive electorate, in 1971 the Twenty-Sixth Amendment reduced the voting age to eighteen.

In this halting fashion, the democratic revolution belatedly worked its way through the Constitution to overcome the veto power of long-entrenched minorities and to eliminate some of the most flagrantly undemocratic features of the constitution. As Alan Grimes observed some years ago, of the twenty-six
(now twenty-seven) amendments to the constitution, “Twenty-one amendments may be said to affirm either the principle of democratic rights or that of democratic processes.”

Democratic Changes in Political Practices and Institutions

The constitution of the Framers was changed not only by formal amendments. It was also fundamentally altered by political practices and institutions that the Framers did not foresee, even though they were unavoidable—indeed, highly desirable—in a democratic republic.

Political parties. Perhaps the most important of these was the political party. The Framers feared and detested factions, a view famously expressed by Madison in Federalist No. 10. Probably no statement has been so often cited to explain and justify the checks against popular majorities that the Framers attempted to build into the constitution. It is supremely ironic, therefore, that more than anyone except Jefferson, it was Madison who helped to create the Republican Party in order to defeat the Federalists. Although the system would not settle down for some years, Jefferson and Madison helped to inaugurate the competitive two-party system that has pretty much remained in place ever since.

Which suggests other questions. Despite the claim of every political party everywhere in the world that it truly represents the general interest, aren't political parties really "factions" in Madison's sense? So did the Framers fail after all to prevent government by factions? And did they succeed only in making it more difficult for a majority faction to prevail—that is, a party reflecting the interests of a majority coalition?

Whatever the best answers to these hard questions, it cannot be denied that partisan politics transformed the constitution. Despite their familiarity with the role of the Tories and Whigs in Britain and nascent parties in then-own legislatures, the Framers did not fully foresee that in a democratic republic political parties are not only possible, they are also inevitable and desirable. As Jefferson and Madison soon came to realize, without an organized political party to mobilize their voters in the states and their fellow supporters in the Congress, they could not possibly overcome the entrenched political domination of their political adversaries, the Federalists. The democratic rights incorporated in the Bill of Rights made parties possible; the need to compete effectively made them inevitable; the ability to represent citizens who would otherwise not be adequately represented made them desirable.

Today we take for granted that political parties and party competition are essential to representative democracy: we can be pretty sure that a country wholly without competitive parties is a country without democracy. If the Framers had been aware of the central importance of political parties to a democratic republic, would they have designed their constitution differently? They might well have. At the very least they would not have created the absurdity of an electoral college.

The electoral college. In an outcome the Framers had made possible by their defective design of the electoral college, the election of 1800 produced a tie between Jefferson and his running mate, Aaron Burr. From the time the final results were known in late December 1800, the deadlock in the electoral college persisted, despite many attempts at persuasion and compromise, until February 17, 1801, when shifts and abstentions by a number of state delegations gave Jefferson the presidency. Ironically, the very institution that the Framers hoped would insulate the election of the president from partisan politics was its first victim. Although a similar fiasco was prevented in the future by the Twelfth Amendment in 1804, even with the amendment the electoral college was converted by partisan politics into nothing more than a rather peculiar and ritualized way of allocating the votes of the states for president and vice president. Yet the electoral college still preserved features that openly violated basic democratic principles: citizens of different states would be unequally represented, and a candidate with the largest number of popular votes might lose the presidency because of a failure to win a majority in the electoral college. That this outcome was more than a theoretical possibility had already occurred three times before it was displayed for all the world to see in the election of 2000. I'll come back to the democratic shortcomings of the electoral college in a later chapter.
The Democratic Revolution: What Madison Learned—and Taught

James Madison arrived in Philadelphia in 1787, a few months past his thirty-sixth birthday. He was already far from a political neophyte, having been elected at the age of twenty-five to the Virginia constitutional convention where, with George Mason, he helped to draft the Virginia Declaration of Rights and the new state constitution. He then became successively a member of the Virginia legislature (though he failed to be reelected because, it was said, he refused to treat the voters to the customary rum punch), a delegate to the Continental Congress, and again a member of the Virginia legislature. In the months before the Constitutional Convention opened, he drafted the outline of the proposal that would be presented in the opening days of the Convention and that would come to be known as the Virginia Plan. (We shall see something of its contents in the next chapter.)

Yet, experienced as he was, like his fellow delegates Madison brought to the Convention limited knowledge of the institutions and practices that a more fully democratized republic would require. Before his death in 1836 at the age of eighty-five, nearly half a century after the Convention, Madison could have looked back on a rich body of experience that would have shaped his constitutional views in many ways.

Following the Convention, he was elected to the U.S. House of Representatives where he drafted and introduced the first ten amendments to the Constitution—the Bill of Rights. With Jefferson he soon became a leader of the opposition to Federalist policies and ideas. As we have seen, they formed and led the opposition party, the Democratic Republicans. After Jefferson's election, Madison became secretary of state. He then succeeded Jefferson in the presidency. By the time he left that office in 1817, his views about democratic political institutions were probably as well informed as those of any person then alive.

However that may be, the Madison of seventy in 1821 was no longer the Madison of thirty-six in 1787. Among other changes, the Madison of 1821 would have trusted popular majorities—American popular majorities, anyway—far more than the Madison of 1787. The mature and experienced Madison of 1821 might therefore have done less to check majority rule and more to facilitate it. Let me offer several pieces of evidence, one from a time early in his awakening to the requirements of a democratic republic, the others from his reflections in old age.

I have already alluded to the first: the basic alteration in his views about "factions," or what the two distinguished historians of Federalism describe as "Madison Revises The Federalist."33 Madison's views in Federalist No. 10, influenced by his reading of David Hume, are cited endlessly: the dangers of factions, the threat from majorities united on principles contrary to the general interest, political parties as at best a necessary evil. But these were not his more mature views.

In January 1792, less than five years after the close of the Convention, Madison begins to publish a series of essays in The Gazette, an opposition newspaper published by Philip Freneau. The first is entitled "On Parties." In "every political society," he writes, "parties are unavoidable." To combat their dangers, Madison offers five proposals that might well serve us better in our own time than the anti-majoritarian biases displayed in Federalist No. 10. Whatever dangers political parties may pose can be overcome

"By establishing political equality among all."
"By withholding unnecessary opportunities from a few, to increase the inequality of property by an immoderate, and especially unmerited, accumulation of riches."
"By the silent operation of the laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence toward a state of comfort."
"By abstaining from measures which operate differently on different interests, and particularly favor one interest, at the expense of another."
"By making one party a check on the other, so far as the existence of parties cannot be prevented, nor their views accommodated."34

"If this is not the language of reason," he went on to say, "it is that of republicanism."
Nearly thirty years later (around 1821), when he is preparing his notes on the constitutional debates for publication, he records some of his later reflections. As to the right of suffrage, he remarks that his observations at the Convention "do not convey the speakers [Madison's] more full and matured view of the subject." "The right of suffrage," he now insists, "is a fundamental Article in Republican Constitutions." He also makes explicit his view of political parties: "No free Country," he says, "has ever been without parties, which are a natural offspring of Freedom." But political parties and a broad suffrage may create a conflict over property. "An obvious and permanent division of every people is into the owners of the Soil, and the other inhabitants." Consequently, if the suffrage is extended to citizens who are not freeholders, a majority might threaten the property rights of the freeholders.

Madison then considers a number of possible solutions to this problem, of which the first would be to restrict the suffrage to "freeholders, and to such as hold an equivalent property." He rejects this solution with an observation that might well have been a central principle of the Second Phase of the American Revolution. "The objection to this regulation," he writes, "is obvious. It violates the vital principle of free Govt. that those who are to be bound by laws, ought to have a voice in making them. And the violation wd. be more strikingly unjust as the lawmakers became the minority." A second option is "confining the right of suffrage for one branch to the holders of property, and for the other Branch to those without property." But to do so "wd. not in fact be either equal or fair." Nor prudent: "The division of the State into the two Classes . . . might lead to contests & antipathies not dissimilar to those between the Patricians and Plebeians at Rome."

After examining other possibilities, he concludes:

Under every view of the subject, it seems indispensable that the Mass of Citizens not be without a voice, in making the laws which they are to obey, & in chusing the Magistrates, who are to administer them, and if the only alternative be between an equal & universal right of suffrage for each branch of the Govt. and a confinement of the entire right to a part of the Citizens, it is better that those having the greater interest at stake namely that of property 6-persons both, should be deprived of half their share in the Govt. than, that those having the lesser interest, that of personal rights only, should be deprived of the whole.35

The older Madison is also more favorable to majority rule. Like most of his contemporaries, Madison believes that "all power in human hands is liable to be abused." But taking that assumption as axiomatic together with the need for government, the relevant question becomes: what land of government is best? His answer remains unchanged:

In Governments independent of the people, the rights and views of the whole may be sacrificed to the views of the Government. In Republics, where the people govern themselves, and where, of course, the majority govern, a danger to the minority arises from opportunities tempting a sacrifice of their rights to the interest, real or supposed, of a majority. No form of government, therefore, can be a perfect guard against the abuse of power. The recommendation of the republican form is, that the danger of abuse is less than any other.36

What has changed is his greater confidence in majority rule. Compared with its alternatives at least, the mature Madison is confident that majority rule, in the words of Marvin Meyers, promises the "least imperfect government."37

"[E]very friend to Republican Government," he writes in 1833, "ought to raise his voice against the sweeping denunciation of majority Governments as the most tyrannical and intolerable of all Governments."

It has been said that all Government is an evil. It would be more proper to say that the necessity of any government is a misfortune. This necessity however exists; and the problem to be solved is, not what form of government is perfect, but which of the forms is least imperfect; and here the general question must be between a republican Government in which the majority
rule the minority, and a government in which a lesser number or the least number rule the
majority.

The result ... is, that we must refer to the monitory reflection that no government of human
device and human administration can be perfect; that that which is the least imperfect is
therefore the best government; that the abused of all other governments have led to the
preference of republican government as the best of all governments, because the least
imperfect; that the vital principle of republican government is the *lex majoris parties*, the will of
the majority.\(^{38}\)

I have little doubt that if the American Constitutional Convention had been held in 1820, a very dif-
ferent constitution would have emerged from the deliberations—although, I hasten to add, we can
never know what shape that constitution might have taken. We can be reasonably sure, however, that
the delegates would have attempted to provide more support for, and fewer barriers to, a democratic
republic.

As to the undemocratic features of the constitution created in 1787, let me suggest four
conclusions.

First, the aspects of the constitution that are most defective from a democratic point of view do not
necessarily all reflect the intentions of the Framers, insofar as we may surmise them. Though the
flaws are traceable to their handiwork, they are in some cases flaws resulting from the inability of
these superbly talented craftsmen to foresee how their carefully crafted instrument of government
would work under the changing conditions that were to follow—and most of all, under the impact of
the democratic revolution in which Americans were, and I hope still are, engaged.

Second, some of the undemocratic aspects of the original design also resulted from the logrolling
and compromises that were necessary to achieve agreement. The Framers were not philosophers
searching for a description of an ideal system. Nor—and we may be forever grateful to them for this—
were they philosopher kings entrusted with the power to rule. They were practical men, eager to
achieve a stronger national government, and as practical men they made compromises. Would the
country have been better off if they had refused to do so? I doubt it. But in any case, they did
compromise, and even today the constitution bears the results of some of their concessions. I'll have
more to say on that point in my next chapter.

Third, undemocratic aspects that were more or less deliberately built into the constitution overesti-
mated the dangers of popular majorities—American popular majorities, at any rate—and
underestimated the strength of the developing democratic commitment among Americans. As a result,
in order to adapt the original framework more closely to the requirements of the emerging democratic
republic, with the passage of time some of these aspects of the original constitution were changed,
sometimes by amendment, sometimes, as with political parties, by new institutions and practices.

Finally, though the defects seem to me serious and may grow even more serious with time,
Americans are not much predisposed to consider another constitution, nor is it clear what alternative
arrangements would serve them better.

As a result, the beliefs of Americans in the legitimacy of their constitution will remain, I think, in
constant tension with their beliefs in the legitimacy of democracy.

For my part, I believe that the legitimacy of the constitution ought to derive solely from its utility as
an instrument of democratic government—nothing more, nothing less. In my last chapter, I'll reflect
further on the meaning of that judgment.
Chapter 3
The Constitution as a Model: An American Illusion

Many Americans appear to believe that our constitution has been a model for the rest of the democratic world. Yet among the countries most comparable to the United States and where democratic institutions have long existed without breakdown, not one has adopted our American constitutional system. It would be fair to say that without a single exception they have all rejected it. Why?

Before I explore that question, I need to clarify two matters. As you may have noticed, rather than speaking simply of "the constitution," I've sometimes used the phrase "the constitutional system." I do so because I want to include in a constitutional system an important set of institutions that may or may not be prescribed in the formal constitution itself: these are its electoral arrangements. As we'll see, electoral systems can interact in crucial ways with the other political institutions and thereby determine the way they function.

Also, I've just referred to the countries where democracy is oldest and most firmly established. We could call them the older democracies, the mature democracies, the stable democratic countries, and so on, but I'll settle on "the advanced democratic countries." Whatever we choose to call them, in order to compare the characteristics and performance of the American constitutional system with the characteristics and performance of the systems in other democratic countries, we need a set of reasonably comparable democratic countries. In short, we don't want to compare apples and oranges—or good apples and rotten apples.

I've noticed that we Americans often assure ourselves of the superiority of our American political system by comparing it with political systems in countries ruled by nondemocratic regimes or in countries that suffer from violent conflict, chronic corruption, frequent chaos, regime collapse or overthrow, and the like. On voicing or hearing criticism of political life in the United States, an American not infrequently adds, "Yes, but just compare it with X!," a favorite X being the Soviet Union during the Cold War and, after its collapse, Russia. One could easily pick more than a hundred other countries with political systems that by almost any standard are unquestionably inferior to our own. But comparisons like this are absurdly irrelevant.

To my mind, the most comparable countries are those in which the basic democratic political institutions have functioned without interruption for a fairly long time, let's say at least half a century, that is, since 1950. Including the United States, there are twenty-two such countries in the world. Fortunately for our purposes, they are also comparable in their relevant social and economic conditions: not a rotten apple in the bunch. Not surprisingly, they are mostly European or English speaking, with a few outliers: Costa Rica, the only Latin American country; Israel, the only Middle Eastern country; and Japan, the only Asian country.

When we examine some of the basic elements in the constitutional structures of the advanced democratic countries, we can see just how unusual the American system is. Indeed, among the twenty-two older democracies, our system is unique.

Federal or Unitary

To begin with, among the other twenty-one countries we find only six federal systems, in which territorial units—states, cantons, provinces, regions, Lander—are endowed by constitutional prescription and practice with a substantial degree of autonomy and with significant powers to enact legislation. As in the United States, in these federal countries the basic territorial units, whether states, provinces, or cantons, are not simply legal creatures of the central government with boundaries and powers that the central government could, in principle, modify as it chooses. They are basic elements in the constitutional design and in the political life of the country.

As with the United States, so too in these other five countries federalism was not so much a free choice as a self-evident necessity imposed by history. In most, the federal units—states, provinces, cantons—existed before the national government was fully democratized. In the extreme case,
Switzerland, the constituent units were already in place before the Swiss Confederation itself was formed from three Alpine cantons in 1291, five centuries before America was born. Throughout the following seven centuries the Swiss cantons, now twenty in number, have retained a robust distinctiveness and autonomy. In the outlier, Belgium, federalism followed long after a unitary government had been imposed on its diverse regional groups. As the brilliant period of Flemish painting, weaving, commerce, and prosperity in the sixteenth and seventeenth centuries reminds us, profound territorial, linguistic, religious, and cultural differences between the predominantly Flemish and Walloon areas existed long before Belgium itself became an independent country in 1830. Despite the persistent cleavages between the Flemish and Walloons, however, federalism did not arrive until 1993 when the three regions—Wallonia, Flanders, and Brussels—were finally given constitutional status. I should point out that the deep divisions between Walloons and Flemish continue to threaten the survival of Belgium as a single country.

The second and third features follow directly from the existence of federalism.

**Strong Bicameralism**

A natural, if not strictly necessary, consequence of federalism is a second chamber that provides special representation for the federal units. To be sure, unitary systems may also have, and historically all have had, a second chamber. However, in a democratic country with a unitary system, the functions of a second chamber are far from obvious. The question that was posed during the American constitutional convention is bound to arise: Exactly whom or whose interests is a second chamber supposed to represent? And just as the Framers could provide no rationally convincing answer, so too-as democratic beliefs grow stronger in democratic countries with unitary governments, the standard answers become less persuasive—in fact, so unpersuasive to the people of the three Scandinavian countries that they have all abolished their second chambers. Like the state of Nebraska, Norway, Sweden, and Denmark also seem to do quite nicely without them. Even in Britain, the gradual advance of democratic beliefs created an inexorable force opposed to the historical powers of the House of Lords. As early as 1911 the Liberals wiped out the power of the Lords to veto "money bills" passed by the Commons. The continuing advance of democratic beliefs during the past century led in 1999 to the abolition of all but ninety-two hereditary seats, whose occupants would be elected by hereditary peers. The future of that ancient chamber remains in considerable doubt.

By the end of the twentieth century, then, a strongly bicameral legislature continued to exist in only four of the advanced democratic countries, all of them federal: in addition to the United States, these were Australia, Germany, and Switzerland. Their existence poses a question: What functions can and should a second chamber perform in a democratic country? And in order to perform its proper functions, if any, how should a second chamber be composed? As the deliberations of the Parliamentary Commission on the future of the House of Lords indicate, these questions admit of no easy answer. It would not be surprising, then, if Britain ends up with no real second chamber at all, even if a ghostly shade of the upper house persists.

**Unequal Representation**

A third characteristic of federal systems is significant unequal representation in the second chamber. By unequal representation I mean that the number of members of the second chamber coming from a federal unit such as a state or province is not proportional to its population, to the number of adult citizens, or to the number of eligible voters. The main reason, perhaps the only real reason, why second chambers exist in all federal systems is to preserve and protect unequal representation. That is, they exist primarily to ensure that the representatives of small units cannot be readily outvoted by the representatives of large units. In a word, they are designed to construct a barrier to majority rule at the national level.

To make this clear, let me extend the range of the term unequal representation to include any system where, in contrast to the principle of "one person one vote," the votes of different persons are
given unequal weights. Whenever the suffrage is denied to some persons within a system, we might say that their votes are counted as zero, whereas the votes of the eligible citizens are counted as one. When women were denied the vote, a man's vote effectively counted for one, a woman's for nothing, zero. When property requirements were required for the suffrage, property owners were represented in the legislature, those below the property threshold were not: like women their "votes" counted for zero. Some privileged members of Parliament, like Edmund Burke, referred to "virtual representation," where the aristocratic minority represented the best interests of the entire country. But the bulk of the people who were excluded easily saw through that convenient fiction, and as soon as they were able to they rejected these pretensions and gained the right to vote for their own M.P.s. In nineteenth-century Prussia, voters were divided into three classes according to the amount of their property taxes. Because each class of property owners was given an equal number of votes irrespective of the vast difference in numbers of persons in each class, a wealthy Prussian citizen possessed a vote that was effectively worth almost twenty times that of a Prussian worker. 

To return now to the United States: as the American democratic credo continued episodically to exert its effects on political life, the most blatant forms of unequal representation were in due time rejected. Yet, one monumental though largely unnoticed form of unequal representation continues today and may well continue indefinitely. This results from the famous Connecticut Compromise that guarantees two senators from each state.

Imagine a situation in which your vote for your representative is counted as one while the vote of a friend in a neighboring town is counted as seventeen. Suppose that for some reason you and your friend each change your job and your residence. As a result of your new job, you move to your friends town. For the same reason, your friend moves to your town. Presto! To your immense gratification you now discover that simply by moving, you have acquired sixteen more votes. Your friend, however, has lost sixteen votes. Pretty ridiculous, is it not?

Yet that is about what would happen if you lived on the western shore of Lake Tahoe in California and moved less than fifty miles east to Carson City, Nevada, while a friend in Carson City moved to your community on Lake Tahoe. As we all know, both states are equally represented in the U.S. Senate. With a population in 2000 of nearly 34 million, California had two senators. But so did Nevada, with only 2 million residents. Because the votes of U.S. senators are counted equally, in 2000 the vote of a Nevada resident for the U.S. Senate was, in effect, worth about seventeen times the vote of a California resident. A Californian who moved to Alaska might lose some points on climate, but she would stand to gain a vote worth about fifty-four times as much as her vote in California. Whether the trade-off would be worth the move is not for me to say. But surely the inequality in representation it reveals is a profound violation of the democratic idea of political equality among all citizens.

Some degree of unequal representation also exists in the other federal systems. Yet the degree of unequal representation in the U.S. Senate is by far the most extreme. In fact, among all federal systems, including those in more newly democratized countries—a total of twelve countries—on one measure the degree of unequal representation in the U.S. Senate is exceeded only by that in Brazil and Argentina.

Or suppose we take the ratio of representatives in the upper chamber to the populations of the federal units. In the United States, for example, the two senators from Connecticut represent a population of slightly above 3.4 million, while the two senators from its neighbor New York represent a population of 19 million: a ratio of about 5.6 to 1. In the extreme case, the ratio of over-representation of the least populated state, Wyoming, to the most populous state, California, is just under 70 to 1. By comparison, among the advanced democracies the ratio runs from 1.5 to 1 in Austria to 40 to 1 in Switzerland. In fact, the U.S. disproportion is exceeded only in Brazil, Argentina, and Russia. On what possible grounds can we justify this extraordinary inequality in the worth of the suffrage?

A brief digression: rights and interests. A common response is to say that people in states with smaller populations need to be protected from federal laws passed by congressional majorities that would violate their basic rights and interests. Because the people in states like Nevada or Alaska are a geographical minority, you might argue, they need to be protected from the harmful actions of
national majorities. But this response immediately raises a fundamental question. Is there a principle of general applicability that justifies an entitlement to extra representation for some individuals or groups?

In searching for an answer, we need to begin with an eternal and elementary problem in any governmental unit: whether the unit is a country, state, municipality, or whatever, virtually all of its decisions will involve some conflict of interests among the people of the relevant political unit. Inevitably, almost any governmental decision will favor the interests of some citizens and harm the interests of others. The solution to this problem, which is inherent in all governmental units, is ordinarily provided in a democratic system by the need to secure a fairly broad consent for its decisions by means, among other things, of some form of majority rule. Yet if decisions are arrived at by majority rule, then the possibility exists, as Madison and many others have observed, that the interests of any minority will be damaged by a majority. Sometimes, fortunately, mutually beneficial compromises may be found. But if the interests of a majority clash irreconcilably with those of a minority, then the interests of that minority are likely to be harmed.

Some interests, however, may be protected from the ordinary operation of majority rule. To a greater or lesser degree, all democratic constitutions do so. Consider the protections that all Americans enjoy, not just in principle but substantially in practice as well. First, the Bill of Rights and subsequent amendments provide a constitutional guarantee that certain fundamental rights are protected whether a citizen lives in Nevada or California, Rhode Island or Massachusetts, Delaware or Pennsylvania. Second, an immense body of federal law and judicial interpretation based on constitutional provisions enormously extends the domain of protected rights—probably far beyond anything the Framers could have foreseen. Third, the constitutional division of powers in our federal system provides every state with an exclusive or overlapping domain of authority on which a state may draw in order to extend even further the protections for the particular interests of the citizens of that state.

The basic question. Beyond these fundamental and protected rights and interests, do people in the smaller states possess additional rights or interests that are entitled to protection from policies supported by national majorities? If so, what are they? And on what general principle can their special protection be justified? Surely they do not include a fundamental right to graze sheep or cattle in national forests or to extract minerals from public lands on terms that were set more than a century ago. Why should geographical location endow a citizen or group with special rights and interests, above and beyond those I just indicated, that should be given additional constitutional protection?

If these questions leave me baffled, I find myself in good company. "Can we forget for whom we are forming a government?" James Wilson asked at the Constitutional Convention. "Is it for men, or for the imaginary beings called States?" Madison was equally dubious about the need to protect the interests of people in the small states. "Experience," he said, "suggests no such danger. . . . Experience rather taught a contrary lesson. . . . The states were divided into different interests not by their differences in size, but by other circumstances."12

Two centuries of experience since Madison's time have confirmed his judgment. Unequal representation in the Senate has unquestionably failed to protect the fundamental interests of the least privileged minorities. On the contrary, unequal representation has sometimes served to protect the interests of the most privileged minorities. An obvious case is the protection of the rights of slaveholders rather than the rights of their slaves. Unequal representation in the Senate gave absolutely no protection to the interests of slaves. On the contrary, throughout the entire pre-Civil War period unequal representation helped to protect the interests of slave owners. Until the 1850s equal representation in the Senate, as Barry Weingast has pointed out, gave the "the South a veto over any policy affecting slavery." Between 1800 and 1860 eight anti-slavery measures passed the House, and all were killed in the Senate.13 Nor did the Southern veto end with the Civil War. After the Civil War, Senators from elsewhere were compelled to accommodate to the Southern veto in order to secure the adoption of their own policies. In this way the Southern veto not only helped to bring about the end of Reconstruction; for another century it prevented the country from enacting federal laws to protect the most basic human rights of African Americans.
So much for the alleged virtues of unequal representation in the Senate. Suppose for a moment we try to imagine that we actually wanted the constitution to provide special protection to otherwise disadvantaged minorities by giving them extra representation in the Senate. What minorities most need this extra protection? How would we achieve it? Would we now choose to treat certain states as minorities in special need of protection simply because of their smaller populations? Why would we want to protect these regional minorities and not other, far weaker minorities? To rephrase James Wilson’s question in 1787: Should a democratic government be designed to serve the interests of "the imaginary beings called States," or should it be designed instead to serve the interests of all its citizens considered as political equals?

As I have said, the United States stands out among twenty-two comparable democratic countries for the degree of unequal representation in its upper chamber. Of the half dozen that have federal systems and an upper house designed to represent the federal units, none come even close to the United States in the extent of its unequal representation in its upper house.

We begin to see, then, that our constitutional system is unusual. As we continue our exploration we shall discover that it is not merely unusual. It is one of a kind.

**Strong Judicial Review of National Legislation**

Not surprisingly, other federal systems among the older democracies also authorize their highest national courts to strike down legislation or administrative actions by the federal units—states, provinces, and the like—that are contrary to the national constitution. The case for the power of federal courts to review state actions in order to maintain a federal system seems to me straightforward, and I accept it here. But the authority of a high court to declare unconstitutional legislation that has been properly enacted by the coordinate constitutional bodies—the parliament or in our system the Congress and the president—is far more controversial. If a law has been properly passed by the law-making branches of a democratic government, why should judges have the power to declare it unconstitutional? If you could simply match the intentions and words of the law against the words of the constitution, perhaps a stronger case could be made for judicial review. But in all important and highly contested cases, that is simply impossible. Inevitably, in interpreting the constitution judges bring their own ideology, biases, and preferences to bear. American legal scholars have struggled for generations to provide a satisfactory rationale for the extensive power of judicial review that has been wielded by our Supreme Court. But the contradiction remains between imbuing an unelected body—or in the American case, five out of nine justices on the Supreme Court—with the power to make policy decisions that affect the lives and welfare of millions of Americans. How, if at all, can judicial review be justified in a democratic order? I'll discuss that question in my last chapter.

Meanwhile, let me return to another aberrant aspect of the American constitutional system.

**Electoral Systems**

Earlier I explained that I wanted to use the term constitutional system because some arrangements that are not necessarily specified in a country's constitutional document interact so strongly with the other institutions that we can usefully regard them as a part of the country's constitutional arrangements. In that spirit, we might want to reflect on the peculiarities of our electoral system, which, natural as it may seem to us, is of a species rare to the vanishing point among the advanced democratic countries. Closely allied with it is an equally rare bird, our much revered two-party system.

To be sure, our electoral system was not the doing of the Framers, at least directly, for it was shaped less by them than by British tradition. The Framers simply left the whole matter to the states and Congress, both of which supported the only system they knew, one that had pretty much prevailed in Britain, in the colonies, and in the newly independent states.

The subject of electoral systems is fearfully complex and for many people fearfully dull as well. I shall therefore employ a drastic oversimplification, but one sufficient for our purposes. Let me simply
divide electoral systems into two broad types, each with a variant or two. In the one we know best, typically you can cast your vote for only one of the competing candidates, and the candidate with the most votes wins. In the usual case, then, a single candidate wins office by gaining at least one more vote than any of his or her opponents. We Americans tend to call this one-vote margin a plurality; elsewhere, to distinguish it from an absolute majority it may be called a relative majority. To describe our system, American political scientists sometimes employ the cumbersome expression “single member district system with plurality elections.” I prefer the British usage: on the analogy of a horse race where the winner needs only a fraction of a nose-length to win, the British tend to call it the "first-past-the-post" system.

If voters were to cast their ballots in the same proportion in every district, the party with the most votes would win every seat. In practice, as a result of variations from district to district in support for candidates, a second party generally manages to gain some seats, although its percentage of seats will ordinarily be smaller than its percentage of votes. But the representation of third parties usually diminishes to the vanishing point. In short, first-past-the-post favors two-party systems.

The main alternative to first-past-the-post is proportional representation. As the name implies, proportional representation is designed to ensure that voters in a minority larger than some minimal size—say, 5 percent of all voters—will be represented more or less in proportion to their numbers. For example, a group consisting of 20 percent of all voters might win pretty close to 20 percent of the seats in the parliament. Consequently, countries with proportional representation systems are also very likely to have multiparty systems in which three, four, or more parties are represented in the legislature. In short, although the relationship is somewhat imperfect, in general a country with first-past-the-post is likely to have a two-party system and a country with proportional representation is likely to have a multiparty system.

In the most common system of proportional representation, each party presents voters with a list of its candidates; voters cast their votes for a party's candidates; each party is then awarded a number of seats roughly in proportion to its overall share of the vote. Countries with a list system may also permit voters to indicate their preferences among the party's candidates. The party's seats are then filled by the candidates who are most preferred by the voters. Twelve of the twenty-two advanced democratic countries employ the list system of proportional representation, and another six use some variant of it. (See Appendix B, Table 3.)

Of the four countries without proportional representation, France avoids one of the defects of single-member districts by providing that in parliamentary districts where no candidate receives an absolute majority of votes, a second election will be held in which the two candidates with the highest number of votes compete. This run-off, two-round, or double-ballot system, as it is variously called, thereby ensures that all the members have been elected by a majority of the voters in their constituency.

This leaves the three oddballs with first-past-the-post, a plurality system in single member districts: Canada, the United Kingdom, and the United States. Even in the United Kingdom, the original source on which the Americans drew, the traditional system was replaced by proportional representation in the 1999 elections to the newly created legislative bodies in Scotland and Wales. Four parties won seats in the Scottish Parliament, and four too in the Welsh Assembly. What is more, the Independent Commission on the Voting System set up by the Labor Party in 1997 to recommend an alternative to first-past-the-post proposed in its report a year later that members of the House of Commons be elected by means of a proportional representation system—a hybrid, to be sure, but one that would ensure greater proportionality between votes and seats in that ancient house. It is altogether possible that one day not far off, Britain will be added to the list of proportional representation countries, leaving only Canada and the United States among the advanced democracies with first-past-the-post.

Although few Americans know much about experience in the other advanced democratic countries with proportional representation and multiparty systems, they seem to have strong prejudices against both. Unwilling to conceive of an alternative to first-past-the-post and under pressure to ensure fairer representation for minorities in state legislatures and Congress, our legislatures and federal courts in
recent years have sometimes gerrymandered weirdly shaped districts... well, yes, rather like a salamander. But neither legislatures nor courts seem willing to give serious thought to some form of proportional representation as quite possibly a better alternative.

The extent to which we take first-past-the-post for granted was clearly revealed in 1993, when it was discovered that a well-qualified candidate to head the Civil Rights Division of the Department of Justice had written an article in a law journal suggesting that a rather sensible system of proportional representation might be worth considering as a possible solution to the problem of securing more adequate minority representation. From the comments the author's innocent heresy generated, you might have thought that she had burned the American flag on the steps of the Supreme Court. Her candidacy, naturally, was stone dead.

First-past-the-post was the only game in town in 1787 and for some generations thereafter. Like the locomotive, proportional representation had not yet been invented. It was not fully conceived until the mid-nineteenth century when a Dane and two Englishmen—one of them John Stuart Mill—provided a systematic formulation. Since then it has become the system overwhelmingly preferred in the older democracies.

After more than a century of experience with other alternatives, isn't it time at last to open our minds to the possibility that first-past-the-post may be just fine for horse races but might not be best for elections in a large and diverse democratic country like ours? Might we not also want to consider the possible advantages of a multiparty system?

I do not say that we should necessarily make these choices. But should we not at least give them serious consideration? Shouldn't we ask ourselves this question: What kind of electoral and party systems would best serve democratic ends?

**Party Systems**

Nearly a half-century ago, a French political scientist, Maurice Duverger, proposed what came to be called Duverger's Law: first-past-the-post electoral systems tend to result in two-party systems. Conversely, proportional representation systems are likely to produce multiparty systems. Although the causal relation may be more complex than my brief statement of Duverger's Law suggests, a country with a proportional representation system is likely to require coalition governments consisting of two or more parties. In a country with a first-past-the-post electoral system, however, a single party is more likely to control both the executive and the legislature. Thus in countries with proportional representation-multiparty systems and coalition governments, minorities tend to be represented more effectively in governing. By contrast, in countries with first-past-the-post and two-party systems, the government is more likely to be in the hands of a single party that has gained a majority of seats in the parliament and the most popular votes, whether by an outright majority, or more commonly, a plurality. To distinguish the two major alternatives, I'll refer to the proportional representation-multiparty countries as "proportional" and countries with first-past-the-post electoral systems and only two major parties as "majoritarian." Where does the United States fit in? As usual: in neither category. It is a mixed system, a hybrid, neither predominantly proportional nor predominantly majoritarian. (See Appendix B, Table 4.) I am going to return to the American hybrid in Chapter 5, but three brief observations may help to put it in perspective here. First, the Framers had no way of knowing about the major alternatives to first-past-the-post, much less fully understanding them. Second, since the Framers' time most of the older and highly stable democratic countries have rejected first-past-the-post and opted instead for proportional systems. Third, our mixed design contributes even further to the unusual structure of our constitutional system.

**Our Unique Presidential System**

As we make our way through the list of countries that share some constitutional features with the United States, the list, short to begin with, diminishes even further. By the time we reach the presidency the United States ceases to be simply unusual. It becomes unique. Among the twenty-two
advanced democracies, the United States stands almost alone in possessing a single popularly elected chief executive endowed with important constitutional powers—a presidential system. Except for Costa Rica, all the other countries govern themselves with some variation of a parliamentary system in which the executive, a prime minister, is chosen by the national legislature. In the mixed systems of France and Finland, most of the important constitutional powers are assigned to the prime minister, but an elected president is also provided with certain powers—chiefly over foreign relations. This arrangement may lead, as in France, to a president from one major party and a prime minister from the opposing party, a situation that with a nice Gallic touch the French call "cohabitation." Yet even allowing for the French and Finnish variations, none of the other advanced democratic countries has a presidential system like ours.

Why is this? The question breaks down into several parts. Why did the Framers choose a presidential system? Why didn't they choose a parliamentary system? Why have all the other advanced democratic countries rejected our presidential system? Why have they adopted some variant of a parliamentary system instead, or as in France and Finland a system that is predominantly parliamentary with an added touch of presidentialism?

To answer these questions in detail would go beyond our limits here. But let me sketch a brief answer.

Before I do so, however, I want to admonish you not to cite the explanation given in the Federalist Papers. These were very far from critical, objective analyses of the constitution. If we employ a dictionary definition of propaganda as "information or ideas methodically spread to promote or injure a cause, nation, etc.," then the Federalist Papers were surely propaganda. They were written post hoc by partisans— Alexander Hamilton, John Jay, and James Madison— who wanted to persuade doubters of the virtues of the proposed constitution in order to secure its adoption in the forthcoming state conventions. Although they were very fine essays indeed, and for the most part much worth reading today, they render the work of the convention more coherent, rational, and compelling than it really was. Ironically, by the way, the task of explaining and defending the Framers' design for the presidency was assigned to Hamilton, who had somewhat injudiciously remarked in the Convention that as to the executive, "The English model was the only good one on this subject," because "the hereditary interest of the king was so interwoven with that of the nation. . . and at the same time was both sufficiently independent and sufficiently controuled [sic], to answer the purpose." He then proposed that the executive and one branch of the legislature "hold their places for life, or at least during good behavior." Perhaps as a result of these remarks, Hamilton seems to have had only a modest influence in the Convention on that matter or any other.

How it came about. What is revealed in the most complete record of the Convention is a body floundering in its attempts to answer an impossibly difficult question: How should the chief executive of a republic be selected, and what constitutional powers should be assigned to the executive branch? The question was impossibly difficult because, as I emphasized in the previous chapter, the Framers had no relevant model of republican government to give them guidance. Most of all, they lacked any suitable model for the executive branch. To be sure, they could draw on the sacred doctrine of "separation of powers." Not surprisingly, the references to that doctrine recorded in Madison's notes were all positive. And up to a point, its implications were obvious: a republic would need an independent judiciary, a bicameral legislature consisting of a popular house and some kind of second chamber to check the popular house, and an independent executive.

But how was the independent executive to be chosen? How independent of the legislature and of the people should he be? How long should his term of office be? ("He" is, of course, the language of Article II and, like most Americans until recently, the only way the Framers could conceive of the office.) The British constitution was a helpful model for the Framers in some respects. But as a solution to the problem of the executive, it utterly failed them. Despite the respect of the delegates for many aspects of the British constitution, a monarchy was simply out of the question.

Even so, they might have chosen a democratic version of the parliamentary system, as the other evolving European democracies were to do. Although they were unaware of it, even in Britain a
parliamentary system was already evolving. Why then didn't the Framers come up with a republican version of a parliamentary system?

Well, they almost did. It has been too little emphasized, I think, that the Framers actually came very close to adopting something like a parliamentary system. What is more, it is far from clear, to me at least, why they rejected it and ended up instead with a presidential system. One obvious solution—even more obvious to us today than it would have been in 1787—was to allow the national legislature to choose the executive. In fact, throughout most of the Convention this was their favored solution. Right off the bat on June 2, only two weeks after the Convention opened, the Virginia delegation, which contained some of the best minds and most influential delegates, proposed that the national executive should be chosen by the national legislature. In Madison's notes, the subsequent course of that proposal and the alternatives to it has left a fascinating and often mystifying trail.

The meandering trail they pursued, as best I can reconstruct it, looks something like this. On three occasions—July 17, July 24, and July 26—the delegates vote for the selection of the president by "the national legislature," the first time by a unanimous vote, the last by a vote of 6-3. With one exception every other alternative is defeated by substantial majorities: in a puzzling detour on July 19, with Massachusetts divided, they vote 6-3 for electors appointed by the state legislatures. On July 26, their favored solution, election by the national legislature, is forwarded to a Committee on Detail. On August 6 the committee duly reports in favor of election by the national legislature. On August 24 two other alternatives fail once again. A new committee to consider the issue reports back on September 4. By now the delegates are eager to wind up a convention that has already gone on for three months. In contradiction to the recommendation of the previous committee, however, this one recommends that the executive be chosen by electors appointed by the state legislatures. Two days later, with nine states in favor and only two opposed, the impatient delegates adopt this solution.

Well, not exactly. What they adopt actually states that: "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and representatives to which the State may be entitled in Congress." Whatever the Framers intend by these words, they will offer a huge opportunity for the democratic phase of the American revolution to democratize the presidency.

Ten days after they agree on this provision, the constitution is signed and the Convention adjourns.

What this strange record suggests to me is a group of baffled and confused men who finally settle on a solution more out of desperation than confidence. As events were soon to show, they had little understanding of how their solution would work out in practice.

So the question remains with no clear answer: Why, finally, did they fail to adopt the solution they had seemed to favor, a president elected by the Congress, a sort of American version of a parliamentary system? The standard answer no doubt has some validity: they feared that the president might be too beholden to Congress. And all the other alternatives seemed to them worse.

Among these alternatives was election by the people, which had been twice rejected overwhelmingly. Yet it was this twice-rejected solution, election by the people, that was quickly adopted de facto during the democratic phase of the American revolution.

How their solution failed. Perhaps in no part of their work did the Framers fail more completely to design a constitution that would prove acceptable to a democratic people. As I have mentioned, their hope for a group of electors who might exercise their independent judgments about the best candidate to fill the office came a cropper following the election of 1800. But as I shall describe in the next chapter, more was still to come. If the election of 1800 first revealed how inappropriate the electoral college was in a democratic order, the presidential election of 2000, two centuries later, dramatized for all the world to witness the conflict between the Framers' constitution and the democratic ideal of political equality.

Ironically, had they adopted the Virginia Plan and placed the choice of the chief executive in the hands of the legislature, as would become the practice in parliamentary systems, the Framers would have put a bit more distance between the people and the president than their solution provided in
practice. Here again, in 1787 they could not anticipate a constitutional design that was yet to evolve fully in Britain and, even later, in other countries on the path to democracy.

The continuing democratic revolution would bring about an even more profound change in the presidency. However deftly Jefferson steered the Congress as he rode the tide of the democratic revolution, he never publicly challenged the standard view that the only legitimate representative of the popular will was the Congress, not the president. Nor did any of his successors, Madison, Monroe, John Quincy Adams, lay down such a claim.

Andrew Jackson did just that. In justifying his use of the veto against Congressional majorities, as the only national official who had been elected by all the people and not just by a small fraction, as were Senators and Representatives, Jackson insisted that he alone could claim to represent all the people. Thus Jackson began what I have called the myth of the presidential mandate: that by winning a majority of popular (and presumably electoral) votes, the president has gained a "mandate" to carry out whatever he had proposed during the campaign. Although he was bitterly attacked for this audacious assertion, which not all later presidents supported, it gained credibility from its re-assertion by Lincoln, Cleveland, Theodore Roosevelt, and Wilson and was finally nailed firmly in place by Franklin Roosevelt.

Whatever we may think of the validity of the claim—I am inclined to think it is little more than a myth created to serve the political purposes of ambitious presidents—it is simply one part of a transformation of the presidency in response to democratic ideas and beliefs that has produced an office completely different from the office that the Framers thought they were creating, vague and uncertain as their intentions may have been.

And a good thing, too, you may say. But if you approve of the democratization of the presidency—or, as I would prefer to say, its pseudo-democratization—arent you suggesting in effect that the constitutional system should be altered to meet democratic requirements?

Why other countries became parliamentary democracies. There is still one more reason why the Framers didn't choose a parliamentary system. They had no model to inspire them. One hadn't yet been invented.

The British constitutional system they knew, and in some respects admired, was already on its way to history's attic of abandoned or failed constitutions. Although no one saw it clearly in 1787, even at the time of the Convention the British constitution was undergoing rapid change. Most important, the monarch was swiftly losing the power to impose a prime minister on the parliament. The contrary assumption was gaining strength: that a prime minister must receive a vote of confidence from both houses of parliament, and that he must resign if and whenever he lost their confidence. But this profound change in the British constitution did not become fully manifest until 1832, too late for the Framers to see its possibilities.

In addition, there was the problem of a monarch. How could a country have a parliamentary system without a symbolic head of state who would perform ceremonial functions, symbolize the unity of the country, and help to confer legitimacy on the parliaments choice by anointing him as prime minister? After the evolution of a parliamentary system in Britain, in due time monarchies also helped the Swedes, the Danes, and the Norwegians—and much later Japan and Spain—to move to a parliamentary system that the monarchy helped to legitimize. But in 1787 the full development of parliamentary democracy in countries with a monarchy was still a long way off. For Americans, a monarch, even a ceremonial monarch, was completely out of the question. So why didn't they split the two functions, ceremonial and executive, by creating a titular head of state to serve in the place of a ceremonial monarch, and a chief executive, the equivalent of a prime minister, to whom executive functions would be assigned? Although that arrangement may seem obvious enough to us now, for the Framers in 1787 it was even more distant than the system that was gradually evolving in Britain, the country they knew best. It was not until after 1875 and the installation of the Third Republic in France that the French evolved a solution that would later be adopted in many other democratizing countries: a president elected by the parliament, or in some cases by the people, who serves as formal head of state, and a prime minister chosen by and responsible to the parliament, who serves
as the actual chief executive. But for the Framers this invention, which now seems obvious enough to us, was almost as far off and about as difficult to imagine, perhaps, as a transcontinental railroad.

Without intending to do so, then, the Framers created a constitutional framework that under the driving impact of the continuing American Revolution would develop a presidency radically different from the one they had in mind. In time American presidents would gain office by means of popular elections—a solution the Framers rejected and feared—and by combining the functions of a head of state with those of a chief executive the president would be the equivalent of monarch and prime minister rolled into one.

I can't help wondering whether the presidency that has emerged is appropriate for a modern democratic country like ours.

So: among the older democracies our constitutional system is not just unusual. It is unique.

Well, you might say, being unique isn't necessarily bad. Perhaps our constitutional system is better for it.

Better by what standards? Is it more democratic? Does it perform better in many ways? Or worse? These questions are by no means easy to answer— probably impossible to answer with finality. But before turning to them, we need to take one more look at that anomalous vestige of the Framers' work, the electoral college.
I began by posing this question: Why should we Americans uphold our Constitution? Let me now change the question slightly: What kind of constitution should we feel obliged to uphold?

I mean, of course, an American constitution—not necessarily our present Constitution, but a constitution that, after careful and prolonged deliberation, we and our fellow citizens conclude is best designed to serve our fundamental political ends, goals, and values.

The Constitution as National Icon

I am well aware that in expressing reservations about the Constitution, as I have in these essays, I may be judged guilty of casting stones at a national icon. "From the time of the founding fathers," a historian has recently remarked, "there [has] been a sacred aura about the Constitution, manifest in holiday political rhetoric." During the years between the two World Wars, worship of the Constitution "acquired the trappings of a religious cult." This reverential attitude continues. In a telephone survey of one thousand adult U.S. citizens in 1997, 71 percent said they strongly agreed with the statement that they were proud of the Constitution; another 20 percent somewhat agreed. In a 1999 survey, 85 percent said they thought the Constitution is a major reason why "America has been successful during this past century." I don't dismiss the importance of icons for strengthening beliefs, religious or political, nor do I dismiss the utility of myth and ritual in helping to foster national cohesion. But a faith that rests on little more than a general conformity to conventional beliefs is a fragile foundation for nationhood—not to say for democracy. I want therefore to suggest an alternative.

The only legitimate constitution for a democratic people, it seems to me, is one crafted to serve democratic ends. Viewed from this perspective an American constitution ought to be the best that we can design for enabling politically equal citizens to govern themselves under laws and government policies that have been adopted and are maintained with their rational consent.

This is hardly a novel view. What I am suggesting is that a constitution derives its legitimacy from a moral and political judgment announced to the world more than two centuries ago. This judgment (slightly modified from the original) asserts:

That all human beings are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights, Governments are instituted among a people, deriving their just powers from the consent of the governed. That whenever a Form of government becomes destructive of these ends, it is the Right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such a form, as to them shall seem most likely to effect their Safety and Happiness.

But two questions immediately arise. First, is political equality a realistic goal? Second, is it really a desirable goal?

Is Political Equality a Realistic Goal?

Some of you may dismiss the noble words I have just quoted as obviously false. If anything about equality is self-evident, you might object, it is that human beings aren't equal. Whether by genes, birth, luck, achievements, or whatever, we aren't equal in education, cultural endowments, social and communication skills, intelligence, motor skills, incomes, wealth, the country in which we live, and so on. Though this objection is a commonplace, it wholly misses the point. The men who wrote and adopted the American Declaration of Independence hardly needed to be reminded of such elementary matters. They knew too much about the ways of the world to make assertions that were obviously contradicted by everyday human experience. But, of course, they didn't mean the Declaration to be
understood as a statement of fact. They meant it to be understood as a moral statement. Human equality, they were insisting, is a moral and even a religious standard against which it is right and proper to judge a political system.

Yet ideal standards might rise so far beyond human reach as to be irrelevant. Is political equality so remote from human possibilities that we might just as well forget it?

I need hardly remind you of the enormous and persistent barriers to political equality and, indeed, to human equality in general. Consider that elemental and age-old barrier arising from differences in the treatment of men and women. The authors of the familiar words about equality that I just quoted and the fifty-five delegates to the Second Continental Congress who voted to adopt the Declaration in July 1776, were, of course, all men, none of whom had the slightest intention of extending the suffrage or many other basic political and civil rights to women—who by the laws of that time and for a full century after were the legal property of their fathers or husbands.

Nor did the worthy supporters of the Declaration mean to include slaves or, for that matter, free persons of African origin, who were a substantial fraction of the population in almost all the colonies that claimed the right to become independent self-governing republics. The principal author of the Declaration, Thomas Jefferson, owned several hundred slaves, none of whom he freed during his life. It was not until more than four score and seven years later (to borrow a poetic phrase from Lincoln’s Gettysburg Address) that slavery was legally abolished in the United States by force of arms and constitutional enactment. And it took yet another century before the rights of African Americans to participate in political life began to be effectively enforced in the American South. Now, two generations later, Americans white and black still bear the deep wounds that slavery and its aftermath inflicted on human equality, freedom, dignity, and respect.

Nor did our noble Declaration mean to include the people who for thousands of years had inhabited the lands that Europeans colonized and came to occupy. We are all familiar with the story of how the settlers denied homes, land, place, freedom, dignity, and humanity to these earlier peoples of America, whose descendants even today continue to suffer from the effects of their treatment throughout several centuries, when their most elementary claims to legal, economic, and political—not to say social—standing as equal human beings were rejected, often by violence; more recently, this lengthy period has been followed by neglect and indifference.

All this in a country that visitors from Europe, such as Alexis de Tocqueville, portrayed (correctly, I think) as displaying a passion for equality stronger than they had ever observed elsewhere.

Yet, despite the fact that throughout human history equality has often been denied in practice, throughout the past several centuries many claims to equality, including political equality, have come to be much more strongly reinforced by institutions, practices, and behavior. Although this monumental historical movement toward equality is in some respects worldwide, it has been most conspicuous in such democratic countries as Britain, France, the United States, the Scandinavian countries, the Netherlands, and others.

In the opening pages of the first volume of Democracy in America, Tocqueville pointed to the inexorable increase in the equality of conditions among his French countrymen "at intervals of fifty years, beginning with the eleventh century." Nor was this revolution taking place in only his own country: "Whithersoever we turn our eyes," he wrote, "we shall witness the same continual revolution throughout the whole of Christendom." He goes on to say, "The gradual development of the equality of conditions is ... a providential fact, and it possesses all the characteristics of a Divine decree: it is universal, it is durable, it constantly eludes all human interference, and all events as well as men contribute to its progress."

We may wish to grant Tocqueville a certain measure of hyperbole in this passage. We may also want to note that in the second volume that he published several years later, he was more troubled by what he viewed as some of the undesirable consequences of democracy and equality. I shall return to his concerns in a moment. Even so, he did not doubt that a continuing advance of democracy and equality was inevitable. And if we look back today to the changes since his time, like Tocqueville in his own day we may well be amazed at the extent to which ideas and practices that respect and promote
political equality have advanced across so much of the world—as, for that matter, have some aspects of a broader human equality as well.

As to political equality, consider the incredible spread of democratic ideas, institutions, and practices during the century that just ended. In 1900, 48 countries were fully or moderately independent countries. Of these, only 8 possessed all the other basic institutions of representative democracy, and in only 1 of these, New Zealand, had women gained the right to vote. Furthermore, these 8 countries contained no more than 10-12 percent of the world's population. At the opening of our present century, among some 190 countries the political institutions and practices of modern representative democracy, including universal suffrage, exist in around 85, at levels comparable to those in Britain, western Europe, and the United States. These countries include almost 5 out of every 10 inhabitants of the globe today.

In Britain, the working classes and women were enfranchised, and more. Men and women of middle, lower-middle, and working-class origins gained access not only to the House of Commons and its facilities but to the cabinet and even the post of prime minister. And the hereditary peers in the House of Lords have, after all, at last been sent packing—well, most of them anyway. In the United States, too, women were enfranchised. The Civil Rights Act of 1964, which protected the right of African Americans to vote, did in fact become law; the law was actually enforced; and African Americans have become a significant force in American political life. I wish I could say that the miserable condition of so many Native Americans had greatly changed for the better, but that sad legacy of human injustice remains with us.

Although we must admit to persistent failures and continuing obstacles, if we assume that beliefs about equality are hopelessly anemic contestants in the struggle against the powerful forces that generate inequalities, we cannot account for the enormous gains in human equality achieved over the past two centuries.

**How Does Greater Political Equality Come About?**

In the face of so many obstacles, how does greater equality—or better, a reduction in some inequalities—ever come about? Although no brief summary can do justice to an explanation of the historical variations and complexities in the process by which changes toward equality take place—and here I have in mind mainly political equality—a summary of the most important elements would probably run something like this:

Despite fervent efforts by privileged elites to promote views intended to give legitimacy to their superior power and status, together with their own unquestioning belief in the lightness of their entitlements (think of the Federalists!), many members of subordinate groups doubt that the inferior position assigned to them by their self-proclaimed superiors is really justified. James Scott has shown pretty convincingly that people who have been relegated to subordinate status by history, structure, and elite belief systems are much less likely to be taken in by the dominant ideology than members of the upper strata are prone to assume. Given the open or concealed rejection of the elite ideology by members of the subordinate groups, a change in conditions, whether in ideas, beliefs, generations, structures, resources, or whatever, begins to offer the subordinate groups new opportunities to express their grievances. And given these, new opportunities and moved by anger, resentment, a sense of injustice, a prospect of greater individual or group opportunities, group loyalty, or other motives, some members of the subordinate groups begin to press for change by whatever means are available. Some members of the dominant group begin to support the claims of the subordinate strata. Privileged insiders ally themselves with outsiders. Insiders may do so for a variety of reasons: moral convictions, compassion, opportunism, fear of the consequences of disorder, dangers to property and the legitimacy of the regime arising from widening discontent, and even the real or imagined possibility of revolution.

So a seismic shift occurs: extension of the franchise, legal protection of basic rights, political competition from leaders of hitherto subordinate groups, election to public office, changes in law and policy, and so on. In the United States, Civil Rights Acts were passed in 1957, 1960, and most crucial
of all, 1964. What is more, they were enforced. African Americans began to seize their opportunities to vote—and among other things soon tossed out the police officials who had violently enforced their subordination. In India, the scheduled castes have begun to vote in substantial numbers for leaders and parties who are drawn from their own strata and committed to reducing discrimination against them. Though changes toward equality may be and typically are incremental, a series of incremental changes can, in time, mount to a revolution.

By such processes, then, a certain measure of political equality and democracy have been obtained in some countries despite enormous and persistent obstacles to human equality.

Is Political Equality a Justifiable Goal?

Yet even if a greater degree of political equality and democracy can be achieved, are these goals really desirable? What’s more, are they so desirable that we should make the constitution of a democratic country—in particular that of the United States—subordinate to achieving these ends?

The desirability of political equality and thus of democracy follows, in my view, from two fundamental judgments. One is moral, the other practical. The moral judgment holds that all human beings are of equal intrinsic worth; that no person is intrinsically superior in worth to another; and that the good or interests of each person ought to be given equal consideration. Let me call this the assumption of intrinsic equality.

Yet if we accept this moral judgment, a deeply troublesome question immediately arises: Who or what group is the best qualified to decide what the good or interests of a person really are? Clearly the answer will vary, depending on the situation, the kinds of decisions, and the persons involved. But if we restrict our focus to the government of a state, then it seems to me that the safest and most prudent assumption would run something like this: Among adults, none are so better qualified than others to govern that they should be entrusted with complete and final authority over the government of the state.

Although we might reasonably add refinements and qualifications to this prudential judgment, it is difficult for me to see how a significantly different proposition could be defended, particularly if we draw on crucial historical cases in which substantial numbers of persons were denied equal citizenship. Does anyone today really believe that when the working classes, women, and racial and ethnic minorities were excluded from political participation, their interests were adequately considered and protected by those who were privileged to govern over them?

Does Political Equality Threaten Liberty?

Like many desirable goals, political equality might conflict with—and may indeed do harm to—other important goals, ends, values. If so, shouldn’t our pursuit of political equality be tempered by our justifiable desire to attain these other goals?

It is frequently said that equality conflicts with liberty and fundamental rights. Like many others, Tocqueville appears to have believed so.

But before I turn to his remarks, I cannot forgo adding that I am amazed by a frequent assertion about the supposed conflict between liberty and equality that makes no mention of what would seem to me to be an absolutely essential requirement of any reasonable discussion about the relation between the two. Whenever we talk about liberty, freedom, or rights, are we not obliged to answer the question: Liberty or rights for whom? When we speak of freedom, liberty, or rights it seems to me essential that we go beyond answering the question, “What liberty or right?” An answer to that question only specifies the domain of liberty. But we are also obliged to answer the question, “Liberty for whom?”

Keeping this question in mind, let me return to Tocqueville. His view, if I understand him correctly, was roughly this: An equality of condition among a people helps to make democracy possible, perhaps even inevitable. But the very equality of condition that makes democracy possible also carries dangers to liberty. Let me paraphrase Tocqueville:
Since the very essence of democratic government is the absolute sovereignty of the majority, which nothing in democratic states is capable of resisting, a majority necessarily has the power to oppress a minority. Just as a man with absolute power may misuse it, so may a majority. Given an equality of condition among citizens, we may expect that in democratic countries a wholly new species of oppression will arise. Among citizens all equal and alike, the supreme power, the democratic government, acting in response to the will of the majority, will create a society with a network of small complicated rules, minute and uniform, that none can escape. Ultimately, then, the citizens of a democratic country will be reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.\footnote{14}

If I have fairly summarized Tocqueville, how should we interpret his forecast in the light of subsequent developments? After all, we have the advantage, as he did not, of two centuries of experience with modern democratic institutions. Some readers have interpreted these passages in Tocqueville as foreshadowing mass society, while to others Tocqueville expected that mass democracy would be the seed of twentieth-century authoritarian and totalitarian systems. Yet, if we read the passages as a forecast of the way in which democratic countries would tend to evolve, I think we are bound to conclude that Tocqueville was just dead wrong. When we examine the course of democratic development over the past two centuries, and particularly over the century just ended, what we find is a pattern of democratic development that stands in total contradiction to such a prediction. We find instead that as democratic institutions become more deeply rooted in a country, so do fundamental political rights, liberties, and opportunities. As a democratic government matures in a country, the likelihood that it will give way to an authoritarian regime approaches zero. Democracy can, as we all know, collapse into dictatorship. But breakdowns are extraordinarily rare in mature democracies; they occur instead in countries that encounter times of great crisis and stress when their democratic institutions are relatively new. Crisis appears to be inevitable in the life of every country. Even mature democratic countries have had to face wars, economic depression, large-scale unemployment, terrorism, and other challenges. But they did not collapse into authoritarian regimes.

In the twentieth century, on something like seventy occasions democracies have given way to nondemocratic regimes. Yet with very few exceptions, these breakdowns have occurred in countries where democratic institutions were very new—less than a generation old. Indeed, the only clear-cut case of a democratic breakdown in a country where democratic institutions had existed for twenty years or more seems to be Uruguay in 1973. In the same year, Chile provided a less clear-cut case because of restrictions on the suffrage that had only recently been lifted. The Weimar Republic had existed fewer than fourteen years before the Nazi takeover. In all three countries the path to collapse bore no relation to the Tocquevillean scenario.

Nor, as we know, is that scenario confirmed by the older or mature democracies. As I indicated in the previous chapter, we can find some small variations among these countries in their protection of basic rights. But they all maintain these rights well above the threshold necessary for democracy. Have the fundamental rights and liberties of citizens grown steadily narrower or less secure over the past half-century? I do not see how an affirmative answer to this question could be seriously maintained. Much as I admire Tocqueville, on this issue, he, like the Framers, could not foresee the future of democratic government.

Far from being a threat to fundamental rights and liberties, political equality requires them as anchors for democratic institutions. To see why this is so, let me once again view democracy as, ideally at least, a political system designed for citizens of a state who are willing to treat one another, for political purposes, as political equals. Citizens might view one another as unequal in other respects. Indeed, they almost certainly would. But if they were to assume that all citizens possess equal rights to participate, directly or indirectly through their elected representatives, in making the policies, rules, laws, or other decisions that citizens are expected (or required) to obey, then the government of their state would, ideally, have to satisfy several criteria.

Let me list them here without amplification. To be fully democratic, a state would have to provide: 
\textit{rights, liberties, and opportunities} for effective participation; voting equality; the ability to acquire
sufficient understanding of policies and their consequences; and the means by which the citizen body could maintain adequate control of the agenda of government policies and decisions. Finally, as we now understand the ideal, in order to be fully democratic, a state would have to ensure that all, or at any rate most, permanent adult residents under its jurisdiction would possess the rights of citizenship.

As we know, the democratic ideal that I have just described is too demanding to be achieved in the actual world of human society. To accomplish it as far as may be possible under the imperfect conditions of the real world, certain political institutions for governing the state would be required. Moreover, since the eighteenth century these institutions have had to be suitable for governing a state encompassing a large territory, such as a country.

There is no need to describe here the basic political institutions of a modern democratic country; but it should be obvious that just as in the ideal, so too in actual practice, democratic government presupposes that its citizens possess a body of fundamental rights, liberties, and opportunities. These include the rights to vote in the election of officials in free and fair elections; to run for elective office; to free expression; to form and participate in independent political organizations; to have access to independent sources of information; and to have rights to other freedoms and opportunities that may be necessary for the effective operation of the political institutions of large-scale democracy.

Both as an ideal and as an actual set of political institutions, democracy is necessarily, then, a system of rights, liberties, and opportunities. These are required not merely by definition. They are required in order for a democratic system of government to exist in the real world. If we consider these political rights, liberties, and opportunities as in some sense fundamental, then in theory and in practice, democracy does not conflict with liberty. On the contrary, democratic institutions are necessary for the existence of some of our most fundamental rights and opportunities. If these political institutions, including the rights, liberties, and opportunities they embody, do not exist in a country, then to that extent the country is not democratic. When they disappear, as they did in Weimar Germany, Uruguay, and Chile, then democracy disappears; and when democracy disappears, as it did in these countries, then so do these fundamental right, liberties, and opportunities. Likewise, when democracy reappeared in these countries so, necessarily, did these fundamental rights, liberties, and opportunities. The connection, then, is not in any sense accidental. It is inherent.

The links between political equality and democracy, on the one hand, and fundamental rights, liberties, and opportunities, on the other, run even deeper. If a country is to maintain its democratic institutions through its inevitable crises, it will need a body of norms, beliefs, and habits that provide support for the institutions in good times and bad—a democratic culture transmitted from one generation to the next. But a democratic culture is unlikely to be sharply bounded. A democratic culture will support not only the fundamental rights, liberties, and opportunities that democratic institutions require. People who share a democratic culture will, I think inevitably, also endorse and support an even greater sphere of rights, liberties, and opportunities. Surely the history of recent centuries demonstrates that it is precisely in democratic countries that liberties thrive.

If we believe that all human beings are created equal, that they are endowed with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness, that to secure these rights governments are instituted among a people, deriving their just powers from the consent of the governed, then we are obliged to support the goal of political equality.

Political equality requires democratic political institutions.

The supposed conflict between liberty and political equality is spurious, first, because an inherent part of democratic political institutions is a substantial body of fundamental rights, liberties, and opportunities; and, second, because a people committed to democracy and its political institutions will almost certainly expand the sphere of fundamental rights, liberties, and opportunities well beyond those strictly necessary for democracy and political equality.

Among a people committed to democracy and political equality, a constitution should serve those ends by helping to maintain political institutions that foster political equality among citizens and all the necessary rights, liberties, and opportunities that are essential to the existence of political equality and a democratic government.
Endnotes

Chapter 1

Introduction

1. Although in three states—Delaware, New Jersey, and Georgia—the vote was unanimous, in the rest it was divided, sometimes closely after sharp debate. For example, in Massachusetts the delegates split 187 to 168; in New Hampshire, 57 to 46; and in Virginia, the state from which several of the principal authors of the Constitution came, the supporters of the Constitution won by a single vote: 80 to 79.

2. In the ten states where the Convention vote was not unanimous, a total of 1540 delegates voted on the Constitution, 964 for, and 576 against.

Chapter 2.

What the Framers Couldn't Know


4. Madison took extensive notes during the Convention, which he later edited and also collated with the very brief Journal of the Convention, published in 1819. His notes were published posthumously in 1840. These form a part of the series described in note 1, above. I have maintained Madison's punctuation and spelling.

5. His speech on June 18 as reported by Madison is in Records, 1: 282ff. Hamilton said that "he had no scruple in declaring ... that the British Govt. was the best in the world... . As to the Executive, it seemed to be admitted that no good one could be established on Republican principle... . The English model was the only good one on this subject." 288, 299.

6. In order to serve as a check on the popular chamber of the national legislature, the second chamber "must have great personal property, it must have the aristocratic spirit; it must love to lord it thro' pride... . The aristocratic body, should be as independent & firm as the democratic.... To make it independent, it should be for life." Ibid., 1: 512. With his usual admiration for the British system, in his first speech to the Convention, Hamilton opined that the "House of Lords is a most noble institution. Having nothing to hope for by a change, and sufficient interest by means of their property, in being faithful to the National interest, they form a permanent barrier agst. every pernicious innovation." 1: 288 (June 18).

7. A few delegates favored the idea of somehow getting rid of the states and consolidating power in the national government. George Read of Delaware "disliked the idea of guarantying territory. It abetted the idea of distinct States wch. would be a perpetual source of discord. There can be [no] cure for this evil but in doing away with States altogether and uniting them all into [one] great Society." Records, 1: 202 (June 11). He had made a similar proposal a few days earlier, on June 6. 136-37. In his maiden address cited above, Hamilton proposed that "the Governor or president of each state shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State of which he is Governor or President" 293.


9. Records, 1: 492-93. I have put these remarks in the first person. In Madison's published notes they are recorded in the third person.

10. The advocates of equal representation in the House were defeated on June 29 by a vote of six states for and four states against, with one state (Maryland) divided. Their proposal for equality in the Senate was stalemated by a tie vote on July 2 (five to five, with Georgia divided) and finally carried on July 7 with six voting yes, three voting no, and two states (Massachusetts and Georgia) divided. Records, 1: 549.

11. Article I, Section 9. For an excellent account of the only full public debate over the slavery issue, see Joseph J. Ellis, Founding Brothers: The Revolutionary Generation (New York: Alfred A. Knopf, 2000), 81-119. The debate took place in the House of Representatives in March 1790 in response to petitions from Quakers in
New York and Philadelphia "calling for the federal government to put an immediate end to the African slave trade." (81).

12. Article IV, Section 2.
13. Article I, Sections 2, 3.
15. Article I, Section 3.
16. By the same electorate as that for "the most numerous branch of the state legislature." (Article I, Section 2).
18. For evidence that the Supreme Court sometimes plays such a role, see my "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," Journal of Public Law 6, no. 2, 279-95.
19. It is only fair to point out that given the political opposition to any increase in federal powers, the Framers may well have gone as far as they could go. Their major opponents, the Anti-Federalists, who saw the constitution as a threat to popular government at the state level, objected that the powers of Congress to regulate interstate commerce were excessive. Richard L. Perry, ed., The Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights (New York: American Bar Association, 1959), 240.
22. The numbers are a matter of uncertainty. In some colonies the suffrage may have grown more restricted during the colonial period. "What is also unclear is just how many people could and did vote. This issue is a source of controversy among historians, some of whom conclude that colonial America was a land of middle class democracy in which 80 or 80 percent of all adult white males were enfranchised, while others depict a far more oligarchic and exclusive political order. In fact, enfranchisement varied greatly by location. There certainly were communities, particularly newly settled communities where land was inexpensive, in which 70 or 80 percent of all white men were enfranchised. Yet there were also locales ... where the percentages were far lower, closer to 40 or 50 percent. Levels of enfranchisement seem to have been higher in New England and in the South (especially Virginia and the Carolinas) than they were in the mid-Atlantic colonies (especially New York, Pennsylvania, and Maryland; not surprisingly, they also tended to be higher in newer settlements than in more developed areas. On the whole, the franchise was far more widespread than it was in England; yet as the revolution approached, the rate of property ownership was falling, and the proportion of adult white males who were eligible to vote was probably less than 60 percent." Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (New York: Basic Books, 2000), 7.
23. On the constitutions exclusion of women, Native Americans, and African Americans, see Keyssar, 130-34.
25. Although Jefferson and his followers often referred to their political group as "Republican," their party seems to have taken the name "Democratic Republican" as early as 1796, and it retained the name through the election of 1828. In 1820, Monroe ran as a Democratic Republican and Adams as an Independent Democratic Republican. In 1824 all four candidates—Adams, Jackson, Crawford, and Clay—ran as factions of the Democratic-Republican party. In 1828, Jackson ran as a Democratic Republican, Adams as a National-Republican. In 1832, Jackson ran as the candidate of the Democratic Party and Clay as a National-Republican. Congressional Quarterly, Presidential Elections Since 1789, 2nd ed. (Washington, D.C.: Congressional Quarterly, 1979), 19-27.
27. "When land offices opened on the frontier, land sales soared. In 1800 some 67,000 acres passed into private hands; 497,939 acres did so in 1801. By 1815 annual sales hit one and a half million dollars, more than doubling four years later." Appleby, Inheriting the Revolution, 64. As Gordon Wood remarks in his review, "Tens of thousands of ordinary folk pulled up stakes in the East and moved westward, occupying more territory in a single generation than had been occupied in the 150 years of colonial history." "Early American Get-up-and-Go," New York Review, June 29, 2000, 50.

29. Dubious as one might be—and I am profoundly doubtful—about the contemporary relevance of the Second Amendment securing "the right of the people to keep and bear Arms," I have no doubt that contemporaries saw it as important to maintaining their liberty from a potentially dangerous central government.  


33. Elkins and McKitrick, 263 et seq.

34. Quoted, ibid., 267.


38. Ibid., 523, 525,530.

Chapter 3.  
The Constitution as a Model: An American Illusion

1. In a 1997 survey, 34% strongly agreed and 33% somewhat agreed with the statement "The U.S. Constitution is used as a model by many countries." Only 18% somewhat or strongly disagreed. (Nationwide telephone survey of 1,000 adult U.S. Citizens conducted for the National Constitution Center, September, 1997.) To the statement "I am proud of the U.S. Constitution," 71% strongly agreed and 18% somewhat agreed. In 1999, 85% said the Constitution was a major reason for America's success in the twentieth century. (Survey of 1,546 adults for the Pew Research Center by the Princeton Survey Research Associates.)

2. Although India gained independence in 1947, adopted a democratic constitution, and has, except for one interval, maintained its democratic institutions in the face of extraordinary challenges of poverty and diversity, I have omitted it from the list for two reasons. First, continuity was interrupted from 1975 to 1977 when the prime minister, Indira Gandhi, staged a coup d'etat, declared a state of emergency, suspended civil rights, and imprisoned thousands of opponents. Second, because India is one of the poorest countries in the world, comparisons with the wealthy democratic countries would make little sense.

3. For a summary of the constitutional differences among twenty-two older democracies, see Appendix B, Table 2.

4. Plus six half-cantons.


6. For example, in the Prussian elections of 1858, 4.8% of the inhabitants were entitled to one-third of the seats, 13.4% to another third, and 81.8% to the remaining third. Thus members of the wealthiest third in effect possessed 17 times as many votes as members of the bottom third. Bernhard Vogel and Rainer-Olaf Schultz, "Deutschland," in *Die Wahl Der Parlamente*, Dolf Sternberger and Bernard Vogel, eds. (Berlin: Walter De Gruyter, 1969), 189-411, Tabelle A 4, p. 348.

7. Lest you think me biased against Nevada, the Rocky Mountain states, or small states in general: I have the greatest affection for Alaska, where I grew up in the days when it was still a territory, and for the Rocky Mountain states, where I like to spend some time every summer. And at just over 3 million people, Connecticut gives me a wholly undeserved voting advantage of nine to one over my sons in California.


10. Stepan, supra n. 8.
11. More precisely, a governmental unit of a "State" defined as a territorial system with a government that successfully upholds a claim to the exclusive regulation of the legitimate use of physical force in enforcing its rules within a given territorial area.

12. For Mason, see Records, 1: 483; for Madison, see 447-48.


14. Article II, Section 4 provides: "The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the place of choosing Senators." Article II, Section 1 provides: "Each state shall appoint, in such manner as the legislature therefore may direct, a number of Electors."


18. In an appraisal of Duverger's propositions in 1958, John Grumm observed that "it may be more accurate to conclude that proportional representation is a result rather than a cause of the party system in a given country." "Theories of Electoral Systems," Midwest Journal of Political Science 2 (1958): 357-76, 375.


22. The only delegate recorded by Madison as speaking favorably about the British monarchy was Hamilton. See note 3 above. Ironically, the Federalist Papers defending the provisions of the Constitution on the executive—Nos. 67-77—were by Hamilton.


25. For a critical view, see my "The Myth of the Presidential Mandate," Political Science Quarterly 105, no. 3 (Fall 1990): 355-72.

Chapter 6.

Why Not a More Democratic Constitution?


5. For a full account of failures to provide equal citizenship among Americans, see Rogers M. Smith's masterly work, Civic Ideals: Conflicting Visions of Citizenship in U S. History (New Haven: Yale University Press, 1997).

6. Probably because he was heavily in debt, he freed only five slaves on his death. Annette Gordon-Reed, Thomas Jefferson and Sally Hemings: An American Controversy (Charlottesville: University of Virginia Press, 1997), 38. Although his reasons for freeing these five are unclear, all were related to his mistress, Sally Hemings, and two were probably sons by her. Although the issue of paternity is disputed, Gordon-Reed provides strong circumstantial evidence. For her "Summary of the Evidence," see 210ff and see also Appendix B, "The Memoirs of Madison Hemings," 245ff. DNA tests provide additional circumstantial, though not conclusive,


9. As one example, he writes, that "among the untouchables of India there is persuasive evidence that the Hindu doctrines that would legitimize caste domination are negated, reinterpreted, or ignored. Scheduled castes are much less likely than Brahmins to believe that the doctrine of karma explains their present condition; instead they attribute their status to their poverty and to an original, mythical act of injustice." Domination and the Arts of Resistance (New Haven: Yale University Press, 1990), 117.

10. The late Joseph Hamburger showed that to secure the expansion of the suffrage (and ultimately the passage of the Reform Act of 1832), James Mill, though opposed to violence as a means, deliberately set out to create a fear of revolution among members of the oligarchy. "Since Mill wished to achieve fundamental reforms without violence, it became necessary to devise means by which an oligarchy would be led to grant concessions out of self-interest.... [T]here were only two alternatives: 'The people' can only obtain any considerable amelioration in their government by resistance, by applying physical force to their rulers, or at least, by threats so likely to be followed by performance, as may frighten their rulers into compliance.' Since the use of physical force was to be avoided, Mill built his hopes on the second alternative.... Mill was proposing that revolution be threatened. He assumed that the threat would be sufficient and that it would not be necessary to carry it out" James Mill and the Art of Revolution (New Haven: Yale University Press, 1963), 23-24.


12. This assumption is more fully developed in Democracy and Its Critics, 105ff, and restated in briefer form in On Democracy (New Haven: Yale University Press, 1998), 74ff.

13. For an excellent analysis, see Amartya Sen, Inequality Reexamined (Cambridge, Mass.: Harvard University Press, 1992). "Libertarians," he writes, "must think it important that people should have liberty. Given this, questions would immediately arise regarding who, how much, how distributed, how equal. Thus the issue of equality immediately arises as a supplement to the assertion of the importance of liberty." (22)

14. These sentences are a close paraphrase of his statements in 1: 298, 304, and 2: 380-81.