

Federalism and Democracy

Although representative government need not be democratic, a democracy, to deserve that name, must be representative.

Except where population is small and citizens cannot all get together in town meeting and make their decisions by direct vote. But the device of representation permits the majority will to function over wide and thickly populated areas, provided two conditions are fulfilled: the election of representatives must be completely uncoerced; and, when chosen, their power of decision must not be fettered by constitutional restraints. Soviet Russia does not meet the first of these essential criteria. The United States does not meet the second. It was never intended that it should.

The founding fathers certainly had a clear idea of the form of government they were establishing by the Constitution. And the most influential of them were strongly opposed to a democratic political system, meaning one that endeavors to facilitate the triumph of the majority

will. In “a pure democracy,” wrote Madison, “there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”¹ John Adams, our second President, put it more sharply: “There never was a democracy that did not commit suicide.”² That was certainly not the system these men were supporting for the United States.

Charles A. Beard, personally one of the most democratic of all our historians, thought it essential to emphasize the undemocratic nature of the American form of government. “At no time,” he wrote, “at no place in solemn convention assembled, through no chosen agents, had the American people officially proclaimed the United States to be a democracy. The Constitution did not contain the word or any word lending countenance to it, except possibly the mention of ‘we, the people,’ in the preamble.”³ This phrase, incidentally, was one of the reasons why Patrick Henry, of Virginia, threw all his powerful influence against ratification of the Constitution. Its preamble, he argued, should have said not “We, the people” but “We, the States.”

¹ The *Federalist*, No. 10.

² Quoted, Claude G. Bowers, *Jefferson and Hamilton*, Houghton Mifflin Co. (Boston and New York 1953) p. 322.

³ *America in Midpassage*, The Macmillan Co. (New York 1939) p. 922.

Actually, it is understatement to say that the Constitution gives no countenance to a democratic system of government. In many particulars this organic law sets up roadblocks calculated to frustrate the will of the majority. The most formidable of these are contained in the Bill of Rights, establishing for the individual a list of privileges which the Courts must uphold and which Congress cannot circumscribe. If the United States were a democracy the provision that: "No person . . . shall be compelled . . . to be a witness against himself" would by now probably have been qualified. Those who seek to hide a communistic, racketeering or otherwise un savory background behind the Fifth Amendment are distinctly unpopular. But as the United States is not politically a democracy, readily responsive to strong majority opinions, this perhaps quixotic safeguard stands.

The Bill of Rights, as the first ten Amendments are collectively known, is an addition to the original Constitution. But we know that the Union would not have been formed as it was without advance understanding that these precise restrictions on democracy would be written into the organic law at the earliest opportunity. The ratification conventions in both Virginia and New York would certainly have rejected the federal plan except for the promise of specific checks to the majority will. Madison admitted as much, when, in the first session of the First Congress, he moved adoption of these amendments, all designed to protect individuals against the ever potential tyranny of the majority. Indeed, both North Carolina and Rhode Is-

land were still outside the Union when Madison, reviewing the many criticisms of the Constitution, said:

the great mass of the people who oppose it, disliked it because it did not contain effectual provision against the encroachments on particular rights, and [for] those safeguards which they have long been accustomed to have *interposed* between them and the magistrate who exercised the sovereign power . . .”

The key word here, from the viewpoint of federalism, has been italicized because it was the first time that the doctrine of Interposition was foreshadowed as a proper and desirable constitutional practice for the United States. Of course the Supreme Court itself, under the Bill of Rights, has on hundreds of occasions “interposed” its power to protect minority interests against both legislative and executive compulsion.

The original Constitution was not merely undemocratic in principle. It also established undemocratic political institutions which have functioned in an undemocratic manner from the outset. In the powerful Upper House of Congress the vote of a Senator from Nevada still has exactly the same weight as the vote of a Senator from New York, with a population some seventy times greater. Similarly, Rhode Island, containing 1,058 square miles, is in all the rights of statehood the exact equal of Texas, of which sixty-four counties possess in each case a greater area than all of Rhode Island.

The Supreme Court, as an institution, is even more undemocratic than the Senate. Here are nine appointed

judges, intentionally safeguarded from any popular control, who are vested with power to nullify legislation approved by the elected representatives of the people. Some would even permit this Court to declare "the law of the land" by decree, though the Congress has taken no legislative action in the matter at issue. The Supreme Court may, as Mr. Dooley asserted, "follow the election returns." But the only definite attribute of political democracy found in that august body is that within its own membership the majority opinion dominates. The actual bearing of this arrangement, however, is that in a five to four decision the judgment of a single appointed magistrate may defeat the majority will of an elected Congress. Democratic is about the last adjective that can be properly applied to such a process.

We find the same hostility to democratic theory in the executive, as well as in the judicial and legislative divisions of our government. The Presidential veto of legislation duly approved by both Houses of Congress has been practiced with increasing frequency in recent years. Since the seventeenth century the power of the purse has been regarded as the essential prerogative of the representative assembly. Yet under President Franklin D. Roosevelt the veto was for the first time used to nullify financial legislation. During the first session of the Eightieth Congress, President Truman twice vetoed tax legislation, although at the time he had not even been elected to the office carrying veto power. On the second of these occasions the most democratic organ of our central government—the

House of Representatives—vainly voted by a more than two-thirds majority to override.

The current use of the veto power is a difficult hurdle for those who like to argue that our political institutions, though unquestionably undemocratic in origin and design, are gradually being adapted to an assumed craving for democracy. And the veto is by no means the only evidence to the contrary. The District of Columbia is as completely disfranchised today as it was half-a-century ago. The quasiautocratic committee chairmen in both Houses of Congress continue to be chosen by the undemocratic seniority rule. In the allegedly “liberal” Eighty-sixth Congress the Senate again endorsed the filibuster by overwhelming rejection of attempts to bring termination of debate by majority vote. All efforts to reform our highly undemocratic electoral college have been equally unsuccessful.

Adoption of the Seventeenth Amendment, providing for the direct election of Senators, is often cited as evidence of a democratic reform. It certainly made the process of choice within each State more democratic. But this procedure, advocated by James Wilson of Pennsylvania at the Constitutional Convention, did nothing to alter the federal principle whereby political power is divided without regard to population ratios. And that essentially undemocratic division is a basic characteristic of federalism.

The Nineteenth Amendment, ratified in 1920, extended the franchise to include women, much as the Fifteenth Amendment, shortly after the Civil War, had at least nom-

inally extended it to Negro men throughout the United States. Enlargement of the electorate is widely regarded as a democratic measure. But the validity of that belief depends primarily on the character of the issues presented to the voters. To the extent that these issues are limited, the theory of democracy is also limited, because a larger number of votes means little or nothing if only inconsequential matters are decided thereby.

Universal suffrage is certainly a prerequisite of democratic government, but does not itself produce that result unless the *form* of government is also democratized. This is made clear by contrasting the relatively stable American form with the profound alterations in behalf of political democracy that have been made in Great Britain. There the franchise was progressively broadened by a series of Reform Acts—1832, 1867, 1884, 1918, 1928. These served to forward political democracy not so much because they enlarged the electorate to include practically all adult “subjects,” but because they were accompanied by the heralded other measures reducing the political power of the throne and of the hereditary House of Lords, increasing that of the now truly representative House of Commons. This change of governmental form has simultaneously democratized the executive, since the Prime Minister, unlike an American President, cannot survive a defeat in the House of Commons and has no power of veto. Nominally, the veto is still a royal prerogative in Great Britain, but it has not been exercised as such since the reign of Queen Anne and would almost certainly cost

the throne to any monarch who would now attempt to use it.

Finally, Great Britain has no judicial institution comparable to our basically undemocratic Supreme Court. Every Act passed by Parliament, which with substantial accuracy can now be called the House of Commons alone, has equal constitutional force. So in that nation there is no longer legislative, nor executive, nor even comprehensive judicial check to the triumph of the majority will,⁴ as expressed by a fully enfranchised adult electorate which chooses and controls its representatives by secret ballot. This system is about as close to true political democracy as is in practice possible. But, for better or worse, it is a system wholly different from that of the United States.

How is it, we may now reasonably ask ourselves, that a form of government as politically undemocratic as that of the United States, should nevertheless be habitually referred to as a "democracy," even by officials sworn to defend and uphold a Constitution that originally so firmly blocked political democracy? It is a really important question, which every conscientious citizen should be willing and indeed anxious to face.

A part of the confusion, though only a part, is due to historical accident, to the illogical practice of referring to the central government as the "federal government."

Actually the federal government is a combination of the one centered in Washington and those located in the States,

⁴ The Common Law, most ably sustained and developed, is of course a safeguard against legislative dictation in Great Britain.

for it is this combination that constitutes the federal system. But in the early days of the Republic the fundamental political struggle was not to defend States' Rights against those of the central government, but rather to establish a central government which would have some real authority over the States. Consequently, those favoring centralization called themselves "Federalists," avoiding the more accurate title of "Nationalists" for fear of stimulating the already strong opposition to the formation of a firmly united nation. During the Civil War the soldiers fighting to preserve the Union were called "Federals," confirming the misuse.

The use of "federal" to denote the central government alone is not merely misleading, but also suggests that effort to keep the federal structure from being centralized is anti-federal, which is absurd. Nevertheless, the usage of "federal" when "national" is meant is now firmly established. In this study, however, wherever there is reference to the Washington government alone, as separate and distinct from those of the States, it is called either "national," "central," or in the phrase preferred by those who wrote the Constitution, "the general government." Also to avoid confusion, the word "state" is capitalized when, but only when, it refers to a State of our political Union.

Misleading use of "federal" has encouraged misuse of "democratic." Obviously, only the general government is able to promote political democracy, interpreted as the general will of the nation as a whole. Consequently, action

by the misnamed federal government, in behalf of an alleged general will, is not merely called democratic, which it should be, but is also made to appear appropriate to the American system of government, which it frequently is not. Federal Aid to Education, for instance, is actually anti-federal, since it threatens to deprive the localities of one of their constitutional functions, vesting it in the central government. But it is argued that this should be done, regardless of constitutionality, if it can be demonstrated that a national majority wants the development. Because it is the so-called federal government that would take this action, its damaging effect on the federal structure is largely concealed. The same difficulty crops up, and is indeed increased, by giving the title of "Federal-State Relationships" to official studies of division of function between the national and State governments. The title implies that the States are somehow apart from, or even hostile to, the federal system, although without the States there would be no federalism.

But this, while important, is only a partial explanation of why "democracy" has become one of the "good" words; why it is fallaciously contrasted with dictatorship, and is habitually though inaccurately used by Americans to describe their form of government. A deeper reason, already suggested, is that the word "democracy" has a social as well as a political connotation, and somewhere along the line we lost the ability to discriminate between the two.

That which is undemocratic, socially speaking, is any

generalized assumption that one man is not, fundamentally, "as good" as another. The affirmation of social equality in no way asserts that all men have equal intelligence; that they are uniform in health, wealth, strength, or manners; that all have the same gifts for leadership; or that all are equally competent either in abstract reasoning or in mechanical ingenuity. Social democracy merely means that in the sight of God, as the source of good, these differences are secondary. All men are subject to the same natural laws and therefore should be treated equally by man-made laws. All are brothers under the Fatherhood of God.

Social democracy is thus basically a religious conception, enormously strengthened by the precepts of Christianity. Its roots in the United States are deep and strong, both because of the dominant role that religion played in most of the early settlements and because of the levelling effect of pioneer life during the formative period of our institutions. In spite of the anomaly of slavery, most Americans in 1776 responded uncritically to the dogmatic assertions that "all men are created equal" and "endowed by their Creator with certain unalienable rights." Except for slaves, also excluded from the scope of both social and political democracy by the ancient Greeks, these claims really seemed to be "self-evident truths," justifying the Declaration of Independence and the establishment of a union of "Free and Independent States."

But between the drafting of the Declaration and the adoption of the Constitution there was a period of twelve

very difficult years, both of war and peace, during all of which the social advantages and the political disadvantages of democracy were in continuous sharp contrast. It was crystal clear, when the Philadelphia Convention met in 1787, that no union would be established unless powers allotted to the general government were severely restrained in the interest of the several States. It was no less clear that democratic disorders would destroy the freedom that Americans prized, if the often ill-informed will of the majority were given free rein. "The general object" was stated by Edmund Randolph, of Virginia, at the opening of the Convention. It was "to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy." His more nationalistic colleague, James Madison, adroitly embroidered the point by emphasizing that the proposed "general government" must be given sufficient power to safeguard "the rights of the minority," continuously jeopardized "in all cases where a majority are united by a common interest or passion."⁵

The eventual accomplishment of this Convention was to evolve a form of government which would paradoxically fortify social democracy by blocking political democracy. The system established was hostile to monopolization of power, by any group, in any form. That,

⁵ *Records of the Federal Convention of 1787*, Max Ferrand, editor, Yale University Press (New Haven 1937) Vol. I, p. 57 and pp. 134-5.

rather than anything distinctive in the nature of Americans, is what makes our Federal Republic socially democratic. But by the same token it is made politically undemocratic, because unless political power is centralized the popular will cannot be made nationally effective. Thus the dispersion of power simultaneously assists social, and hampers political, democracy.

This clever arrangement counteracts the fatal tendency of political democracy, through its requisite of centralized government, to destroy first social democracy and then itself. Centralization of power means, to begin with, that the seat of this power—the national capital—will tend to draw to this focus point the most talented and intelligent minds. There is nothing accidental in the fact that in the unitary nations of England and France all cities seem to be, and are called, “provincial” by comparison with London and Paris.

Unfortunately, this is not merely a matter of focussing literary and artistic, or commercial and financial, talent. The administrative skill necessary for government is similarly concentrated in the capital. It draws strength and encouragement from the general atmosphere of centralized culture and power. Soon the top echelons begin to regard themselves as a managerial elite, entitled to rule the rest of the country in the manner which the word “provincial” superciliously suggests. Such an attitude has nothing in common with democracy, either social or political. And it is well to recall that, in 1835, De Tocqueville

had hope for the future of our “democratic republic” largely because “America has no great capital city, whose direct or indirect influence is felt over the whole extent of the country.” And “this I hold to be one of the first causes of the maintenance of republican institutions in the United States.”⁶

Because it must be given close consideration later, we have left to the end of this chapter mention of the most legitimate reason for describing the American governmental system as a “democracy.” As will be demonstrated, two of the Constitutional Amendments—the Fourteenth and Sixteenth—have undeniably operated subtly to undermine the federal structure of the United States as originally planned. The Fourteenth Amendment in effect reversed the emphasis of the first eight Amendments, all designed to limit the powers of the central government, so as to make these limitations applicable by the central government to the States. The Sixteenth Amendment supplemented this revolutionary change by giving the central government virtually unlimited power to tax the people without regard to State needs or boundaries.

It is under the influence and judicial interpretation of these two Amendments that the United States has now moved far from the original concept of federalism, and ever closer towards that of a centralized, unitary state which could actually become, temporarily, the political

⁶ *Democracy in America*, Vol. I, pp. 289–90.

democracy which it is so often loosely said to be. And, for causes now to be considered, there have from the outset been forces working to destroy American federalism and to substitute for it that type of political democracy which springs from Rousseau's concept of the "general will."