

*How Democratic
Is the
American
Constitution?*

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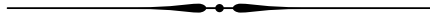
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CHAPTER 2

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 Philadel-

phia,”¹ Madison studied the best sources as carefully as a top student preparing for a major exam.² 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."³ The only delegate who was recorded by Madison⁴ 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.⁵ 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.⁶ 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.⁷

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 indi-

vidual 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.”⁸

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.⁹

Faced with the refusal of the small states to accept anything less, Madison, Wilson, Hamilton, and the other opponents of equal representation finally ac-

cepted 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.¹⁰

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 1808¹¹ 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.¹² 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.¹³ It implicitly left in place the exclusion of half the population—women—as well as African Americans and Native Americans.¹⁴ 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 wis-

dom 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.¹⁵ 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.¹⁶

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 policies 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 role 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 3.¹⁷

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.¹⁸

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,¹⁹ 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.²⁰ 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,”²¹ 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.²²

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 be 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.²³ 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 re-phrased: 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.²⁴

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.²⁵ 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 rabble rousers, 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.”²⁶ 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 time.²⁷ 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.²⁸ 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.²⁹

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.”³⁰

*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. 10.³¹ 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 their 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.³² 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 speaker’s [Madison’s] more full and matured view of the sub-

ject.” “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 & 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 kind 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 partis*, the will of the majority.³⁸



I HAVE LITTLE DOUBT THAT IF THE AMERICAN CONSTITUTIONAL Convention had been held in 1820, a very different 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 overestimated 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.