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## TWO VISIONS OF "WE THE PEOPLE"

Americans today are divided politically, ideologically, and culturally. Some of us live in blue states and watch CNN; others live in red states and watch Fox News. Some Americans want more government, others less. We engage in passionate debate over myriad issues: gun control, health care, same-sex marriage, immigration, the war on terrorism—the list of issues that divide Americans goes on and on. Our divisions are reflected in print, on the airways, and increasingly online. Battles are fought in city councils, state legislatures, and in the halls of Congress.

Of course, as we saw with Obamacare, the Supreme Court, too, is divided. This is because Americans are not just divided about politics, culture, and ideology. Americans are also divided about the Constitution itself. Every open seat on the Supreme Court is an occasion for intense partisan conflict. Confirmation hearings for Supreme Court justices become Kabuki theater in which our deep political conflicts are transformed into competing visions of the Constitution.

In this book, I call these divergent visions the "Democratic Constitution" and the "Republican Constitution," but I don't intend these labels to be partisan. There are political conservatives who hew to some aspects of the Democratic

Constitution and some progressives who adopt aspects of the Republican one. Many people flit between conceptions depending on which happens to conform to the results they like. I chose the terms *democratic* and *republican* constitutions because both terms have deep roots in our constitutional history, and neither is pejorative. I dislike arguments by labels and both these labels today have a positive connotation.

At its core, this debate is about the meaning of the first three words of the Constitution: "We the People." Those who favor the Democratic Constitution view We the People as a group, as a body, as a collective entity. Those who favor the Republican Constitution view We the People as individuals. This choice of visions has enormous real-world consequences.

Each vision of We the People yields a different conception of what is called "popular sovereignty." Those who adhere to the Democratic Constitution hold a different conception of popular sovereignty than those who adhere to the Republican Constitution. So let me begin by explaining the role that popular sovereignty plays in our thinking about the Constitution.

The concept of popular sovereignty was first developed in the United States at the time of our founding. Back then it was a first principle of political theory that sovereignty—or the right to rule—must reside somewhere in any polity. While the ultimate sovereign was thought to be God, who ruled the world, on earth, monarchs claimed to be the sovereign rulers of their own people, ruling by delegation from God, or what was called divine right.

When the Americans had their revolution and rejected the rule Of the English king, political theory required them to say who was sovereign in their new polity. The answer they gave was that "the People themselves" were the ultimate sovereign. But this raised at least as many questions as it solved. If "sovereignty" was an answer to the question of who has the right to rule, in what sense do the people rule? This seems like a contradiction. We need

government to rule the people, and yet the people themselves are supposed to be the ultimate ruler. What sense does this make?

### THE DEMOCRATIC CONSTITUTION

What I am calling the Democratic Constitution is one way to address the problem of how the sovereign people can be said to rule. If sovereignty is conceived as residing in the people collectively, then popular sovereignty means rule by the people *as a body*. And rule by the people as a body then means rule according to the "will of the people."

Of course, it makes perfect sense to talk about the will or desires of a sovereign monarch. But in what sense does a body of individual persons have a collective will or desire? No one who makes claims about the will of the people claims that there must be, or ever is, a unanimous consensus of everyone to some particular desire. In practice, the collective "will of the people" must rest on the desires of a majority or supermajority of the people. It does not—because it cannot—rest on the desires of everyone.

Therefore, in operation, a conception of popular sovereignty based on rule according to the will of the people means rule according to the will of a majority of the people. So the Democratic Constitution;

- starts with a *collective* vision of We the People;
- which leads to a conception of popular sovereignty based on the "will of the people" as a *group*;
- which, in practice, can only be the *will of the majority*.

For this side of our constitutional divide, then, a legitimate constitution is a Democratic Constitution. It sets up institutional mechanisms by which the desires of a majority of the people can be expressed.

If a well-constructed Democratic Constitution, based on a collective conception of popular sovereignty, is one that allows the will of the majority to prevail, then a number of important implications follow.

First and foremost, any principle or practice that gets in the way of the will of the majority or majority rule is presumptively illegitimate and requires special justification.

Under a Democratic Constitution, the only individual rights that are legally enforceable are a product of majoritarian will— whether the will of majorities in the legislature who create ordinary legal rights, or the will of majorities who ratified the Constitution and its amendments and created constitutional rights.

So, under a Democratic Constitution, *first comes government and then come rights*. First one needs to establish a polity with a legislature to represent the will of the people. And then this legislature will decide which rights, if any, get legal protection and which do not.

A Democratic Constitution is a "living constitution" whose meaning evolves to align with contemporary popular desires, so that today's majority is not bound by what is called "the dead hand of the past." The will of yesterday's majority cannot override the will of the majority today.

Under a Democratic Constitution, unelected judges who are not accountable to the majority present what Alexander Bickel called the "counter-majoritarian difficulty."<sup>22</sup> Judges are not selected to represent the desires of anyone. They are appointed, not elected, and in the federal system they serve for life. To the extent they invalidate popularly enacted laws, these unelected and unaccountable judges are thwarting the will of the people as expressed by their elected representatives.

Because of all this, under a Democratic Constitution, judges are told they should exercise their power of judicial review with

"restraint." They should "defer" to the will of the popularly elected branches by adopting a "presumption of constitutionality" that simply presumes—perhaps irrebuttably—that properly elected legislatures have acted properly when they restrict the liberties of the people. For the people are only restricting themselves, we are told, and how they are to govern themselves is for their democratically selected representatives to decide.

Ultimately, this is *how* the Obamacare case was decided as it was: a majority of the Supreme Court could assert they were deferring to Congress, the popularly elected and most democratically accountable branch. Who was the unelected Supreme Court to obstruct the will of We the People as manifested by a majority of representatives in Congress? In short, five justices hewed to the vision of a Democratic Constitution.

Today, belief in the correctness of a Democratic Constitution is so pervasive among both progressives and conservatives—and among Democrats *and* Republicans—that you might be sitting there wondering what other view of the Constitution there could be. Perhaps the most important purpose of this book is simply to identify and describe this other view—what I am calling a Republican Constitution—so that you can recognize it as a distinct vision of the Constitution.

### THE REPUBLICAN CONSTITUTION

What separates a Republican Constitution from a Democratic Constitution is its conception of "popular sovereignty." Where a Democratic Constitution views sovereignty as residing in the people collectively or as a group, a Republican Constitution views sovereignty as residing in the people *as individuals*.

If one views We the People as a collection of individuals, a completely different constitutional picture emerges. Because those in government are merely a small subset of the people who serve

as their servants or agents, the "just powers" of these servants must be limited to the purpose for which they are delegated. That purpose is not to reflect the people's will or desire—which in practice means the will or desires of the majority—but to secure the preexisting rights of We the People, each and every one of us.

Under a Republican Constitution, then, the first duty of government is to equally protect these personal and individual rights from being violated by both domestic and foreign transgressors. The agents of the people must not themselves use their delegated powers to violate the very rights they were empowered to protect. But how may these delegated powers be effectively limited to their proper exercise?

A Republican Constitution views the natural and inalienable rights of these joint and equal sovereign individuals as preceding the formation of governments, *so first come rights and then comes government*. Indeed, the Declaration of Independence tells us, it is "to secure these rights" that "Governments are instituted among Men." What are the implications of adopting an individual rather than a collective conception of popular sovereignty?

Under a Republican Constitution, because We the People consists of each and every person, We the People as a whole never govern. Instead, the power to govern must be delegated to some subset of the people. The small subset of individuals who are empowered to govern the rest of us are not to be confused with the people themselves, but are considered to be the servants of the people. The people are the principals or masters and those in government merely their agents. As agents they are to govern on behalf of the people and subject to their ultimate control.

Under a Republican Constitution, to ensure that these servants remain within their just powers, this lawmaking power must itself be limited by law. The Republican Constitution, then, provides the law that governs those who govern us and it is put in writing so it can be enforced against the servants of the people,

each of whom must swear a solemn oath to obey "this Constitution." Those servants or agents who swear the oath to "this Constitution"—the written one—can no more change "the law that governs them" than we can change the speed limits that are imposed on us.

In short, under a Republican Constitution, *the meaning of the written Constitution must remain the same until it is properly changed*—which is another way of saying that the written Constitution must be interpreted according to its original meaning until it is properly amended.

Under a Republican Constitution, a completely different picture of judges emerges. Like legislators, judges too are servants of the people, and their primary duty is to adhere to the law of the Constitution above any statute enacted by Congress or by the states. Judges are given lifetime tenure precisely so they may hold democratic legislatures within the proper scope of their just powers and by so doing protect the individual "rights . . . retained by the people"—and "the privileges or immunities of citizens"— from being denied, disparaged, or abridged by their servants in the legislature.

But what are these individual rights that are retained by the people? The idea of individual popular sovereignty helps us to better understand just what rights and powers, privileges and immunities are retained by the sovereign people as individuals. Indeed, under a Republican Constitution, the rights and powers retained by the people closely resemble those enjoyed by sovereign monarchs.

- Just as sovereign monarchs claim jurisdiction over their territories and possessions, sovereign individual citizens have jurisdiction over their private property.
- Just as one monarch may not interfere within the territorial jurisdiction of other monarchs, no citizen may interfere with the person and property of any other.



- Just as monarchs may use force to defend their people and territory from the aggression of other monarchs, so too may individual citizens use force in defense of themselves and their possessions.
- Just as monarchs may consensually alter their legal relations with other monarchs by entering into treaties, so too may individual citizens freely alter their legal relations with their "fellow citizens and joint sovereigns" by entering into contracts with each other.

Of course, a Republican Constitution is established, in part, so that these liberties of the individual may be regulated by law. But the proper purpose of such regulation must be limited to the equal protection of the rights of each and every person. Any law that does not have this as its purpose is beyond the just powers of a republican legislature to impose on the citizenry. In short, when the liberty of a fellow citizen and joint sovereign is restricted, judges as agents of these citizens have a judicial duty to critically assess whether the legislature has improperly exceeded its just powers to infringe upon the sovereignty of We the People.

It is important to recognize that the Democratic and Republican views of popular sovereignty and We the People are ultimately incompatible. Adopting one of these worldviews will have implications that will differ in all these ways from adopting the other. However, because both worldviews are deeply rooted in our Constitutional history and traditions, holders of each have tried to incorporate the most appealing features of the other.

Those who hold a democratic or collective vision of popular Sovereignty based on majoritarian rule have strained to justify the protection of some personal or individual rights—but not so many as to thwart unduly the will of the majority. And those who hold a republican or individualist vision of popular sovereignty will acknowledge that popular elections provide a vital

constraint on the exercise of power by the agents or servants of the people.

So, in practice, a constitution that hews to one of these visions may still accommodate some significant element of the other, albeit in a subordinate way. To identify the nature of a particular constitution, then, the key is to distinguish the features that are the exceptions from those that reflect the more fundamental worldview that animates that constitution. Which worldview underlies and animates the Constitution of the United States? In this book, I explain how our Constitution is a Republican Constitution.

#### RECLAIMING THE LABEL "REPUBLICAN"

In 2008, Sanford Levinson published his provocative book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong*.<sup>23</sup> In reviewing it, I freely admitted that our Constitution was undemocratic in the way he suggests but went on to say that these features are what made the Constitution exceptional and good. True, they were "undemocratic," but that was because they were "republican."<sup>24</sup> Thinking about Levinson's book provoked me to write this one and to title it *Our Republican Constitution*.

Were the founders really against democracy? You bet. They blamed the problems in the states under the Articles of Confederation on an excess of democracy. For example, Edmund Randolph, the first attorney general of the United States, under George Washington, observed that "the general object was to provide a cure for the evils under which the U.S. laboured."<sup>25</sup> And that "in tracing these evils to their origin every man had found it in *the turbulence and follies of democracy*."<sup>26</sup> Others said the same thing.

Elbridge Gerry from Massachusetts stated: "The evils we experience flow from the *excess of democracy*." Roger Sherman, of

Connecticut, contended that the people "immediately should have as little to do as may be about the Government."<sup>27</sup> Gouverneur Morris, delegate from Pennsylvania, noted that "[e]very man of observation had seen in the democratic branches of the State Legislatures, precipitation—in Congress changeableness, in every department excesses against personal liberty private property & personal safety."<sup>28</sup> Even those who remained more amenable to democracy, like George Mason of Virginia, admitted that "*we had been too democratic*" in forming state governments.<sup>29</sup>

And yet, having deliberately devised what Professor Levinson calls "our undemocratic constitution," these framers all insisted that it was still a *republican* constitution. As historian Richard Beeman reminds us, the "vast majority of the Founding Fathers were republicans, not democrats."<sup>30</sup> Nearly all "harbored keen misgivings about the desirability of democracy as a guiding principle for the new government."<sup>31</sup> Yet, at the close of the Philadelphia convention, when Benjamin Franklin was asked what form of government the convention had devised, he famously replied, "A republic, if you can keep it." So, if the founders rejected an excess of democracy in favor of a new, undemocratic form of government they called "republican," then I believe it is fair for me to call our undemocratic Constitution "republican."

The fact that our Republican Constitution has democratic elements does not make it what I am calling a Democratic Constitution. The bare fact that a particular form of government has elected legislators, or an elected president does not by itself tell us whether it is a democracy or a republic. Representative government is consistent with *both* conceptions of popular sovereignty. Representative government can be favored as a practical way to "re-present" the will of the sovereign people, when direct democracy is infeasible. Alternatively, such a form of government can be viewed as a popular "check" on the servants of the people who are tasked with governing on their behalf.

Therefore, to decide whether a particular form of government is democratic or republican, we need to look to other features to see whether "first come rights and then comes government," or whether the rights of the people are considered to be the result of democratic deliberation. To the extent that the individual rights retained by the people are recognized and effectively protected from the will of majorities, that polity is a true republic.

I do not claim that everyone who used the term *republican* at the founding or thereafter necessarily meant the Republican Constitution as I am defining it. The more democratic governments of the states under the Articles of Confederation were called "republican," too. But when that system failed, the founders opted for a new approach. For this reason, the meaning of *republican* necessarily changed in 1787, when this new "undemocratic" form of government went public.

Ultimately what matters, however, is not the labels we use to describe these differing views of popular sovereignty, or what they were called in the past. Nor does it really matter which exact view was held by those who wrote the Constitution. What matters is the type of constitution they wrote and whether we today believe it to be a good enough constitution to follow.

In this book, I will examine the text of the Constitution to show that it was republican in nature, and I will then argue that our Republican Constitution is a good constitution, the meaning of which should remain the same until it is properly changed by amendment. But it is not enough to get that meaning right. Judges must then protect our Republican Constitution by enforcing the limitations on power that it imposes on the other branches, and on state legislatures.

## NOTES

22. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), 16.
23. See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (New York: Oxford University Press, 2008).
24. See Randy E. Barnett, "Constitutional Conventions," *Claremont Review of Books* 7 (Summer 2007), <http://www.claremont.org/crb/article/constitutional-conventions/>.
25. James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: Norton, 1987), 42 (statement of E. Randolph).
26. *Ibid.* (emphasis added).
27. *Ibid.*, 39 (statement of R. Sherman, advocating that House members be chosen by state legislatures) (emphasis added).
28. Madison *Notes of Debates*, 233 (statement of G. Morris).
29. *Ibid.*, 39 (statement of G. Mason) (emphasis added).
30. Richard Beeman, *Plain Honest Men: The Making of the American Constitution* (New York: Random House, 2009), xi.
31. *Ibid.*, 122.