

America: Republic or Democracy? The Difference That it Makes

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...[O]ur sages in the great [constitutional] convention...intended our government should be a republic which differs more widely from a democracy than a democracy from a despotism. The rigours of a despotism often...oppress only a few, but it is the very essence and nature of a democracy, for a faction claiming to oppress a minority, and that minority the chief owners of the property and truest lovers of their country.

■ Fisher Ames, American statesman, 1805

We consistently have adhered to the principle that the will of the people is the paramount consideration. Our goal today...[is] to reach the result that reflects the will of the voters.... The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of this right.

■ Florida Supreme Court, 2000

With the election of George W. Bush, America has its first president in over 100 years to be elected to office without having received a plurality of the nationwide popular vote. Taking advantage of his popular plurality, Al Gore justified his fight for Florida's 25 electoral votes as a battle for "the integrity of our democracy [which] depends upon the consent of the governed, freely expressed in an election where every vote counts."

Even after the Florida recounts under the extended timetable fixed by the Florida Supreme Court yielded a Bush victory, Gore's supporters insisted that Gore had a "moral right" to continue his contest "because he leads in the national popular vote." Indeed, Gore's more strident supporters claimed that, even if Bush won Florida, his presidency would be illegitimate for his having failed to win the "vote of the people."

Countering this claim, Bush defenders took advantage of a nationally televised map showing that Bush had won 2,434 counties, while Gore had won only 677; that Bush's counties covered 2,427,039 square miles of the nation, while Gore's totaled only 580,134; and that the population in Bush's counties totaled 143 million while Gore's counties trailed at 127 million. Thus, the Republicans maintained a Bush presidency would enjoy national support, whereas a Gore presidency would be rooted primarily in a few densely populated regions of the country.

The Bush plea fell on many a deaf ear, however, as the Gore forces trumpeted the Warren-era Supreme Court's "democratic ideal" of one person/one vote. Finally, the conservative wing of the current U.S. Supreme Court put an end to the seemingly endless Florida recounts. But it did so on the grounds that the Florida Supreme Court's recount order was not democratic enough, demonstrating that they, too, have succumbed to the liberal siren song that in modern America each voter's vote must be weighed equally. (Bush v. Gore, 531 U.S. ---, 148 L Ed 2nd 388, 398, 400-01 (2000))

Ironically, the court's democratic solution catapulted the "minority candidate" into the White House. By resting its decision on the democratic ideal of one person/one vote, however, the court has undermined the very process by which President Bush, and all American presidents before him, has been elected. That process is governed by a constitutional formula deliberately calibrated to give greater weight to the votes of the small, less populated states, and thus, making it possible that a president could be elected with less than a nationwide majority of the popular vote.

Indeed, the process set forth in Article II, Section 1 of the Constitution of the United States does not even guarantee a popular vote for president. As the U.S. Supreme Court in Bush v. Gore, *supra*, 148 L Ed 2nd at 398, acknowledged, "[t]he individual citizen has no federal constitutional right to vote for the President of the United States unless and until the state legislature chooses a statewide election as a means to implement its power to appoint members of the Electoral College." That decision – not to prescribe a popular, nationwide election of the president – was no accident, but was an integral part of the deliberate design of America's founders to create a federal republic, not a national democracy.

A Republic, If You Can Keep It

At the close of the Constitutional Convention in Philadelphia on September 18, 1787, a Mrs. Powell, anxiously awaiting the results, pressed Benjamin Franklin as he emerged from Independence Hall. She asked, "Well doctor, what have we got, a republic or a monarchy?" Franklin quickly replied, "A republic, if you can keep it."

From anti-federalist John Taylor to federalist Fisher Ames; from James Madison of Virginia to Noah Webster of Massachusetts, Americans believed that they had founded a republic, thereby charting a middle course between the Scylla of a monarchy and the Charybdis of a democracy.

John Taylor, the preeminent theorist of Jeffersonian Old Republicanism, proclaimed that "[a] federal republic is the best for maintaining a republican form of government over a country so extensive as the United States," dividing power "between Federal and State departments to restrain ambitious men in both." (J. Taylor, *Tyranny Unmasked* 263 (Liberty Fund: 1992)) In a series of essays on "Monarchical versus Republican Government," federalist Fisher Ames warned against appeals to "the will of the people," claiming them to be mere camouflage for demagogues to seize tyrannical power without regard for the rule of law. (I Works of Fisher Ames 116-186 (Liberty Fund: 1983))

In *Federalist* numbers 10, 14, and 48, Madison insisted that the new Constitution established a republic, not a democracy, emphasizing in *Federalist No. 10* that a "Republican" form of government protected the people from the dangers of tyranny of the majority. In his "Examination into the Leading Principles of the Federal Constitution," Noah Webster, writing as an American citizen, extolled the virtues of the American republic's bicameral legislature; the very design of which was to protect the people from rash and hasty laws passed by a transient, passionate majority.

This unity among America's founding statesmen remained unbroken as late as 1945, 158 years after the ratification of the Constitution, when the 79th Congress of the United States unhesitatingly approved, by joint resolution, the official pledge of

allegiance to the flag of the United States, containing the phrase “and to the Republic for which it stands.” Yet 60 years later, on the cusp of the 21st century, this affirmation that America is a republic, like the pledge itself, has fallen from favor. In its place is a new declaration that America is, and always has been, a democracy.

Indeed, there is hardly a voice left in Congress, much less in the White House, Republican or Democrat, who refers to our nation’s government as a republic. Even President Bush declared that his election to the presidency was a vindication of the integrity of “American democracy.” In doing so, the new president was simply following suit. For several decades, America’s political leaders have been promoting the virtues of America’s “democratic ideal” within, by shaping public policy according to the latest opinion polls, and at the same time, exporting democracy abroad, by employing American military power to reshape other nations’ governments to conform more closely to “the will of the people.” Both goals stand, however, in direct contradiction to America’s founding principles.

America Is Not A Democracy

Those who insist that the United States of America is a democracy rest their claim on the foundational principle in the nation’s charter, the Declaration of Independence, “[t]hat governments are instituted among men, deriving their just powers from the consent of the governed.” To support this claim, they point to the preamble of the Constitution of the United States which begins “We, the people of the United States...do ordain and establish this Constitution of the United States.” Additionally, they rely upon statements such as the one that appears in Article I, Section 1 of the Florida constitution that “[a]ll political power is inherent in the people,” a phrase that appears in one form or another in every one of the 50 state constitutions.

Such statements do not, however, support the proposition that the civil governments in America are democracies – quite the contrary. Read in context, all of these statements support the proposition that America’s governments are republican in form, not democratic.

First, although the Declaration of Independence does affirm that governments derive their just powers from the consent of the governed, it does not, however, declare that governments derive their purposes from the consent of the governed. Rather the Declaration of Independence avers that those purposes are derived from the nature of a created order, an order in which all mankind are endowed with certain “inalienable rights,” namely life, liberty, and the pursuit of happiness. Therefore, the Declaration of Independence concludes that governments are instituted to **secure** these rights, not to enforce the will of the governed.

Second, although the Constitution of the United States does affirm that the people ordained and established the government of the United States, they did so, **not** to promote the will of the people, but to “establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity....” Likewise, although the state constitutions affirm that all power is inherent in the people, they did not establish state governments to obey the will of the people, but to ensure that all individuals enjoy their pre-existing rights of life, liberty, and property with which they have been naturally endowed.

To achieve these purposes, the people of the United States and of the several states well knew that a government under the direct control of the people was downright dangerous, because, as James Madison put it in *Federalist No. 10*, “there is nothing to check the inducements [of a majority] to sacrifice the weaker party, or an obnoxious individual.” Thus, Madison contended, that a major task for any people seeking a government to protect life, liberty, and property was to “prevent” the majority from imposing “injustice and violence” on individuals who did not share the majority’s “passion or interest.”

To that end, Madison and his constitutional colleagues chose a republican, not a democratic form of government.

The Nation’s Republican Form of Government

At the heart of a democratic form of government is the rule of the majority, unhindered by law. As the Florida Supreme Court, in support of its initial ruling extending the statutory deadlines for recounting the votes in the 2000 presidential elections, explained: “[T]he will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases....” By contrast, in Bush v. Gore, Chief Justice William Rehnquist, writing for himself and two of his colleagues, declared that the rule of the Constitution, in that case the power of the Florida legislature, prevails over any judicial attempt to vindicate the power of the people.

The foremost distinction between a democratic form of government and a republican one, is the subordination of the power of the majority to the rule of law. To accomplish this, there must be rules of law that prevent the majority from imposing their will through the election process. The Constitution of the United States is replete with such safeguards. Not only is the legislative power divided between the House of Representatives and the Senate, but also the number of senators is determined not in proportion to the population, but equally state by state. Even the U.S. House, the membership of which is proportionate to the population, guarantees to each state, regardless of population, at least one representative.

Additionally, a bill does not become law simply upon the vote of a majority of the members of both chambers of Congress. It is subject to the veto of the president, which can only be overridden by a two-thirds majority in both chambers. In addition, as previously mentioned, the state-by-state process by which the president is elected does not guarantee to a nationwide majority of the people the power to elect the president.

Not only do these political checks and balances exist, but there is also the separation of powers among the three branches of government. Even if a majority of the people voted for the president, the head of the executive branch, that same majority cannot elect the members of the legislative branch, thereby ensuring that the elected officials of the two branches answers to different constituencies of the people. As for the judicial branch, its members are not elected, but appointed, and although the president has the power of appointment of federal judges, that power is subject to the advice and consent of the Senate.

Not only does the Constitution diffuse the powers of government within the federal government, but also it divides the powers of government between two

independent and sovereign entities, the federal and the 50 states. As a government of enumerated powers, Congress, the president and the courts are forbidden by the Tenth Amendment from exercising the police power which belongs exclusively to the states.

Finally, the constitutional provisions establishing the system of checks and balances, separation of powers, and a federal union may not be changed by a majority of the people, but only by an amendment process requiring majority votes of two-thirds to propose and three-fourths to ratify. In addition, even these supra majority requirements cannot be exercised directly by the people, but only by their elected representatives.

All of these limits have been placed upon the federal government by the people whose elected state representatives proposed the adoption of the Constitution, and whose elected representatives ratified the Constitution in conventions assembled in each of the original states. By so establishing these safeguards against the absolute rule of a majority, the people of the United States unquestionably created not a democracy, but a republic, which John Adams succinctly defined as a government “bound by fixed laws, which the people have a voice in making, and a right to defend.” (J. Adams, “Novanglus No. VII,” reprinted in *The Revolutionary Writings of John Adams* 227 (Liberty Fund: 2000))

The 50 States’ Republican Form of Government

Not only does the Constitution of the United States prescribe a republican form of government for the nation, but also, by Article IV, Section 4, commands the United States to “guarantee to every State in this Union a Republican Form of Government...” Each of the 13 original states entered the union, having already formed governments which were republican in form, including political checks and balances and separation of powers in their respective constitutions. Additionally, those same states came into the union subject to the principles of the Declaration of Independence, thereby committing each state to enact laws to secure the inherent individual rights of life, liberty, and property, not to implement the will of the people.

To ensure that future states admitted to the union were subject in like manner to the republican principles of the nation’s charter, Congress, even before the ratification of the Constitution of the United States, resolved that new states formed out of the Northwest Territories would be “republican...with the same rights of sovereignty, freedom, and independence as the other states.” (*Sources of Our Liberties* 387-88 (R. Perry, ed., Amer. Bar. Found.: 1978)) Thus, the Northwest Ordinance, adopted by Congress, prescribed that the newly formed states of Ohio, Indiana, Illinois, Michigan, and Wisconsin would be admitted to the Union on an “**equal footing** with the original States, in all respects whatsoever...” (Id. At 397 emphasis added)

Prior to the admission of these states, and thereafter, all of the states of the Union have been admitted on the “same footing” (*Coyle v. Oklahoma*, 221 U.S. 559 (1911)), thereby fulfilling the obligation of the United States to guarantee each state a republican form of government.

As to preserving that republican form, the United States Supreme Court has consistently declined to impose a **legal** definition of a republican form of government, leaving it to Congress to enforce that guarantee by the exercise of Congress’s power to

admit to, or exclude from, that body a state's elected representatives and senators. (See Coleman v. Miller, 307 U.S. 433,454-56 (1939)). As for Congress, it has not seen fit to intervene in the internal governmental affairs of the states, leaving it to the people of those states to determine the specific republican form of government by which they will be ruled.

It is certainly arguable that some states have approved some democratic procedures that depart from the pure republican form. For example, the initiative and referendum, whereby the people of some states, by constitutional amendment, have reserved to themselves the power to propose and enact laws independently of the legislative assembly, as well as to approve or reject any act of that body, thereby making it possible for public policy to be made directly by a majority without the political accountability of a representative assembly. (See *Federalist No. 10*.) Such powers are, however, limited by law to "single subjects" and to legislative and executive implementation. To date, no state has substituted a system of direct democracy in which the people "assemble and administer the Government in person." (*Federalist 10*)

Conclusion

Just under 200 years ago, Fisher Ames penned an essay warning the people of America not to place confidence in the democratic ideal whereby governments are structured to reflect the will of the people. While the "power of the people is their liberty," he wrote, the people "can have no liberty without strong...restraints upon their power." (I Works of Fisher Ames, supra, at 5) America's founders knew this to be true because they had studied the history of democracies and discovered that they inevitably destroyed both the morals and liberties of the people. If the modern-day drive for democracy in the nation continues, the American people will experience a similar fate.