

CHAPTER 1

Introduction: Fundamental Questions

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

Well, an American citizen might reply, it has been our constitution ever since it was written in 1787 by a group of exceptionally wise men and was then ratified by conventions in all the states.¹ But this answer only leads to a further question.

To understand what lies behind that next question, I want to recall how the Constitutional Convention that met in Philadelphia during the summer of 1787 was made up. Although we tend to assume that all thirteen

states sent delegates, in fact Rhode Island refused to attend, and the delegates from New Hampshire didn't arrive until some weeks after the Convention opened. As a result, several crucial votes in June and July were taken with only eleven state delegations in attendance. Moreover, the votes were counted by states, and although most of the time most state delegations agreed on a single position, on occasion they were too divided internally to cast a vote.

My question, then, is this: Why should we feel bound today by a document produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slaveholders, and adopted in only thirteen states by the votes of fewer than two thousand men, all of whom are long since dead and mainly forgotten?²

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

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

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

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

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

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

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

As one part of an answer, I am going to suggest that we begin to view our American Constitution as nothing more or less than a set of basic institutions and practices designed to the best of our abilities for the purpose of attaining democratic values. But if an

important democratic value is *political equality*, won't political equality threaten the rights and liberties we prize? In Chapter 5, I'll argue that this view—famously defended by Tocqueville, among others—is based on a misunderstanding of the relationship between democracy and fundamental rights.

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



BEFORE TURNING TO THESE QUESTIONS, I NEED TO DISPOSE OF TWO MATTERS. One is purely terminological. In discussing the formation of the constitution at the Convention in 1787, I shall refer to the delegates as the Framers, not, as is more common, the Founding Fathers. I do so because many of the men who reasonably might be listed among the Founding Fathers—including such notables as John Adams, Samuel Adams, Tom Paine, and Thomas Jefferson—were not at the Convention. (By my count, only eight of the fifty-five

delegates to the Convention had also signed the Declaration of Independence.)

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

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

Even if some of the Framers leaned more toward the idea of an aristocratic republic than a democratic republic, they soon discovered that under the leader-

ship of James Madison, among others, Americans would rapidly undertake to create a more democratic republic, and in doing so they would begin almost immediately to change the constitutional system the Framers had created.