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## What Is Democracy?

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### Abstract

Modern democracies, including the United States, rely upon three normative elements: (1) rights expressing the dignity of the citizen; (2) law expressing a commitment to public reason; (3) elections as the method of selecting representatives. In each dimension, citizens are to see a representation of themselves as popular sovereign. Morality and law are not matters to be resolved at the polls. Yet, popular opinion, supported by contemporary social sciences, tends to reduce democracy to the third element. On this view, the higher the voter turnout, the better the democracy. In an age in which we worry as much about majority, as minority, tyranny, this view is not credible. A mob at the polls is still a mob even if it is a majority. An exclusive focus on quantification represents a profound misunderstanding of the meaning of democracy. Democratic politics includes an interpretive practice across the moral and the legal dimensions. It relies as much on persuasion as on proof. Recovery of a vibrant democratic life requires a renewed appreciation of a public humanities, not as a pastime but as way of living.

**Keywords:** elections; democracy; popular sovereignty; Tocqueville; representation

Americans are thinking of the regular election cycle when they speak of their nation as a democracy. Yet, they also know of its democratic “irregularities.” Presidential elections turn on the Electoral College, not the popular vote. Twice in the last five presidential elections, the victor lost the popular vote. Senators have, since 1913, been elected from their states, but the Senate is hardly democratic, when it grants equal power to California – population of nearly 40 million – and Wyoming – population of just over 500 thousand. In the House, members are elected from districts of equal population, but because of extreme gerrymandering, state delegations often bear little resemblance to the actual distribution of party preferences in the state.

These are the well-entrenched but also well-understood democratic pathologies of America’s electoral institutions. Many Americans – particularly on the left – believe that these structural features account for the dismal state of our politics. Faith in redemption through electoral reform may be a necessary attribute of progressive politics. Indeed, these pathologies should, as a matter of justice, be corrected. The pursuit of reform to better align election results with the majority should not, however, lead us to equate democracy with rule by a majority.

America aspires to democracy, but both the right and the left mistakenly identify democracy with counting votes. That is a deracinated version of what was once a robust idea of government as an expression of popular sovereignty. Rule by the people did not mean – or did not only mean – rule by a majority of the voters. To reduce democracy to counting represents not the success of popular government, but its failure.

Tocqueville came to America in the 1830s to study democracy, not voting. Democracy, for him, is a social condition before it is a political system. It is a set of beliefs and practices carried in the social imaginary.<sup>1</sup> He wanted to learn how a democratic society creates and maintains institutions of governance, both public and private. He focused on civil society as the great democratic innovation in the United States. Not only is most governance done through civil society institutions, but so is most of the education in democratic citizenship.

Democratic citizens create electoral institutions, but they also expect much more of themselves than occasionally entering a polling booth. To introduce the electoral institutions without paying attention to the civil society and individual character that supports a democracy may be to introduce instruments for mob rule. Tocqueville worried, for example, about the soft tyranny of public opinion.<sup>2</sup> He saw a vibrant civil society as a possible break from the threat of what Lincoln would call “mobocracy.”<sup>3</sup> Democracy, Tocqueville believed, begins in the schoolhouse and is sustained in the town meeting. It depends upon the circulation of information, common sites for the formation of public opinion, and an individual character that embraces volunteerism through associations, both formal and informal.

Democracy is properly thought of as a rule by and for the people, but the people are not equivalent to those who succeeded in the last election. Politics is an intergenerational endeavor. The people include those of the past and the future. To have a political identity is to take up as one’s own a community’s past and to accept responsibility for its future.<sup>4</sup> To act politically is to be a part of this intergenerational community. If there ever is a final generation, it will not have a political life.

If we fail to embrace this idea of the people as an intergenerational, collective agent because it lacks the objectivity of electoral results, then we have no persuasive answer to the problem of rule by the dead hand. Today’s Americans did not vote on the constitution or the many laws by which they are governed. The past can appear as a foreign country; rule by law can appear as tyranny. Where, for example, were the women and minorities when the constitution was adopted? There is no reason to believe that somehow those earlier generations “got it right” such that we do best by deferring to their legislative work.

Similarly, without belief in the people as a single, collective agent, there is no robust reason for a losing party to accept the outcome of an election. A deeply polarized community cannot resolve its differences through electoral politics. Under these conditions, elections are likely to exacerbate conflict. Trump voters did not rally to support Biden after his 2020 victory. Rather, they refused to recognize him as the legitimate President.

<sup>1</sup> For this reason, Tocqueville can write that America “sees the results of the democratic revolution operating among us without having had the revolution itself” (Tocqueville 2002, 12). American institutions were democratic from the beginning; the Revolution marked only a change in the arrangement of political institutions.

<sup>2</sup> Tocqueville 2002, 244.

<sup>3</sup> Lincoln 1946.

<sup>4</sup> Arendt 2006.

A democratic system is one in which there is a robust idea of the popular sovereign – We the People – that is represented in the multiple expressions of political and social life. Democracy is the government of the popular sovereign, not the government by a temporary majority. We must, accordingly, broaden our approach to understand the multiple ways in which a democracy represents the people. Three are particularly prominent.<sup>5</sup> First, democracy means the rule of law. Second, democracy means equal respect and dignity for each individual. Third, democracy means elections as the method of selecting public representatives. We do not have democracy if any of these elements are missing.

Each of these elements contributes a different normative perspective on the meaning of government by the people. The rule of law speaks to the elaboration of reason as the common source of public policy.<sup>6</sup> Arbitrary and capricious actions violate the idea of law, even if supported by a majority. A vibrant democracy will have a lively debate about the nature of public reason, ranging from the supporters of John Stuart Mill to those of John Rawls. It will take seriously critical work and be self-conscious regarding hidden biases. It will invest in education as necessary for citizenship.

The dignity of the individual speaks to the place of morality in a democracy. Individual citizens continue to be moral agents entitled to respect as such. Morality does not disappear with a majority vote. A democratic society does not tolerate castes or outcasts. It understands public life to depend on personal morality. This is not the private morality of an internal conscience but the public morality of a civil society in which citizens are recognized as rights-bearing agents enmeshed in communities ranging from families to markets. These are the conditions for the democratic formation of public opinion.<sup>7</sup> As with public reason, this commitment to the idea of rights does not settle our debates over the substance of rights. Rather, a democracy invites this debate.

Finally, democracy uses elections as its method for selecting those who will temporarily exercise the power to make and execute law. Elections are a method of decision for choosing among competitors who have equal standing. The winner of an election occupies an office defined and limited by law. The officeholder has no authority to disrespect any citizen or to violate the law. He or she has no personal authority, but only that attached to role.<sup>8</sup> Accordingly, every official is replaceable, for power is located in the office, not the person.

These three elements of a democracy are not exclusive. Alone, they will not offer a robust account of how a democracy works successfully. But the three do give us a framework for analysis. We need to ask, for example, how a society can inform policy by public reason. Similarly, we need to ask how we teach respect for individual dignity: what roles are played by schools, families, and communities? Finally, we need to think through the structures and procedures of fair elections. Different nations will answer these questions differently.<sup>9</sup>

<sup>5</sup> Mathias Kumm refers to these as the Trinity of constitutional faith (Kumm 2011).

<sup>6</sup> Roberto Unger refers to this as “rationalizing legal analysis” (Unger 1996, 36).

<sup>7</sup> This idea is associated with Jürgen Habermas, who summarizes his view on this point: “This then is the core of the argument: Without basic rights that secure the private autonomy of citizens, there also would not be any medium for the legal institutionalization of the conditions under which these citizens could make use of their public autonomy. Thus private and public autonomy mutually presuppose each other in such a way that neither human rights nor popular sovereignty can claim primacy over its counterpart” (Habermas 1999, 940).

<sup>8</sup> The recently decided case of *Trump v. United States* (July 1, 2024) is quite to the contrary. It is, accordingly, a deeply problematic decision.

<sup>9</sup> See Benhabib 2006.

Democratic politics is, for this reason, incapable of mechanical ordering. The art of democratic governance is that of holding these three different perspectives together, for they span diverse schemes of value.

Democracy, then, is a moral, legal, and political project. In each respect, we must speak meaningfully about government by and for the people, which means we must speak meaningfully of the people as a collective agent appearing in each of these perspectives. We suffer today from a narrowing of the democratic perspective such that our attention focuses only on the third element: elections. Consider an analogy. Teaching literature, we distinguish among the characters, the plot, and the theme of a work. A democracy sustains a narrative of itself that rests on similar imaginative structures. The officials are the characters; passage of laws forms the plot; and the theme is an aspiration to realize a full and meaningful life for every citizen. This is the meaning of We the People as a political, legal, and moral force in the world. We call that force democracy.

American history has gone through eras in which one perspective on democracy has dominated the others.<sup>10</sup> In the decades up to the Civil War, democracy was understood largely through the perspective of legality. The constitutional project of law creation filled the imagination even as North and South argued about the nature of that project. The moral perspective dominated the era from the end of the Civil War to the middle of the 20th century. Americans argued about the nature of liberty: was it expressed in Reconstruction or markets? Ours is an era in which counting votes dominates the democratic imagination. Democracy becomes a story of electoral success: laws and public morality are to follow from that success. We have effectively been captured by an image that only lately arrived. The image equates democracy with the voting booth.

To think we can understand democracy from this single perspective, however, is comparable to thinking we can understand literature by paying attention only to the characters – their interests, successes, and failures. A democracy empowers the governed to subject their governors to periodic elections. Of course, but not only. A democracy can thrive only when all three aspects are robust representations of the people. We must see ourselves whether we look to our fellow citizens, the laws that govern us, or our representatives.

The health of our democracy will only begin to recover when we have constructed the conditions under which all of these beliefs are again imaginable. As Tocqueville understood, this begins in the schoolhouse and continues as a practice of volunteering within the community. Once we have realigned our faith and our practices with the broad array of democratic values, trust in elections may again become credible.

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<sup>10</sup> See Kahn 2019.

## References

- Arendt, Hannah. 2006. "What Is Authority?" In *Between Past and Future*. Penguin Classics, New York.
- Benhabib, Seyla. 2006. "Democratic Iterations: The Local, the National, and the Global." In *Another Cosmopolitanism*. Oxford University Press, Oxford.
- Habermas, Jurgen. 1999. "Between Facts and Norms: An Author's Reflections." *Denver University Law Review* 76: 937–42.
- Kahn, Paul W. 2019. *Origins of Order, Project and System in the American Legal Imagination*. Yale University Press, New Haven.
- Kumm, Mathias. 2011. "An Integrative Theory of Global Public Law: Cosmopolitan, Pluralist, Public Reason Oriented." [http://www.ucl.ac.uk/laws/jurisprudence/docs/2011/2011\\_kumm.pdf](http://www.ucl.ac.uk/laws/jurisprudence/docs/2011/2011_kumm.pdf).
- Lincoln, Abraham. 1946. "The Perpetuation of Our Political Institutions: Address before the Young Men's Lyceum of Springfield, Illinois, January 27, 1838." In *Abraham Lincoln: His Speeches and Writings*, edited by Roy Basler, 76–85. World Publishing Company, Cleveland.
- Tocqueville, Alexis de. 2002. *Democracy in America* [1835], edited and translated by Harvey C. Mansfield and Delba Winthrop. University of Chicago Press, Chicago.
- Unger, Roberto. 1996. *What Should Legal Analysis Become?* Verso, New York.