

2011

Direct Democracy: Government of the People, by the People, and for the People

Richard A. Epstein

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard A. Epstein, "Direct Democracy: Government of the People, by the People, and for the People," 34 Harvard Journal of Law and Public Policy 819 (2011).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

DIRECT DEMOCRACY: GOVERNMENT OF THE PEOPLE, BY THE PEOPLE, AND FOR THE PEOPLE?

RICHARD A. EPSTEIN*

In the Gettysburg Address, President Lincoln declared ours a “government of the people, by the people, [and] for the people.”¹ Is the Gettysburg Address an appropriate template for the American Constitution? Are national referenda and initiatives an appropriate template for the American Constitution? This Essay will argue that they are not.

In fact, after considering Professor William Eskridge’s remarks at the 2010 Federalist Society National Lawyers Convention,² my opposition to the use of either referenda or of initiatives has, if anything, hardened. Let me ground this intuition in political and constitutional theory. There is one question that is absolutely essential to this discussion: Just how unrestrained ought our legislative authority be in a constitutional democracy that seeks to protect vested individual rights?

In a constitutional democracy, we are far from thinking that the sole object of government is to satisfy the preferences of the median voter. We have, at least in the original design of the Constitution, a system that has no directional pull at all. Each distinct institution of government, from the President, to the Senate, to the House, is subject to different rules, all of which, in combination, are designed to create multiple obstacles to the enactment of laws.³ Why does American government take this

* Laurence A. Tisch Professor of Law, New York University School of Law; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; Senior Lecturer, The University of Chicago Law School.

1. President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN 184, 184* (William E. Gienapp ed., 2002).

2. William N. Eskridge, Jr., *Remarks at the 2010 Federalist Society National Lawyers Convention, Government of the People, by the People, and for the People?* (Nov. 19, 2010), http://www.fed-soc.org/publications/pubid.2024/pub_detail.asp.

3. *See* U.S. CONST. art. I, § 7, cls. 2–3 (articulating the bicameralism and presentment requirements); *THE FEDERALIST NO. 51*, at 322 (Alexander Hamilton or James

presumptively obstructionist stance? It does so because it harbors a deep ambiguity about what it means for anyone to evoke the multi-faceted image of “the people” in analyzing American constitutional law or indeed any other system of governance.

What do I mean by this simple and uneasy proposition? The nub of the argument is that when we start thinking about “the people,” we do so in two very different ways. Sometimes we treat any reference to the people as reason for celebration. The American people have spoken and decided that X, not Y or Z, ought to be President of the United States. Yet the reality is that 54 percent voted for candidate X, while the other 46 percent of voters split their votes among Y and Z. In cases where the passing of legal authority is at stake, we consciously create an illusion of collective unanimity by using the term “people” to turn a fragile majority into a 100 percent rout. As long as everyone may participate in the election, this usage is, at least for the moment, a useful affirmation of democratic participation.

But using this illusion to secure political legitimacy also has a dark side, for all too often this phrase can be misleading and dangerous. In one sense, the most dangerous words in the U.S. Constitution are the most celebrated. I refer here to the words “We the people,” which begin the Constitution’s Preamble.⁴ I take such a negative view of one of the cornerstones of our Constitution because of how the original draft of this particular provision read. The words were: “We the People of the *States* of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the fol-

Madison) (Clinton Rossiter ed., 1961) (“A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights.”).

4. U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

lowing Constitution for the Government of Ourselves and our Posterity.”⁵ Today’s familiar Preamble contains no such suggestion that the Constitution was designed to bind the people of each individual state.⁶ It is indeed evident that the use of that longer phrase set a different tone for the rest of the Constitution. It showed that the Framers had to tread carefully because they were acting as delegates for individuals in their own states, some of whom might disagree with them. The more elaborate language invites a mood of caution. In contrast, the phrase “We the People” used in the final draft⁷ creates an image of coercive unanimity.

Consider the reaction that we all have when we speak about the People’s Republic of China or the People’s Republic of East Germany or, closer to home for at least for some of us, the People’s Republic of Cambridge, or the People’s Republic of Berkeley. The first two examples refer to totalitarian regimes. The second two examples refer to cities whose policies on such issues as rent control and land use planning invoke that rather unflattering comparison. In all of these cases, there is a risk that any group that can attain a majority, and many oligarchs who cannot, can introduce measures in the name of the public that do not match the preferences of the people who will be bound by those measures. Therefore, the aggressive reference to the power of the people to make law creates, in my mind, an open invitation to totalitarianism.

But it need not be that way. Look closely now at the other uses of the word people in the Constitution. There are four such uses in the Constitution, all of which are contained in the Bill of Rights: the right of assembly in the First Amendment;⁸ the protection against unreasonable searches and seizures in the Fourth Amendment;⁹ the guarantee of individual rights in the Ninth

5. COMM. OF DETAIL, REPORT OF THE COMMITTEE OF DETAIL (Aug. 6, 1787), *available at* <http://hdl.loc.gov/loc.rbc/bdsdcc.c01a1> (presenting the first draft of the Constitution).

6. *See* U.S. CONST. pmbl.

7. *Id.*

8. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

9. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by

Amendment;¹⁰ and the reservation of all powers not delegated to the United States in the Tenth Amendment to the states or the people¹¹ (think again about the choice of words in the Preamble).

These four instances involve a benign use of the term people. No longer do we have the risk of majoritarianism (or worse) running rampant. Rather, we have a stirring declaration that each individual within this society will receive explicit personal protection against the impositions of government, so that people can assemble peaceably in public or be secure in their homes. This guarantee of protection does not mean that we all have the right to live together in one giant teepee, but that each of us has private individual rights, and that these rights will be protected against government interference. No longer do we speak of the rights of the majority. Now we speak of the rights of each individual to be a majority of one in his own space.

These defensive uses of the term people in the Bill of Rights thus have a completely different resonance and tone from the aggressive and collectivist use of the term as it appears in the Preamble. Moreover, this difference has had real consequences for the interpretation of the original Constitution, because when courts invoke the term "We the People" from the Preamble, they use it to indicate the direct relationship of individuals to the central government, which necessarily downplays and degrades the independent role of the States in the original system.¹² So this trope of "We the People" is not simply a rhetorical trope without institutional consequences. It is a wedge to the modern expansion of federal power.

Having thus set the stage, I return to the Gettysburg Address. The great achievement of the Gettysburg Address was to make the case for the inclusion of all people in whatever crazy processes the United States had developed to make and apply

Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

10. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

11. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

12. See *e.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570, 579–80 (2008) (outlining the individual right to bear arms vis-à-vis the government).

laws.¹³ Accordingly, we cannot today exclude large numbers of individuals within the United States from participating as equal citizens.¹⁴ And so in its own way, the oblique subject of the Gettysburg Address was the great issue of the time: slavery. Viewed in light of its historical context, President Lincoln's speech was a stunning rhetorical and intellectual achievement. But although it speaks authoritatively on the importance of inclusion, it does not address just how this inclusive organization should operate.

I now consider the referendum and the initiative in two ways. The first way considers these devices as a way of putting more laws into place. Given the number of laws already in force, that is the last thing that we want from the federal government. The second way sees these devices as alternatives to the present structure of our national government. In this regard, the judicial protection of individual rights of "the people" is a concerted effort to slow down the overall pace of government, by ensuring that the median voter cannot impose his will, through referenda and initiatives, on those dissidents inside this society who have different views about how to run their own lives.

We thus face a collective dilemma. We need to rely on median voters on matters of collective deliberation, but we need to restrain the median voter on questions of individual rights. No constitutional democracy can afford to neglect either part of this two-step game.

With these twin objectives in mind, consider the difficulties of both the referendum and the initiative. First, as a prosaic matter, how does one select the date of a national referendum? Although this looks at first like a trivial problem, it takes on a different significance in light of Proposition 8 in California, where the vote in favor of limiting gay marriage was influenced by holding the referendum on the same day as the presidential election.¹⁵ The choice of this particular date increased voter turnout in socially conservative black communities that might have af-

13. See *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality from . . . Lincoln's Gettysburg Address . . . can mean only one thing—one person, one vote.").

14. See, e.g., U.S. CONST. amend. XV (race no bar to voting); U.S. CONST. amend. XIX (women's suffrage).

15. See *Proposition 8 Exit Poll: Whites Oppose, Blacks Support, Latinos Divided*, L.A. TIMES, Nov. 4, 2008, <http://latimesblogs.latimes.com/lanow/2008/11/proposition-8-e.html>.

fects the outcome.¹⁶ But if the referendum is held on some day other than the national election, what day is chosen, and why?

The choice of date ties in to a second problem: the clear incentive for interest groups to play the timing game. Even at its best, the referendum gives only a snapshot of public preferences. A program of universal healthcare like the Patient Protection and Affordable Care Act of 2010 (PPACA)¹⁷ would have done quite well in a referendum (if a referendum could be held on such a complex matter) had it been held sometime in April or May of 2009.¹⁸ But a year later, the same measure would completely crater in light of the major shifts in public opinion.¹⁹ Which of these two different results makes sense? This one variable thus becomes the object of strategic calculation for both sides.

A third problem with this device is equally mundane: how many separate referenda can be bundled into a single election? Can a government have one, two, three, ten, or twenty of these things going forward at the same time? Once that is decided, the complex administration of the system could lead to the need for a lengthy recount if this process goes amiss. *Bush v. Gore*²⁰ is a cautionary tale.

Now suppose that the referendum passes only on an advisory basis in order to avoid a direct clash with our current legislative structure; how should Congress draw inferences if that vote comes out 53% one way, 47% the other way? If the referendum is on some major structural change, does a 53% majority suffice to warrant the shift in policy? Or is the demand for any supermajority wholly inappropriate because the people, or at least 51% of them, have spoken and that bottom line is all that matters? These modest complexities with the referendum just dump back into the lap of Congress another set of endless

16. *See id.*

17. Pub. L. No. 111-148, 124 Stat. 119.

18. Paul Steinhauser, *Poll: Americans OK with More Government Health Care Influence*, CNN, May 29, 2009, http://articles.cnn.com/2009-05-29/politics/health.care.poll_1_health-care-health-care-health-insurance?_s=PM:POLITIC (“[S]lightly more than six out of 10 think the government should guarantee health care for all Americans.”).

19. Stephanie Condon, *Poll: Most Americans Remain Against Health Care Overhaul*, CBS NEWS, Apr. 2, 2010, http://www.cbsnews.com/8301-503544_162-20001700-503544.html?tag=contentMain;contentBody (finding that 53% of those polled opposed, 32% approved the PPACA).

20. 531 U.S. 98 (2000).

procedural disputes that make it hard to determine the validity, interpretation, and enforcement of any referendum.

On top of all of these difficulties, it is necessary to make some sensible judgment of the kinds of matters that are proper to present through a referendum of any sort at the federal level, considering the now frayed doctrine of enumerated powers that (thankfully) still exerts some hold on the American conscience. It thus is worrisome to ask what should be done with respect to a referendum whose content falls outside the power of Congress. At this particular point, the referendum will run headlong into a series of judicial challenges about its constitutionality.

Given these institutional puzzles, how should we think about the role of the median voter? My view is that we should, in today's environment, set the presumption against the will of the median voter in a national election; however, this judgment is ever so tenuous in the absence of real knowledge as to what a particular referendum provides. On the broader question of more law, or less, the answer today is perfectly unambiguous. We want fewer laws coming out of Congress. So in that spirit I offer my own parliamentary amendment: The only time the Senate filibuster should be out of order is when a proposal is on the floor to repeal legislation already in effect. But we should by all means keep, or strengthen, the filibuster whenever new legislation is on the table.

This nation is in a perilous state now that the engine of government is overheating. A way must be found to cool it down. That cannot be done by seeking to implement a major new scheme for creating law on top of the present overloaded system.

But if we put the referendum to one side, what should be done to advance meaningful structural reform? My own preference is for the Supreme Court to return to a system of interpretation that stresses limited government and strong property rights. I do not dare suggest that we work toward this end by constitutional amendment, for in my view the amendment process—given the general tenor of the time—will turn into a runaway train that will lead to heaven knows where. As a nation, we should work to return to the original tradition that takes enumerated powers and individual rights much more seriously than we do.

Professor Randy Barnett has put forward an ingenious way of challenging significant portions of the PPACA by attacking

the individual mandate as outside the scope of the Commerce Power.²¹ I think that there are many more adjustments to the federal-state interface that can be handled through the encroachment doctrine²² or through a serious investigation of whether or not the regulated entities receive a permissible return on their investment given the major restrictions on pricing in the PPACA.²³ The best way to return to a more sane government is to make sure that short-term popular majorities cannot invade the vested rights of liberty and property of other citizens.

I thus propose a radical shift away from the referendum. Rather than trying to find ways to force more issues into the political process, I would prefer to lower the heat, to lower the decibels on the political front by concentrating on a neglected piece of the puzzle: a return to the original vision of a constitutional democracy. Recall that “Democracy,” when Aristotle talked about it, was an impolite word.²⁴ “Republican” was, in fact, the preferred form of popular rule because it avoided the dangers of majoritarian will.²⁵ “Referendum” pushes the discourse in the wrong direction. Rather than ride a new horse into the sunset, we should try to consolidate and restrain the current level of activity. Keep these restless horses in the stable and work to reform the current constitutional structure. Make it more responsive to the will of the people by doing less, not more, through the intervention of the national government.

21. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2011).

22. See, e.g., Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111 (2011) (discussing state resistance to the encroachment of the federal government in healthcare).

23. See Richard A. Epstein, *Impermissible Rulemaking in Health-Insurance Reform: Why the Reid Bill is Unconstitutional*, POINT OF LAW (Dec. 18, 2009), <http://www.pointoflaw.com/columns/2009/12/impermissible-ratemaking-in-he.php> (arguing that health care reform strips health insurers of returns on their massive investments in their businesses).

24. See Fred Miller, *Aristotle's Political Theory*, THE STAN. ENCYCLOPEDIA PHIL. (Jan. 26, 2011), <http://plato.stanford.edu/archives/spr2011/entries/aristotle-politics>.

25. See THE FEDERALIST NO. 10 (James Madison).