I. DEMOCRACY VERSUS MERITOCRACY?

Like others in this volume, I treat political meritocracy as rule by the meritorious (those with superior ability and virtue) along with a selection mechanism that aims at selecting those with merit. I shall identify “democracy” with political systems of collective self-government based on the principle of political equality: democratic governments are understood to rest on the ultimate sovereignty of the people as a whole, and citizens are treated as political equals. Power holders are accountable to the people in appropriate, albeit often complex, ways. I say more about this later.

Let us begin with what strikes many nowadays as an especially acute moral and practical dilemma, one that the American founders also confronted. On the one hand, by making government accountable to the people, democracy helps solve the problems of both normative and descriptive legitimacy, but, on the other hand, accountability to mass electorates creates an equally troubling problem of competence. The leading public markers of democratic legitimacy are mass elections with a universal adult franchise, but regular mass elections in no way guarantee capable government. Indeed, it often seems that instituting competent authorities to deal with mounting problems requires technocratic and bureaucratic institutions constituted on the basis of expertise or merit, insulated from democratic accountability.

Many observers of mature democracies seem to doubt that democratic institutions are capable of responding adequately to our problems, including the looming catastrophe of climate change and even more immediate economic and political crises. Dealing effectively with climate change seems to require the further empowerment of nation-based and international bureaucracies, staffed by scientific and administrative elites, able to plan for the long term in coordination with other elites in multinational forums. Bureaucracies such as these may be able to address long-term environmental problems precisely because they are not directly accountable to the electorate. The financial crisis in Europe similarly seems to require a transfer of power from “democratically elected” legislatures to unelected technocrats at the European Central Bank, the International Monetary Fund, and elsewhere. In Italy and other critical nodes in the European financial crisis (which continues to unfold as I write), a crucial ongoing question has been whether national electorates and electorally accountable officials can devise, enact, and adhere to fiscal policies capable of ending the
crisis, or whether resort must be had to unelected governments of technocrats, such as that led by Mario Monte, a former EU commissioner and academic, who served for a time as both prime minister and finance minister in Italy.

The apparent inability of elected leaders to enact legislation with an eye to long-term problems causes many to question whether democracy is itself consistent with good government. Elected leaders may be accountable and responsive to electorates (or at least the politically active and mobilized) but not act responsibly to address long-term problems. So must we conclude that rule on the basis of democratic equality is necessarily opposed to rule on the basis of competence and virtue? Ought we to prefer the rule of merit or, more moderately, strike a compromise between the principle of democratic equality and the principle of merit, thereby favoring a “mixed” or hybrid regime? These questions, and the suspicions that fuel them, are as old as democracy itself.

John Stuart Mill argued in favor of giving “plural votes” to the highly educated. Political theorists such as Bryan Caplan and Jason Brennan have recently suggested that there ought to be a competency test for voting. Indeed, the fact that voting involves the exercise of political power over others suggests to some that competency tests for voting are not only permissible but necessary.

One problem with voter competency tests is that they often seem arbitrary. An example would be the proposal by professors of political theory to test citizens in political theory. While a capacity to exercise good moral and political judgment is a pre-requisite of good citizenship, it is doubtful that these can be tested for. Insofar as we aim to empower the meritorious in politics, that should mean that we are empowering not simply the talented but the virtuous: those with good moral and practical judgment, who will put their talents to use on behalf of the public good and justice. How would we test for that? Possessing a college degree or more advanced degrees would, at best, correspond very imperfectly with the qualifications and qualities that we want citizens to possess, and for that reason such tests will justifiably be seen as palpably invidious by those who are thereby disadvantaged.

Enjoying the privilege of a specially weighted vote based on educational qualifications is less arbitrary than enjoying it based on lineage or birth, arguably, but many of those who are thereby disadvantaged in this basic aspect of citizenship will have reasonable grounds for objecting in my view. Democracy is now understood, properly, not simply as a mode of collective self-governance but as a social ideal according to which citizens relate to one another as equals: equal not merely in formal rights, but as social equals who enjoy a fair opportunity to succeed regardless of conditions of birth, and who do not defer to one another on arbitrary grounds, such as supposed nobility of lineage.

It is possible that special age-based or education-based privileges with respect to political participation – “plural” or specially-weighted voting privileges for those who are older (and so, arguably, wiser) or who have higher educational attainments – would be more generally acceptable in some Confucian societies than in their Western counterparts. It is especially difficult to speak reliably of public opinion in societies that do not yet enjoy freedom of speech and association, a free press, and multiparty competition. It is a further question whether those specially empowered elites would pursue the good of all or the narrow interests of themselves, their families, and their class. Many forms of privilege that purport to be based on merit serve mainly to give unmerited privileges to self-serving elites, and particular group-based biases (older voters are predictably more conservative on various social issues and also more sympathetic to public spending on old-age pensions). So we need to beware of the abuses of the idea of meritocracy.

Irrespective of how one judges specific proposals such as those I have just discussed, the framing of “democracy versus meritocracy” is unhelpful and misleading. “Democracy” comes in many varieties, but leading forms of contemporary liberal, democratic, representative government (republican government, as the American founders would have said, or constitutional democracy) incorporate strong meritocratic elements. The whole point of political representation, according to James Madison and many others since, is “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” Indeed, he argued that “it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.” These sorts of observations, indeed, lead Bernard Manin to go so far as to question whether systems involving political participation should be regarded as “democratic” or whether that term should be reserved for systems more like that of the ancient Athenians, where, as Madison put it, “a small number of citizens... assemble and administer the government in person.” The Athenians also employed representation to administer
some of the functions of government, but the distinctiveness of the American system, and many of the other constitutional democracies that have followed, is, as Madison put it, "the total exclusion of the people in their collective capacity from any share in" the direct exercise of governance.8 Nowadays, we regard constitutional systems based on political representation as species of democracy, and for good reason, as I explain subsequently.

Of course, the framers of the American Constitution were not confident that popular elections would always elevate the fittest to govern; some were extremely pessimistic on this score, and many became more so over time. Institutions had to be arranged so as to elicit the qualities desired in office holders, and to give office holders incentives to behave well. Moreover, accountability mechanisms (sometimes in the form of "checks and balances") had to be put in place to curb abuses of power. Accountability would operate horizontally, or across elites, one to another, and not only vertically, from elites to the people.

So it seems to me that framing the issue as "democracy versus meritocracy" is misleading and unhelpful. The important practical question is how can we improve the meritocratic quality of our governing institutions consistent with democratic principles. The lesson of the American founding is: very far indeed. That is, there are many ways in which systems of government that rest on popular sovereignty can and do empower institutions insulated from direct electoral accountability, not to compromise democratic values but to realize in practice a system of deliberate and competent collective self-government. Among the crucial features of constitutional systems for reconciling democracy and competence are representation, delegation, and forms of accountability other than by popular election.

The specific institutions of American democracy are, obviously, frequently flawed. The American party system is deeply polarized at the elite level, and this is especially true of Republicans in Congress who are far to the right of the general public and unwilling to compromise to address pressing problems.9 The selection process for Supreme Court justices is poorly conducted, with the Senate failing to play its proper role and the system of lifetime tenure for justices now resulting in too little turnover on the Court. And of course American politics is awash in private money, making a mockery of political equality. Nevertheless, with some significant amendments, the American constitution has sustained a system of representative democracy for well over two hundred years.

Rather than defending the U.S. Constitution's particular features, I draw on it to make the more general point that democracy in its modern constitutional form is compatible with a host of mechanisms that seek to enhance the role of competence in government. In this spirit, I defend the enterprise of modern liberal democratic constitutionalism, which the American founding did a great deal to help inaugurate. I do not argue, here or elsewhere, that American institutions should be copied in detail by others.

II. THE CONSTITUTIONAL CONCEPTION OF DEMOCRACY

The constitutional conception of democracy builds on the insights of the American founding.10 This view opposes a variety of alternative conceptions of democracy that can be characterized as majoritarian, aggregative, plebiscitary, populist or participatory, views that sometimes bear similarity to the political views of the Antifederalist opponents of the Constitution.

Those latter views, which I reject, tend to identify democracy with directly participatory institutions, with the exercise of power by the people’s directly elected representatives, or with strictly majoritarian institutions.11 These views typically reject the democratic credentials of institutions designed to operate at some remove from direct electoral accountability, such as courts armed with the power to review legislation for its conformity with the constitution. So, on this view, a central bank insulated from electoral pressures may be necessary for good government, but it departs from democratic principles and exacts a cost in the currency of democracy. Thus, it is fairly easy to tell when democracy is realized: we look for the right procedures, which typically involve the electorate directly, the exercise of power by the immediate representatives of the electorate, or via majority rule voting.

On the view I favor, democracy is understood to be a system of collective self-rule on the basis of political equality, but the underlying principles of popular sovereignty and political equality are consistent with a variety of institutional forms, including institutions that are insulated from direct electoral accountability. This general approach to thinking about democracy builds complex judgments into questions of democratic design and assessment: it sets higher and more abstract but more defensible moral standards for assessing institutional performance than the views that are rejected (which reintroduce the complexity by
saying that we want both democracy and "good government"). So, for example, majoritarian or participatory conceptions of democracy (described earlier) conclude readily that judicial review makes a system less democratic. But on the constitutional conception, the issue can’t be settled so quickly.

Judicial review, as its defenders insist, is consistent with the principle of political equality, it may be authorized by a popular constitution, and it may have the ongoing support of electorates. Judges may have a sufficient democratic pedigree if the power of the judges is understood to flow ultimately from the people and judges are selected by elected officials or by some other publicly acceptable process. Also crucial is that the judges themselves are appropriately accountable, not directly via elections necessarily but indirectly, because of the need to justify their decisions in written opinions that are scrutinized and debated in public. Finally, we can consider whether judicial review operates in a way that leads to better protection for fundamental rights or other guarantees of basic justice and increases the reasonableness or competence of legislation, in ways that the public eventually endorses, then we may say that judicial review improves substantive public justifiability.

Now that last criterion – of substantive public justifiability – might seem to suggest only that the Supreme Court increases the justice or merits of governance, but not in a way that improves its democratic credentials. So this criterion may seem to one side of democratic values specifically. I don’t want to settle anything by conceptual fiat. However, when the third element is combined with the first two, then I think we can understand it to be an aspect of democratic value. The Court has to explain its decisions in public, and its politically salient decisions will only stand if the other branches and the public is persuaded, if not immediately, in due course. So we should view Supreme Court decisions and the justifying written opinions not simply as judicial fiat asserting understandings of rights or justice deemed superior to the legislatures, but rather as arguments addressed to the other branches of government and the public, who in turn have ways of pushing back and seeking to have Supreme Court decisions overturned. In fact, I think the president and members of Congress should contest more actively Supreme Court decisions with which they disagree.

In addition, and most important from a democratic standpoint, is that judicial review can help protect the equal rights and equal standing of political minorities, whose fundamental interests might otherwise be infringed on in more majoritarian branches of government.

Constitutional courts, by enhancing the protection of minority rights and helping make sure that minority views are taken seriously in legislative settings, can and do make government more democratic rather than less.44

On this more complex, constitutional conception, there is an interpretive gap between the abstract principles of democracy and particular institutional forms. That gap means that we cannot conclude automatically that some particular practice or institution is undemocratic simply because it places power at some remove from direct accountability to the people (via election or accusation at a public meeting or in some other direct way). The U.S. Supreme Court may well be a democracy-enhancing institution if it has an acceptable democratic pedigree, is appropriately democratically accountable, and tends to increase our capacity to collectively realize democratic values of collective self-government on the basis of political equality.

Indeed, as Christopher L. Eisgruber argues, the Supreme Court should be understood as a representative institution: the office of Supreme Court Justice is designed to represent the public’s capacity for impartial moral judgment. Supreme Court justices are insulated from direct electoral accountability, but this only sharpens the justices’ need to defend their decisions publicly and in opinions that are subject to intense scrutiny and criticism. Life tenure means that judges need aspire to no other or higher office, and this can help protect their capacity for impartiality (they have no need to curry favor with others). These and other features can be understood as attempts to craft an institution capable of representing the people’s capacity for impartial moral judgment. And ultimately, the capacity of this institution to make its decision stick, especially when they are highly salient and controversial — such as the limitations imposed in national legislative power in the early decades of the twentieth century (which eventually failed), or the efforts to advance racial equality in the mid-twentieth century (which eventually succeeded, at least in part) — depend on its capacity to win over the public mind and thereby to secure the support of the elected branches of government.

It may seem overly sanguine to cast constitutional courts as representative institutions and to say that they represent the people’s capacity for impartial judgment. It is true that the public often fails to display a capacity for reasoned reflection. But the fact is that since World War II, most popularly ratified constitutions have included judicial review. And publics typically place a high degree of confidence in their
constitutional courts – very often, more than they do in their elected legislatures. Part of the reason, I think, is that constitutional decisions are not really outside of but rather form part of a larger political process that unfolds over time. As Barry Friedman puts it toward the end of his impressive study, aptly titled The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution: “It simply is the case that the judiciary’s capacity to give the Constitution meaning, to protect minority rights, has always been limited by popular support for those decisions.” Justice Ruth Bader Ginsburg also rightly insists that judges “do not alone shape legal doctrine”; rather, “they participate in a dialogue with other organs of government, and with the people as well.”

The point here is not to defend the specific institutional form of the American Supreme Court. Indeed, I am persuaded by Mark Tushnet that other constitutional systems may do a better job of promoting legislative and popular deliberation on constitutional questions and of protecting social welfare rights. My point is broader than the specifics of the U.S. Constitution: a constitutional conception of democracy is especially well suited to incorporating within our understanding of democracy those values associated with meritocracy. Simpler conceptions of democracy, whether majoritarian, electoral, aggregative, or participatory, tend to flatten and simplify the democratic landscape, placing tremendous emphasis on popular elections and elected representatives. But when mass publics address constitutional design, they recognize that a richer and more complex set of institutional arrangements are needed to realize in practice the values of self-government by all and in the name of all.

III. CONSTITUTIONAL DEMOCRACY’S ACCOUNTABILITY SPECTRUM: FROM RESPONSIVENESS TO RESPONSIBILITY

Democracy is about a lot more than mass elections, but that does not mean periodic mass elections do not matter to democracy. To the contrary, mass elections are big dramatic moments in the lives of modern democracies, where the ruling element, or important parts of it, is directly accountable to the mass public. These moments maximize horizontal equality and inclusion: all adults within the appropriate constituency get an equal vote or votes and the decision as to who wins depends on a tally. The period of campaigning leading up to and culminating in major elections is typically a period of sustained and intense mobilization and engagement, in which contending sides reach out to and seek the support of every last voter. But elections also have tremendous limitations. For one thing, voters are typically confronted with a limited range of choices, which may not allow them to register their actual judgments. Moreover, the fact that in a mass democracy of many millions, one’s personal influence is so dilute means, as Schumpeter observed, that voters have no strong incentive to prepare to vote in a well-informed and responsible way (he likened the franchise to being a member of a committee so unimaginably huge that no one has any incentive to prepare for the meeting).

And so we can see that accountability to the public takes many forms in modern mass constitutional democracies. These forms might, as John Ferejohn has observed, be laid out across a spectrum. Toward one end are those institutions and holders of public office whose authority flows from mass elections and direct and frequent electoral accountability to mass publics. At the other end are institutions remote from direct and frequent accountability, but these institutions typically have heightened reason-giving requirements. We can think of the ends of the spectrum as ranging between poles of pure electoral and pure justificatory accountability. At the electoral end, when voters enter the polling booth and get behind the curtain, they can vote for whoever they damn-well please. And, at the other end, we expect Supreme Court justice to offer elaborate written opinions citing precedents and principles that constitute a soundly reasoned public justification.

Modern democracies routinely create institutions that span the spectrum, and the whole range ought to be thought of as ways of constituting a system of collective self-rule. Elections help ensure that periodically, as Ferejohn puts it, the public simply gets to “yank the chain” and make those wielding power pay attention, by rejecting those in office (“throwing the bums out”). On the other hand, the members of the Federal Reserve Board, the Supreme Court (as well as the federal judiciary generally and most state judiciaries), and the many regulatory agencies that operate on the basis of elaborate administrative procedures, are insulated from direct electoral accountability. It is not that they are unaccountable, but their accountability operates via procedures and the need to give reasons and evidence in public: these insulated offices act on behalf of the American public; their work is assessed by other elites, elected legislatures, and the public. They have, as I said earlier, a sufficient democratic pedigree: they are appointed by elected
officials, often for limited terms. They often enjoy a high level of public confidence and legitimacy. We may say that they seem to represent, for the public, the public’s capacity for responsible and deliberate judgment.

Institutions arrayed across this spectrum tend to reflect both ends to a degree. Members of the House of Representatives (directly elected every two years) are still expected to justify their votes in public. And if the public and their direct representatives get upset enough, they can overturn decisions of the Supreme Court or the Board of Governors of the Federal Reserve. These institutions are hard to reverse — public opinion must be concerted, broad, and sustained — but they can be (and have been) reversed and so they do not have the final word.21 And as I have said, other constitutional systems have found ways of improving on the American model. I endorse the Australian practice of mandatory voting, for example, and I am sympathetic to the idea — advanced by John Stuart Mill once again — that citizens should vote in public, which would do more to encourage them to defend their votes.22

IV. AMERICAN CONSTITUTIONAL DEMOCRACY: RESPONSIVE AND RESPONSIBLE REPRESENTATION

I offer these remarks, and what follows, only for the sake of illustration. My aim is not to argue that the American constitutional order is functioning well or that it should be copied by others. There is a lot of room for criticism of many features of the American system. I make a broader point: delegations of power to institutions insulated from direct electoral accountability to the people for the sake of improving merit-based performance is perfectly consistent with democratic legitimacy; indeed, such insulation frequently represents democratic improvement. This means that the problem of meritocracy can be addressed within the framework of constitutional democracy and that problems of democratic constitutional design should not be viewed as “democracy versus meritocracy.”

The American Founders were deeply concerned about the problem of democratic incompetence. They worried that institutions too responsive to the public — with short terms of office — would tend to be fickle, unwise, and irresponsible. They thought, in fact, that this was precisely the experience of popular self-rule under the Articles of Confederation, the confederation of states that lasted from 1781–9. Under the Articles, the national government was extremely weak. It lacked, for example, the power of direct taxation and had to request funds from the states whose compliance was essentially voluntary.23 What is more, the state governments were also strikingly populist or plebiscitary, as we would say now, and unstable. The destabilizing features of state governments included such things as plural executives (executive councils) that made it hard to assign responsibility or engage in vigorous execution of the laws, unicameral legislatures with short terms, and provisions for popular recall of elected officials. The weakness of state governments under the Articles reflected one legacy of the revolution’s struggle against British rule: a deep suspicion of executive power and all remote power, and a desire to keep government close to the people. The “Antifederalists” opponents of the new Constitution (who favored more moderate adjustments to the Articles of Confederation) were aptly called by historian Cecelia Kenyon “men of little faith.”24

The framers of the American Constitution did not favor “democracy,” which they understood in terms of direct democracy with a strong tendency toward instability, lack of wisdom, and majority tyranny. But they endorsed the republican principle according to which all political authority was understood to flow from the people (women, slaves, and, in many states, propertyless males were excluded, but the franchise was unusually wide by the standards of the time). In the language of the Declaration of Independence (and in these respects following John Locke, among others), governments are “instituted” among men to secure their rights, and all governments derive their “just powers from the consent of the governed.” Thus, we can say that the American founders accepted the principle of “government of the people.” They also endorsed the principle of “government for the people”: all political offices were understood as having authority to govern only for the public good, the good of all arrived at after due reflection. The object of government was, as Federalist #10 put it, “the permanent and aggregate interests of the community.”

But what about “government by the people”? The framers did not endorse highly participatory democracy, or plebiscitary democracy, and so we must leave a question mark there for now. Notably, the Constitution not only employed representation but, Madison emphasized, totally excluded “the people in their collective capacity” from the government.25 All power was exercised at arm’s length and by representatives who could only lay partial claim to representing the will of the people. In some sense, the system as a whole, in all its parts, represented the people. The public’s formal direct power under
the constitution consisted mainly of electing representatives to the lower house of the national legislature. In addition, the people could participate in amending the Constitution, which was difficult but far from impossible (the first ten amendments were passed soon after constitutional ratification and two more within a couple of decades; but the U.S. Constitution is now regarded as the hardest to amend in the world). A great deal of power was to be exercised at the national level by public office holders *neither selected nor accountable in direct popular elections*, including the president, vice president and other members of the executive branch, senators, and justices of the Supreme Court.

The president was selected by an “electoral college,” which itself was originally composed of electors selected by methods left up to the various state legislatures. The idea was that this specially constituted electoral college was to make an independent judgment in selecting the nation’s chief executive. The particular provisions made were a flop, and the presidential selection process was amended in 1804, retaining an electoral college that has become simply a rubber stamp for the state’s popular vote. The language through which the original mode of presidential selection was defended, in *Federalist* #68, gives a flavor of the founders’ attempts to “refine and enlarge the public views by passing them through the medium of a chosen body of citizens” — namely, representatives: “It was desirable that the sense of the people should operate in the choice of” the president, and this was adequately assured by confining the power to choose presidential electors to the state legislatures. However, the actual selection of a chief executive should be made

by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.

So the mode of selection was intended to insulate the chief executive from the whims, caprice, and unreflective judgments of the public, but not from their reflective judgment, which would be better assayed indirectly: by representatives chosen by their representatives.

In his contribution to this volume, Philip Pettit seems to have something like this mode of representation in mind in describing his category of “indicative” representation. So he says of an “indicative” representative, “her mentality is indicative of my own. Where she is led in her judgments and decisions, I would be likely to be led.” Or later, “given the indicative status of the representee, the representative may be assumed to hold those attitudes.” Of course, we ought not to simply cast the indicative representative as a reliable barometer of public judgment, leaving out the qualitative element that I have associated with responsible representation. The responsible representative represents our better judgment: what we might be led to think after sober reflection, or at our best. He or she is not simply a reliable indicator or anticipator of what we will think or are likely to think. Responsible representation is a fully bona fide form of popular representation.

The Antifederalists also opposed several specific features of the strong executive outlined in Article II of the U.S. Constitution, including the president’s eligibility for reelection and the general grant of “the executive power.” The Antifederalists strongly preferred strict term limits, carefully delimited executive powers, and a plural executive council in place of the unitary executive established by the Constitution. They worried that the chief executive would acquire tyrannical power over time.

Hamilton boldly replied that a feebly executed government could not be good government, and if a choice had to be made between a strong executive and republican government, the former would have to be chosen: “Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks... to the steady administration of the laws; to the protection of property... to the security of liberty.” However, he hastened to insist that, happily, a unitary executive would be both more competent and more accountable. Unity in the executive branch is essential to both energy in government and executive branch accountability. When one person alone occupies the office, responsibility is concentrated and cannot be evaded by finger-pointing and blaming another. Moreover, the unity of the executive branch, and reeligibility for the president to stand for reelection, not only concentrates responsibility but provides scope for large ambitions, and that too is conducive to safety rather than danger. Term limits would, perversely, have the effect of diminishing “the inducements to good behavior.” The safest course, he warned, was to make the “interest” of office holders “coincide with their duty.” And in the case of the president, at the pinnacle of an extended republic, a motive worth engaging was “the
love of fame, the ruling passion of the noblest minds, which would prompt a man to plan to undertake extensive and arduous enterprises for the public benefit,” if provided with sufficient time and powers to undertake them.31

Reputation is invoked in The Federalist as an important accountability mechanism: one that melds self-interest and the desire to serve the public good. That did not mean that reputation was regarded as sufficient: the president could be impeached for “high crimes and misdemeanors,” and serious forms of governmental corruption are subject to criminal prosecution.

And so also with respect to the Senate, the upper house of the bicameral national legislature, by which the Constitution’s framers sought to supply another crucial institutional mechanism for curbing the instability and incompetence of simpler, highly participatory system. Originally, members of the Senate (allocated two per state with six-year terms of office and unlimited eligibility for reelection, then as now) were chosen by state legislatures. A practice later developed in many states of having popular referenda, which state legislatures ratified. Direct popular election of senators was finally achieved by constitutional amendment only in 1913, with the Seventeenth Amendment to the U.S. Constitution.

Antifederalists warned that only members of the elite would manage to secure election to the Senate, by means of their personal influence in state legislatures. Moreover, Antifederalist opponents of the Constitution argued that a body so removed from direct electoral accountability to the people would lack public confidence and so be incapable of exercising any genuine authority. Madison responded, in Federalist #62, that the point of the Senate was not to set the interests of an elite against those of the common people but rather to represent “the cool and deliberate sense of the community” against the “temporary errors and delusions” of the people’s own more immediate representatives in the House of Representatives: “how salutary will be the interference of some temperate and respectable body of citizens, in order to check the career” of some ill-conceived proposal “until reason, justice, and truth can regain their authority over the public mind.” This is an excellent description of responsible representation: not merely predictive about what people will come to think but hopeful about what people might come to think after being exposed to the reasons offered in public by meritorious holders of public office.

But, Madison asked, given its remoteness from direct electoral accountability, how would the Senate maintain its authority with the public? Madison’s reply (in the Federalist #63) illustrates a point that runs through the Federalist Papers and that furnishes lessons for us: “Against the force of the immediate representatives of the people nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with . . . [the House of Representatives] the affections and support of the entire body of the people themselves.”

So the framers certainly believed in government based on merit: those holding office should be meritorious. But they sought to reconcile merit with the principle of popular sovereignty, rather than institute a government based on a compromise of the two principles. One point needs to be noted in this regard. Although the Constitution did not impose qualifications for voting (it prohibited “religious tests” for officeholding), it left the determination of the qualifications for voting to the states. In practice, at the time of the ratification of the Constitution, this generally meant white male suffrage with property qualifications, although in four states, free black men could vote. Several states also had religious tests for voting.32 By the standards of the time, the franchise in the early United States was broad, as I mentioned earlier, but the franchise was far from the universal adult suffrage that is now identified with democracy.

American constitutional institutions were designed to draw on and shape the public’s capacity for reasoned judgments by means other than elections. Admittedly, the relevant judgments would need to be eventually ratified in elections. But in the short run, an institution removed from immediate electoral accountability to the public might do a far superior job of representing the public good on reflection in a way that it is hoped the public itself will eventually endorse. If so, we would expect those institutions that are remote from electoral accountability, but that succeed in this task — giving voice to the public good on behalf of the people — to enjoy a high level of public legitimacy and authority. And in fact the Supreme Court consistently ranks far higher than Congress in polls of public confidence.

This desire to elicit and strengthen what we might describe as a deliberative public opinion — or public reason — runs through the Federalist Papers. It is present in Madison’s defense of the Constitution’s embrace of an “extended republic” in Federalist #10, which is often
cast as based on a political “realistic” acceptance of the self-interested nature of human motivations in politics. The realist interpretation is not altogether wrong: Madison does say that, rather than trying to eliminate “factions,” we must accept their existence and design a polity in which they will tend to cancel each other out. However, he also hoped that the need to communicate across an extended plain would tend to elevate the collective conversation, and so he observed that “where there is consciousness of unjust or dishonorable motives, communication is always checked by distrust in proportion to the number whose concurrence is necessary.” Thus, an extended republic would tend to select against “unjust and interested” majorities in favor of those whose honorable aims are more easily communicated in the open.

Of course, this begs various questions that need to be addressed concerning the sincerity of public discussions and advocacy and the capacity of the public to see through self-serving proposals dressed up in high principle. I certainly would not claim that larger political communities always do better than smaller political communities: there are many differences that would need to be taken into account. I mean these remarks only to testify to the justifying aspirations of the Federalist advocates of the Constitution: they sought, with partial although not complete success, to use various features of constitutional design to serve the cause of popular control of government and also the cause of merit or competence in government. Even if one thinks that the specific institutional recommendations of 1787 have been bettered—and how could they not be, given both the limited experience with modern popular constitutionalism at that time and the intense need for compromise to secure ratification—the broader point remains: merit and democracy are not fundamentally or inherently opposed. The two can be pursued together.

The current problems of American constitutional democracy are many. We have an antique constitution, which is a sign of its success in one important respect. Some of its features—including the extent to which government powers are divided and shared—likely do contribute to the current polarization of political elites, and their unwillingness and inability to grapple cooperatively and constructively with long-term problems, including the long-term deficit, climate change, and other matters. Problems of government accountability also furnish opportunities for well-funded and well-positioned factions to distort and derail public deliberation.

V. POPULAR SOVEREIGNTY AND COMPETENCE?

The framers hoped that popular voting would tend to put relatively qualified persons into office—distinguished persons with extensive connections and reputations—and that the quality of office holders would rise as one moved higher from local to state to national politics. Education, refinement, and a proper occupation would help people acquire qualifications; and the property qualification for voting was also thought to help bolster people’s capacity for independent judgment. It was a staple of the 18th century that landowning was especially favorable to the exercise of independent judgment (commerce was seen as comparatively unstable).

In an interesting exchange of letters in 1813, former presidents John Adams and Thomas Jefferson considered the question of whether there is a “natural aristocracy” — an aristocracy of merit — and whether the voting public could be counted on to select members of this class for office. The conversation was initiated by Jefferson, who allowed that the “moral and physical qualities of man, whether good or evil, are transmissible in a certain degree from father to son,” and so there was bound to be both a natural aristocracy of “virtue and talent” and also a “pseudo Aristoi” of wealth. And he continued, optimistically,

I think the best remedy is exactly that provided by all our constitutions, to leave to the citizens the free election and separation of the aristoi from the pseudo-aristoi, of the wheat from the chaff. In general they will elect the real good and wise. In some instances, wealth may corrupt, and birth blind them; but not in sufficient degree to endanger the society.

Jefferson went further, not simply trusting in nature but laying on government an affirmative obligation to promote the conditions under which the truly meritorious, from all ranks of society, could rise. He applauded Virginia’s abolition, in the wake of the adoption of the Declaration of Independence, of primogeniture and entail. And he recalled, in his exchanges with Adams, his proposal:

to divide every county into wards of 5. or 6. miles square, like your [New England] townships; to establish in each ward a free school for reading, writing and common arithmetic; to provide for the annual selection of the best subjects from these schools who might receive at the public expense a higher degree of education at a district school; and from these district schools to select a certain number of the
most promising subjects to be completed at an University, where all the useful sciences should be taught. Worth and genius would thus have been sought out from every condition of life, and completely prepared by education for defeating the competition of wealth and birth for public trusts.\textsuperscript{36}

Further, anticipating Alexis de Tocqueville’s now-famous argument in Democracy in America, he argued that bringing the practice of government within the reach ordinary people would help prepare them for self-government:

My proposition had for a further object to impart to these wards those portions of self-government for which they are best qualified, by confiding to them the care of their poor, their roads, police, elections, the nomination of jurors, administration of justice in small cases, elementary exercises of militia, in short, to have made them little republics, with a Warden at the head of each, for all those concerns which, being under their eye, they would better manage than larger republics of the county or state.\textsuperscript{37}

On this basis, he expressed confidence in the popular capacity to exercise the franchise responsibly:

The law for religious freedom, which made a part of this system, having put down the aristocracy of the clergy, and restored to the citizen the freedom of the mind, and those of entails and descents nurturing an equality of condition among them, this on Education would have raised the mass of the people to the high ground of moral respectability necessary to their own safety, and to orderly government; and would have completed the great object of qualifying them to select the veritable aristoi [aristocracy of merit].\textsuperscript{38}

Adams insisted that he had no love of hereditary aristocracy but was far less optimistic that elections would tend to favor the genuinely meritorious. He thought that the public would not reliably choose the genuinely learned and virtuous but equally rich, witty, and well-born demagogues — “all respected for their names and connections and whenever they fall in with the popular Sentiments” — who would pander to popular sentiments and prejudices.\textsuperscript{39} And even were the virtuous and talented chosen to lead, Adams asserted, the allure of office, the temptations of power, and the spirit of party or faction would prove corrupting: “By corruption, here I mean a sacrifice of every national Interest and honour, to private and party Objects.”\textsuperscript{40}

VI. DEMOCRACY AND MERITOCRACY TODAY

In addressing today’s severe problems of governance, we can make use of America’s meritocratic and constitutional conception of democracy, including its openness to a variety of forms of accountability that include the electoral and the publicly justificatory. It is at this level of principle that I would most heartily defend the insights of the American Founding. When it comes to the specifics of institutional design, it must be remembered that the modern state was still in its infancy when the U.S. Constitution was launched 225 years ago. Much has been learned since then, and it would be foolish to regard the U.S. Constitution as a model slavishly to be followed.

Modern statecraft since the time of the Founding generation has yielded insights about the ways in which scientific and expert judgment can be brought to bear in democratic governments. Administrative agencies, or public bureaucracies, are a product of the late nineteenth and early twentieth centuries. Such agencies are typically insulated from direct electoral accountability, but they are created by legislative statute and subject to various forms of legislative and public oversight. Their legislative origins give them a sufficient democratic pedigree. And, although they are insulated from direct electoral accountability to the public, they are nevertheless typically subject to high expectations of justificatory accountability in public: administrative law specifies the need for publication of supporting evidence, the circulation of draft rules for public comment, hearings with contending testimony, and revision and republication of rules.\textsuperscript{41} Administrative procedures thus represent high standards for decision making based on due process, and public evidence and reason-giving. Knowledge elites at universities and research centers and specialized media pay especially close attention. But these deliberations are also open to the public, and sometimes the public acquires a fairly clear sense of agency mission and method. High-profile agencies that attract high levels of public confidence may acquire additional power based on those reputational resources.

This seems especially true, in the United States, of the Food and Drug Administration (FDA). Daniel Carpenter’s book Reputation and Power makes the case that the public has some genuine
understanding of the FDA’s mission and methods with respect to drug testing: to ascertain the safety and efficacy of new drugs by subjecting them to premarket scientific testing. Famous episodes in which the FDA played a lead role, including banning an elixir that proved toxic in the 1930s (just as FDA enabling legislation was being considered in Congress), and thalidomide, the drug prescribed in Europe to pregnant mothers (which caused many hundreds of severe birth defects in infants in the late 1950s and early 1960s). These and other episodes received intense press coverage, enhancing public understanding and burnishing the agency’s reputation. And so, the public has long placed considerable trust in the FDA, and this gives the agency, in turn, an incentive to protect its reputation, adhering to scientific standards for safety and efficacy, but sometime also shifting its standards in response to perceived public preferences (for example, concerning access to risky drugs).42 There have, of course, been regulatory failures, and the agency has been subject to considerable controversy and charges of politicization. Still, Carpenter argues that, despite its small staff and budget, the FDA has managed to induce “the production of far more information (and higher quality information) from drug companies and medical researchers than would otherwise have occurred.”43 Agencies that are insulated from direct electoral accountability may serve the public good by adhering to demanding standards of evidence and reason-giving, in ways that elicit public understanding (in some measure at least) and confidence.

Evidence suggests that despite the malignant attitude of many U.S. politicians toward international institutions such as the United Nations, the American public places confidence in them. So, in the run-up to the invasion of Iraq, the public strongly favored going to the United Nations Security Council to seek a second resolution, authorizing the use of military force. Moreover, evidence suggests that the American public has more confidence in foreign aid when it is delivered through multilateral organizations, rather than bilaterally.44 The public seems to appreciate in instances such as these that remote institutions, staffed by officials drawn from global elites, may help correct for biases in domestic institutions that are more directly subject to their electoral control.

Domestic and international bureaucracies, operating on the basis of expertise, reason-giving, and horizontal accountability to other global and domestic elites, are among the institutional mechanisms through which democracy and meritocracy may be reconciled. Of course, politics is a difficult and complex business, and institutions often fall short of their ideal aims. Nevertheless, electorally insulated institutions can and do improve the workings of constitutional democracies reliably enough to have secured an important place in the lives of all contemporary democracies. These institutions are extensions, in important ways, of the sorts of institutional design strategies that were deployed and advanced by the founders of the American constitutional order. Globalization and the proliferation of transnational forms of governance present further challenges and opportunities for new forms of delegation, at least if the public is willing to accept the necessity for such institutions, and effective accountability mechanisms can be devised. In practice, democratic publics often fail to think far enough ahead to anticipate problems or they reject the warnings of those leaders who prescribe unpleasant medicine; witness the current stalemate concerning the design of effective responses to global climate change. Meanwhile, many of the elites who wield power and prosper find it not in their interest to participate in crafting constructive solutions. This sometimes seems especially true in the United States, perhaps because its great power and relative geographic isolation mean that it has had the luxury of ignoring problems, at least in the short run.

Reconciling collective self-determination by the people with meritocratic competence and virtue among officeholders is an enduring problem. Some claim that “Confucian” political cultures, including China’s, do a better job than their Western counterparts of combining government for the people with the virtues of a publicly spirited and competent elite. Perhaps, but complaints about corruption are rife in China; recent news reports contain extensive coverage of the great wealth that is being amassed by Chinese political and military elites and their extended families.45 China, moreover, is a country in transition, economically and politically, and it faces the challenge of crafting more effective means to make public officials accountable to the public as a whole.

My claim is only that some valuable insights can be gleaned from the American founding debates and its subsequent constitutional experience. Elections help provide for one form of systematic accountability of government to the people. A broad popular franchise helps promote a fairer sharing in the gains of social cooperation.46 But electoral
mechanisms are far from sufficient for promoting good government. Constitutional democracies also make ample use of institutions insulated from electoral accountability but operating on the basis of reasons and evidence presented and debated in public. The future of democracy would seem to depend on the further development of such institutions, along with the improvement of electoral contestation.

NOTES


3. John Stuart Mill famously called for “plural voting” privileges—extra votes—for the highly educated, an idea that Charles Beitz has suggested, quite plausibly, would represent a socially invidious form of preference in the Western context. See Mill, Representative Government ch. VIII; and Charles Beitz, Political Equality (38-40).

4. See the conclusion to this chapter.


6. Ibid.

7. Ibid., p. 81.


10. For a related account from which I have benefited, see Christopher L. Eisgruber, Constitutional Self-Government (Cambridge, MA: Harvard University Press, 2003).

11. Jeremy Waldron is an apparent example.

12. Obviously there are lots of possibilities: there could be tests for competence and selection by lot from a pool of competent candidates or election by a pool of qualified delegates.

13. I am defending what is known as a generally “departmentalist” understanding of the distribution of interpretive authority under the constitution; for a more extended treatment, see Stephen Macedo, Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism (Oxford: Clarendon Press, 1990); and Friedman, Will of the People.


23. Each state had one vote in Congress, regardless of size; Congress had no power to levy direct taxes (it depended on requisitions which it counted onto states to supply); there was no national power to regulate foreign and interstate commerce; no national executive or national courts; Amendments to the Articles of required a unanimous vote.


25. Federalist 63.

26. The electors are now selected by popular vote (in forty-eight of the fifty states, the presidential candidate winning a plurality of the state’s popular vote wins all of that state’s electoral votes).

27. Federalist 68.

28. See Pettit (Ch. 5 of this volume), in the section titled “Representation, Responsive and Indicative.”


30. Federalist 70. He digs to the heart of the matter by declaring, “There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government.” The next several numbers set out to address this question, which could be reframed as the question of the compatibility of competence and democracy. His answer is an unequivocal affirmation of the priority of competence (which he casts in terms of a fully
energetic executive): supporters of republicanism "can never admit the truth" of the incompatibility "without at the same time admitting the condemnation of their own principles." Hamilton's defense of a strong executive branch in *Federalist Papers* #66–77 are powerful and worth reading.

31. *Federalist* #72.
32. Religious tests and property qualifications fell aside as a consequence of state constitutional reforms in the early decades of the nineteenth century.
33. For a sobering account, see Mann and Ornstein, *Worse Than It Looks*.
36. Ibid.
37. Ibid.
38. Ibid.
40. Ibid.
43. Ibid., p. 751.