

## WHAT DEMOCRACY IS NOT

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Democracy is what philosophers call an “essentially contested concept.” An essentially contested concept is a concept on whose meaning people agree in a broad and even nebulous way. When a political concept, in particular, is widely or universally thought of as desirable—such as, in today’s world, democracy, freedom, or equality—proponents of particular governing arrangements struggle to define the concept—democracy, for example—as including their favored arrangements and excluding competing arrangements. Thus, differences that seem on their surface to concern the meaning of the word “democracy” in most cases are actually struggles to advance particular and controversial political ideas. Proponents of particular political programs commonly put forth—or, more often, tacitly assume—their own specific definitions, which is why “democracy” became an essentially contested concept once democracy became a label that commanded nearly universal favor.<sup>1</sup>

In the classic conception, democracy is rule by “the people” or rule by “the many,” as opposed to rule by one (monarchy or tyranny) and rule by the few (aristocracy or oligarchy).<sup>2</sup> That definition is sufficiently broad and nebulous that it can stand more or less

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1. The idea of an essentially contested concept was first expounded in W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. OF THE ARISTOTELIAN SOC’Y* 167, 168–69 (1956). See also WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10–11, 35–36, 40 (1974) (applying Gallie’s idea to politics and giving a more formal and complete definition of “essentially contested concept”).

2. See, e.g., ARISTOTLE, *POLITICS* bk. III, at 77, 79–81 (B. Jowett trans., Oxford University Press ed. 1855).

unanimous agreement. It leaves open all questions about *how* a government can be or should be organized to effectuate the rule of the many, while also conforming to other considerations dictated by principle or prudence.

One particular set of governing arrangements, sometimes known as “plebiscitary democracy,” calls for decisions to be made directly according to the preference of the majority. Nothing in classical democratic theory requires simple majority rule.<sup>3</sup> It does fit within the classical definition, though by no means perfectly, but the same is true of many other conceptions of democracy, including the conception established by the United States Constitution.

By definition, there are more people in a majority than in a minority. But if a group of 1,001 people divides 501 to 500, it is a strain to call the former group “the many” and to call the latter “the few.” The 500 are among “the people,” who are supposed to rule according to the classical definition, as much as the 501. That example also assumes there are only two choices. If more than two possible courses of action are possible, there may be no stable majority. The eighteenth-century French writer Condorcet demonstrated that if there are three possible choices, *a*, *b*, and *c*, it is both possible and not at all uncommon that in a straight-up vote, *a* defeats *b*, *b* defeats *c*, and *c* defeats *a*.<sup>4</sup> Even if there are only two choices, majorities often fail to exist if some people abstain. If, as the plebiscitary definition of democracy implicitly assumes, only a majority can be “the many,” then reliance on pluralities necessarily means control by “the few.”

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3. See, e.g., ARISTOTLE, *supra* note 2, bk. IV, at 112 (“It must not be assumed . . . that democracy is simply that form of government in which the greater number are sovereign, for in oligarchies, and indeed in every government, the majority rules . . . we should rather say that democracy is the form of government in which the free are rulers, and oligarchy in which the rich; it is only an accident that the free are the many and the rich are the few.”).

4. KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 92, 93 n.11, 95 (1951). There, Arrow famously elaborates on cyclical majorities, which originate in MARQUIS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE A LA PROBABILITE DES DECISIONS RENDUES A LA PLURALITE DES VOIX*, lxi (1785). For a summary and translation of the relevant passage of Condorcet's *Essai*, see Janet Barnett, *The French Connection: Borda, Condorcet, and the Mathematics of Voting Theory*, 1 GEN. EDUC. AND LIBERAL STUD. 1, 18 (2021).

Despite these concerns, a simple majority vote is often the most sensible way for a group to make decisions, particularly when a one-time decision must be made and the stakes are not too high for anyone. That simple majority votes should play a part in a complex democratic system is also sensible. For example, majority voting in the House of Representatives is a non-controversial feature of the American system. However, as the exclusive or predominant governing arrangement in a nation or subdivision, majoritarian democracy is subject to numerous serious objections, of which I will mention two—one specific and one general.

The specific objection is that if the make-up of a society enables a persistent majority to prevail over a persistent minority, then majority-rule permits tyrannical domination of the minority by the majority.<sup>5</sup> The general objection is that the plebiscitary idea is much too thin and abstract, because it places a simple arithmetical formula over all considerations of practical government. On a given question, there are likely to be other matters of principle or prudence not directly related to the question of rule by the many, and plebiscitary democracy makes no allowance for such considerations.

These objections and many others suggest that sole or even heavy reliance on direct majority rule is likely to have bad consequences. In addition, there are many reasons to doubt that plebiscitary government of a nation or large political subdivision is actually possible, even if it is desired. Again, I will mention only two.

First, the study of democracy in practice suggests that no matter how any large organization is structured, policies and actions will be determined by a small group of active participants. In an influential book, Robert Michels found this to be the case in European trade unions and political parties designed expressly to ensure actual control by the majority of the membership. Michels' empirical research showed that such organizations ended up in practice to be

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5. See, e.g., JOHN STUART MILL, ON LIBERTY 13 (2d ed. 1859) (“Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread[.]”).

oligarchies. He referred to his finding as the “iron law of oligarchy.”<sup>6</sup>

Second, the well-known free-rider problem suggests that in political conflict in democracies, causes supported by small numbers of people often have the advantage over those with large numbers of supporters, creating a tendency opposite to majority rule. To keep matters simple, suppose in a conflict I am one of five people who stand to benefit from and favor outcome *A*, while the other 10,000 people in the constituency stand to benefit from and favor outcome *B*, and let us also assume that the outcome will be heavily influenced by which side can raise a million dollars. Assuming I and my four allies can each afford to contribute \$200,000, it is very likely that each of us will do so, for two reasons. First, I can see that my own \$200,000 by itself will make a big difference. Second, my giving or not giving will be entirely visible to the other four. Each of us can recognize that if any one of us declines to give, the likely consequence is that all of us will decline to give. Now suppose I am one of the 10,000 who prefer *B*. We will meet the goal if each of us contributes \$100. But most likely, very few of us will give. I will see, first, that my hundred dollars in itself is meaningless, and second, that because I am only one of 10,000, my individual action is very unlikely to influence what others do. True, I know that I would be better off giving my hundred dollars and having everybody else do so, but it is the second half of that proposition that makes me better off, and my control is limited to the first half. A few worthy souls will probably contribute \$100 each whether out of naiveté or a high sense of principle, but most of us will take a “free ride.” It follows that even if the formal institutions seem to favor majority rule, in practice decisions will often be counter to what the majority favors.

Despite these objections and others, the familiar use of majority voting in many daily situations gives simple majoritarianism at least a superficial appeal. In several contemporary debates on important subjects such as the electoral college, the composition of the

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6. ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 224–35 (Eden Paul & Cedar Paul trans., Batoche Books 2001) (1911).

United States Senate, redistricting, and judicial review, proponents of eliminating or modifying these institutions claim that the proponents' particular views—for example, replacement of the electoral college by a national popular vote or elimination of the Senate—are required by “democracy,” by which they mean plebiscitary democracy.

By taking this posture, they seek to place their opponents on the defensive, making them argue that other considerations supporting these opponents' own views are so strong as to justify seeming departures from democracy. Unwisely, opponents of plebiscitary positions in such debates tend tacitly to accept that starting point.<sup>7</sup>

Contrary to this tacit assumption that all too often underlies current political discourse, neither the United States nor other successful democracies are based predominantly on simple majority rule. The case for flexible application of the classical definition of democracy is made eloquently and persuasively in *The Federalist* by Hamilton, Madison, and Jay in their explanation of separation of powers and all the many other *non*-majoritarian provisions of the Constitution.

It is true that Madison's definition of democracy, set forth in *Federalist 10*, is close to though not identical with the modern concept of plebiscitary democracy. Madison distinguished between republics and democracies. As he understood them, he opposed the latter and supported the former. Madison's use of these terms does not support the tacit assumption I am challenging that only plebiscitary democracy is real democracy. On the contrary, Madison had in mind a concept similar to the classical definition of democracy when he championed the vague concept of the “Republican principle.”<sup>8</sup> He did not try to define it precisely but rather characterized it as overall rule by the people.<sup>9</sup> Within a generation or so,

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7. See, e.g., Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 438–39, 472 (1998) (detailing the drawbacks of plebiscitary democracy).

8. Robert A. Dahl, *James Madison: Republican or Democrat?*, 3 PERSPS. ON POLS. 439, 443 (2005).

9. See also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1–2 (Henry Reeve, trans., London, Saunders & Otley 1835) (defining democracy as a societal system in which “[t]he people is therefore the real directing power”).

American usage decisively adopted “democracy” to refer to governments like the one the Constitution had created.<sup>10</sup> In arguing for the classical definition, I advocate for the concept that Madison favored, though he did not call it “democracy.”

As for other successful democracies, they are if anything further from the plebiscitary form than the United States. Consider, for example, plebiscitary-based opposition to the electoral college. In fact, the electoral college is far closer to a majority (or at least plurality) choice than the parliamentary system that prevails in most other successful democracies.

My purpose is to make one simple point: the assumption that only plebiscitary forms are truly democratic is fallacious. It is an assumption that should be openly and directly contested by those supporting non-plebiscitary positions on the policy questions I have mentioned and others. Pointing out that the electoral college, the Senate, and judicial review are every bit as consistent with the idea of “rule by the people” as their elimination would be does not prove that their preservation is desirable. But it does force the debate to be conducted as it should be, on the specific pros and cons of different arrangements, and not on the false ground of which side in the debate is more “democratic.”

In a famous essay, Isaiah Berlin refers to an ancient adage that “the fox knows many things, but the hedgehog knows one big thing.”<sup>11</sup> Berlin interprets this adage to mark a deep difference between two kinds of thinkers: “[T]here exists a great chasm between those, on one side, who relate everything to a single central vision . . . in terms of which alone all that they are and say has significance—and on the other side, those who pursue many ends . . . connected, if at all, only in some *de facto* way.”<sup>12</sup> In the debates over democratic institutions, the plebiscitary majoritarians are

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10. Yascha Mounk, *American Is Not a Democracy*, THE ATLANTIC (Mar. 15, 2018), <https://www.theatlantic.com/magazine/archive/2018/03/america-is-not-a-democracy/550931/> [https://perma.cc/62L3-TR7P].

11. ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 91 (Henry Hardy ed., 2d ed. 2013) (1953).

12. *Id.* at 2.

hedgehogs and those who incline more toward Madison's "Republican principle" are the foxes. I stand with the foxes.