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The Devil's in the Details: The 1987 Bicentennial of theConstitution and Public Culture

"If you're gonna do what you did two hundred years ago, somebody's going to have to get me short pants and a tray so I can serve coffee." – Justice Thurgood Marshall, 1993

Is it not ironic that Americans worship their founding political document but downplay how it contributed to a war over slavery and how it has been amended twenty-seven times? My use of the word "worship" is certainly fair. Edward S. Corwin and Max Lerner in the 1930s and Michael Kammen in the 1980s observed that many Americans piously revere the Constitution. Such piety is not strictly anti-intellectual. Law professor Sanford Levinson uses a typology of "Catholicism" and "Protestantism" to distinguish two modes of constitutional interpretation.[1] Levinson's invocation of religion troubles me, though not because it is unwitting. He is aware of the irony of abusing religious metaphors to interpret the Constitution in an age when religious belief has purportedly declined. Instead, what troubles me is how his irony actually hides another one: looking at the Constitution as divine may satisfy a modern yearning for interpretive transcendence, but that yearning also increases ignorance about the constitutional meanings of two centuries of human history.

I may never solve the mystery of how any transcendent intelligence could justify the existence of evil in the world. I can only admit my limits in matters of metaphysics. A constitution, however, is not a mystery. It is a political document made and remade by human beings and thus unavoidably imbued with their hopes, tastes, needs, interests, reasons, hatreds, and pieties. Its compromises remain in the realm of the human, and they are hardly mysterious and often unjustifiable. But, as Americans too often forget, constitutional evils have seemed neither mysterious nor justifiable to Anti-Federalists, the drafters of the Eleventh Amendment, slaves, abolitionists, slaveholders, suffragists, imperialists, immigrants, Progressives, drys and wets, Socialists, corporations, civil rights activists, unions, feminists, gays and lesbians, and fundamentalists. Because of them, Americans warred over slavery and have kept trying to change the Constitution.[2]

Representing Popular Sovereignty, by Daniel Lessard Levin, an assistant professor of political science at Boise State University, explores the consequences of celebrating the Constitution while failing to acknowledge its long human history. To be sure, Levin's book itself is not historical. It registers somewhere between cultural theory and historical sociology – what he calls "sociological constitutionalism" (6). In less grand terms, one may accurately describe his book as a series of reflective essays on the meanings of the bicentennial of the United States Constitution, which Americans celebrated with pomp and circumstance during the late 1980s and early 1990s. The big question of his book is "whether it makes sense for Americans to link their contemporary national and political identity with a two-hundred-year-old document" (12).

In an important sense, Levin's big question is moot. Americans will continue to be linked to Congress, the Presidency, the Supreme Court and their constitutional rights for some time to come. Just as I am skeptical of claims about "globalization" simply killing the nation-state, I am also wary of claims that a "two-hundred-year-old" document will not be able to govern twenty-first-century America. In a general way, it unquestionably does. Concretely, it does too: I would urge a skeptic to ask someone waiting on death row why he cannot get a federal court to hear his appeal right now. But, in another sense, Levin's big question seems appropriate. If "link" is construed broadly, then no longer are we simply talking about politics – rather, we are talking about the cultural practices that frame political consciousness around a two-hundred-year-old document.

"Link" is a small word that actually has great and complex meaning in this context. According to Levin, the

Bicentennial celebrated Americans' unmediated connection to the founding document. The "link" felt intimate, as celebrants skipped past generations of muck, wars, migrations, and compromises to celebrate the world of eighteenth-century revolutionary republicans. As Levin notes, this was an impossible enterprise. Indeed, the executive director of Philadelphia's "We the People 200" celebration admitted that "[t]he Constitution as a celebration topic is just not sexy … It doesn't sell soap. It doesn't sell any product or service because it's not tangible" (53).

Levin makes a great deal out of the commodification, fetishization, and cultification of the Constitution as suggested by the executive director's comments. Mostly, he places blame on the written aspect of the document – its abstract embodiment of an act of delegated popular sovereignty. The result, he argues, is political alienation: "A written constitution necessarily involves the estrangement of the constitutional system from the citizenry that establishes it" (101). The Constitution puts the imagined power of the people "somewhere else." Liberals might celebrate this estrangement because it softens political passions by fostering what Albert Hirschman called "shifting involvements" – that is, people balancing political involvements with more private interests. And, at the end of his book, Levin echoes this point (185-193). Yet, Levin also admits that estrangement leads Americans to search constantly for the imagined popular sovereignty conjured by the document's opening three words, "We the People."

Contemporary celebrations seek to create cultural forms that try to satisfy searchers by linking moderns to 1787. But because the Constitution was secretly drafted by fifty-five delegates and then ratified by state conventions representing a society that "We the People" today would find hardly democratic, recent celebrations have established links that embody a number of plain contradictions and humorous juxtapositions. For instance, Levin highlights the contradiction evident in Congress's mandate to the Bicentennial Commission, requiring the 1987 celebration to be strictly focused on the Federal Convention and ratification while also stressing the "contribution of diverse ethnic and racial groups" (85). It was this mandate that Justice Thurgood Marshall mocked when he joked about dressing like a slave after declining the invitation to participate in ceremonies.

Perhaps, celebrations must be riddled with contradictions if they aspire to create linkages by selling Americans a single story about the Constitution's origins. Instead, celebrations might embrace the many different episodes and points of view that make up constitutional history. For example, as Justice Marshall observed, "the Union survived the Civil War, the Constitution did not" (74). The Reconstruction Amendments clearly represented a more profound commitment to equality than did the original document, though they also were acts of political compromise.[3] Indeed, women lost their fight for suffrage during Reconstruction and only won it with the Nineteenth Amendment (1920), which itself was followed by the proposed Equal Rights Amendment, drafted in 1923 by Alice Paul but defeated nearly sixty years later, in 1979-1982, by a handful of states. Here, the democratic promises of the Founding are retold as stories about possibility, defeat, recommitment, compromise, then defeat and renewed possibility.

By contrast, Levin thinks that Americans' political alienation results not from how they go about celebrating the Constitution, but from their attempts to celebrate the past in the first place: "If constitutionalism [is] to become a more significant element in American political culture, Americans must make it their own through political action within a representative democracy, not civics classes or commemorative ceremonies" (193). There is something to acknowledge in this point of view. It recognizes that the Constitution is not a thing to be worshipped, but a thing to be worked out. Instead of saying that God is in the machine, Levin is claiming that the devil is in the details: "If civic virtue is to be reborn in contemporary America, it will first reappear in discussions … over trash removal, and not in artificial discussions of such public issues as the Supreme Court's decisions on pornography, over which participants have no authority" (192).

It is his last clause however – about the limits of the authority of American citizens – that is most troubling. It is not clear to me why citizens should feel as if they have no authority over issues like pornography. Levin bases his argument on the idea that debates about large issues – like school prayer and flag burning – simply reproduce debates about a document in which "the ultimate powers of self-government were alienated from the people over two hundred years ago" (193). Levin's claim left me wondering: if, instead of flag burning, Levin had mentioned the right of women to vote or the abolition of slavery, how would his argument have turned out? Did the original Constitution settle those questions, too? Should people who debated such issues instead have been more involved in "trash removal"? Levin may be right to point out that "there is more to the role of citizen than political activity" (193), but surely his "sociological constitutionalism" blinds him to the long and troubled history of constitutional politics that citizens, and sometimes non-

citizens (Dred Scott), have waged for over two hundred years.

Levin is at his best when he criticizes constitutional celebrations for institutionalizing what I would call 'democratic spectatorism' – a process that offers people the chance to participate symbolically in intimate, town-hall style settings when celebrating the Constitution. These celebrations merely entertain citizens by giving them a feeling of self-governance and a sense of belonging to an imagined community (154). Levin's proposed remedy for this pseudo-democratic culture is to exhort people to exercise their rights and duties in what he calls a "representational" democracy. Those rights and duties are indeed of fundamental importance. Yet, cultural representations of the Constitution can also help Americans imagine the linkages connecting large public issues with institutional and democratic practices by which they can actively engage their hopes, tastes, needs, interests, reasons, hatreds, and pieties.

Such practices include town meetings, but they also include large institutions such as political parties, unions, and other associations that wield enough power to negotiate and counteract other social forces that have emerged since the eighteenth century – such as corporations, mass media, and the administrative state. Indeed, nothing prevents large-scale celebrations from also negotiating and counteracting those same modern forces.

Constitutional celebrations, however, must be honest about the ironies of American history to avoid transforming a reverence for the Founding Fathers into a Whiggish reverence for Progress. Each such sentiment entails a kind of Constitution-worship in differing ways, and both leave participants with the same kind of "thin" intimacy with the Constitution that Levin decries. It is at least strongly plausible that Americans will be more inspired and engaged as citizens if they learn that the Nineteenth Amendment did not just "fix" the original Constitution but was shaped by Seneca Falls and Reconstruction and also led to further controversy among Americans about the equal rights of women.

Finally, Levin rightly argues for the existence of limits in representing popular sovereignty. Indeed, all constitutional celebrations must entail acts of cultural power that represent something that can never be actually present: "We the People" is ultimately a fiction, as Edmund Morgan has pointed out.[4] And so, celebrations cannot truly make democracy visible. In fact, the fiction of American democracy works best when people cooperate to assert it: in streets, schools, and capitols. However, cultural practices can help render visible the traces of democratic action and reaction during the past two centuries and, in the process, help more people to become familiar with political paths abandoned, avoided, compromised and maintained.

NOTES

[1]. Sanford Levinson, *Constitutional Faith* (Princeton, N.J.: Princeton University Press, 1988).

[2]. See generally Richard B. Bernstein, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It? (New York: Times Books/Random House, 1993); David E. Kyvig,* Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995_ (Lawrence: University Press of Kansas, 1996).

[3]. See generally William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988).

[4]. See generally Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton, 1988).

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