

The Problem of an Abstract Constitution

A central irony animates any book devoted to the Constitution's significance in American culture. It is not the abundance of the Constitution's representations within that culture that must be explained, but their paucity. To put it plainly, constitutionalism lacks sex appeal in the competitive world of American popular culture. Commemorations of the Constitution's longevity have been eclipsed in popularity as occasions for patriotic celebrations by the anniversaries of such events as George Washington's birth and the signing of the Declaration of Independence.¹ Among recent celebrations, the Constitution's Bicentennial looked particularly lackluster when compared with the centennial celebrations of the Statue of Liberty in 1986 and the bicentennial observances of the American Revolution.²

As Michael Kammen notes, there are relatively few representations of American constitutionalism and popular sovereignty, especially "when one considers the centrality of constitutionalism itself in American culture."³ Howard Chandler Christy's painting "We, the People" is the only artistic representation of the Constitution that compares with all of the famous depictions of the Revolution in American political culture,⁴ and the Christy painting became

famous primarily through the exertions of the federal Commission celebrating the Constitution's Sesquicentennial.⁵ As Wilbur Zelinsky has observed, the number of local governmental units named "Constitution" is exactly one, compared with three hundred and twenty-four for "Union," one hundred and eighty-two for "Liberty," twenty-nine for "Freedom," and an even two for "Equality."⁶ Similarly, the number of streets named "Constitution" is dwarfed by those named after other patriotic ideals.⁷

The Constitution's weakness in American ceremonial culture can also be seen in the lack of popular support for even a single day set aside for the celebration of the Constitution. Constitution Day, the seventeenth of September, when the Constitution was signed by the remaining thirty-nine members of the Constitutional Convention, is celebrated with much less fanfare than the Fourth of July, commemorating the signing of the Declaration of Independence.⁸ Constitution Day was first proposed in 1916 and was first observed nationally in 1919; it was remade as "Citizenship Day" by Congress in 1952, changing the focus of the holiday from the history of the document to the duties of the American people.⁹ Both *We the People 200* in Philadelphia and the federal Commission on the Bicentennial lobbied Congress for over a year to designate September 17, 1987 as a one-time federal holiday, giving all federal workers the day off, and encouraging the states and private employers to do so as well. The national holiday was essential to the commercial success of the parade and gala, a fact understood by all involved in creating the events.¹⁰ The historical neglect of Constitution Day continued even during the Bicentennial; the bill authorizing the holiday was defeated as legislators found the economic cost of a national holiday greater than the commemoration's historic significance.¹¹

That the Constitution is a difficult document to understand has been demonstrated by the difficulty that promoters have confronted in gaining greater publicity for it. Sesquicentennial organizer Sol Bloom attempted as early as 1926 to secure governmental funding for a movie about the

Constitution; when faced with indifference, Bloom began to defend the Constitution against charges that it was "dry," even exclaiming that "[i]ts content can be made as vivid as some of the most thrilling events of our history."¹² Warren Burger faced similar problems during the Bicentennial in selling a planned gala in Washington, D.C. that was rejected by CBS, the same television network which broadcast the Philadelphia celebration, because it was unable to "solve the creative problems" and "develop an appropriate concept."¹³

This lack of interest was reflected in the few Bicentennial offerings, and the largely educational treatment of the document in America's most popular medium, television. Many of the television programs that brought constitutionalism into American living rooms during the Bicentennial were news specials,¹⁴ in which television journalists explained various constitutional rights and features.¹⁵ However, compared to the previous year's centennial celebration of the Statue of Liberty, network television news show gave the Constitution short shrift. From June 1986 to December 1991, the network news showed thirty-nine stories about, or related to, the Bicentennial in contrast to more than seventy stories about the Statue of Liberty celebration during the thirteen months from July 1985 through July 1986. Coverage of the Constitution's Bicentennial was mostly composed of "videogenic" events, such as the celebrations in Philadelphia and the recreation of Washington's inauguration, and the celebration lacked a period of concentrated coverage comparable to the media preoccupation with the celebration during the two-week period preceding and including Liberty Weekend.¹⁶ While the telecasts of the Statue of Liberty Centennial ceremonies captured the attention of the majority of the television watching public, the nationally televised "gala" that was the centerpiece of the Constitution's bicentennial celebrations, was outshone in that ultimate measure of popular approval, the Nielsen ratings, by "NBC Investigates Bob Hope" (a parody of the recently concluded Iran-Contra hearings) and the movie *Mr. Mom*.¹⁷

The lack of attention paid to the Constitution is evident in the public's ignorance about the document. In 1986, the Hearst Corporation sponsored a national survey which tested the American people's familiarity with the Constitution. By most standards, the public flunked. Sixty-four percent of those surveyed believed that the Constitution made English the national language, and sixty-eight percent believed that the Constitution did not permit states to legalize marijuana within their own borders. Fifty-nine percent of those surveyed could not correctly identify the Bill of Rights, and sixty-six percent did not know the approximate number of amendments. Many people confused the Constitution with the Declaration of Independence; eighty and seventy-seven percent respectively believed that the phrases "all men are created equal" and "life, liberty and the pursuit of happiness" were in the Constitution, and twenty-five percent believed that the purpose of the Constitution was to declare independence from England. On the positive side, fifty-four percent knew that the Constitution was written "to create a federal government and define its powers," and substantial majorities knew that only a person born in the United States could be elected President, and that the President is not directly elected through the popular vote.¹⁸

In his history of the Constitution's importance in American culture, *A Machine That Would Go of Itself*, Michael Kammen proposes three areas of inquiry for explaining public ignorance about the Constitution: how the schools have taught the Constitution to students, "how information about the Constitution filters down to laymen," and the associated problem of relations "between the Constitution, the Supreme Court, and the media."¹⁹ Kammen is undoubtedly correct in attributing much of the public's unfamiliarity with the Constitution to poor public education, inadequate and careless media accounts of the constitutional tradition, and a lack of communication between the judiciary and the public. However, public ignorance of the Constitution can

also be traced to problems inherent in the Constitution's role as a symbol of popular sovereignty.

The Obscurity of a Constitution and the Necessity of a King

The most difficult problem with the Constitution's role as a symbol of the political system can be traced back to its roots in the Latin word *constitutio*. As far back as Cicero, *constitutio* has served as "a descriptive term for the political community 'as it actually is.'"²⁰ Such a complex reference is neither specific nor stable, nor is it easily compressed into a single symbol. The nebulous nature of a constitution was noted by Walter Bagehot, who declared that the concept of the British Constitution, consisting of the interaction of institutions, parties, and public opinion, involves "complex facts, difficult to know and easy to mistake." Bagehot compared the obscurity of the British Constitution with the concrete and tangible institution of the monarchy, observing:

When you put before the mass of mankind the question, 'Will you be governed by a king, or will you be governed by a constitution?' the inquiry comes out thus—'Will you be governed in a way you understand, or will you be governed in a way you do not understand?'"²¹

Bagehot's reflections are not restricted to Britain, but help to explain the American preoccupation with the native institution closest to the monarchy, the presidency. American political culture does not lack for representations of presidents, and has endowed the presidency with many of the charismatic qualities traditionally associated with sovereign monarchs.²²

While British currency bears the portrait of the sovereign, American currency carries likenesses of former presidents and other dead statesmen, but not a single phrase from the Preamble nor any representation of popular sovereignty. And, while Constitution Day has become Citizenship

Day, and has never had the status of a full-blown national holiday, Lincoln's and Washington's birthdays have long been celebrated as such, although they were recently combined into the generic Presidents Day. The relatively powerful image of the presidency undoubtedly contributed to the belief of that forty-nine percent of the public who agreed with a pollster's statement that "the President can suspend the Constitution in time of war or national emergency."²³

The relative paucity of representations of the Constitution in American culture results from a distinctive problem in democratic theory, the difficulty of embodying popular sovereignty. As the popularly enacted charter for the American state, the Constitution symbolizes the formal political relationships between individual citizens and the state based on the theory of popular sovereignty. Unlike primitive societies, which lack the idea of a distinct political sphere, "[i]n modern states, written constitutions and other such documents are used as symbols of organizational distinctiveness."²⁴ Understanding the American constitutional system as a distinctive entity requires that citizens are able to conceive of both an identifiable popular sovereign and a political state which is separate from, but dependent on, that popular sovereign. However, because Americans have never conceived of the state as fully autonomous from society, the Constitution is a weak symbol, lost in the mist that surrounds the American state. One early observer of the emerging American state, Alexis de Tocqueville, found it particularly difficult to conceive of the state within American political culture because "although everything moves regularly, the mover can nowhere be discovered. The hand that directs the social machine is invisible."²⁵ Contemporary observers have agreed with Tocqueville that "an American sociopolitical self-examination simply leaves no room for any valid notion of state."²⁶

If the American state is poorly defined, the popular sovereign is even more problematic. Rather than identifying any single instrument of government as sovereign, Tocque-

ville described popular sovereignty as an almost mystical form of government:

The people reign in the American political world as the Deity does in the universe. They are the cause and the aim of all things; everything comes from them, and everything is absorbed in them.²⁷

The phrase "We the People," which often appears as a symbol of constitutionalism, evokes just this sense of popular omnipresence. "We the People" serves as a symbol of a national identity while remaining inherently ambiguous in its reference to an unspecified first person plural. While the term "people" may be used for an aggregate of individuals, to speak of 'the people' is to announce a collectivity that differs from the sum of its individual parts. "The people," notes Edmund Morgan, "are a fiction dreamed up by an advocate and infused with an artificial, rhetorical, reality by the agreement of an audience to participate in a collective fantasy."²⁸ Defining a people is a rhetorical act that binds together those who agree with it and those who fall within its limits. Taking American constitutionalism seriously requires one to assume that the "people" is an important and identifiable entity. Yet, the phrase "We the People" does little to define the popular sovereign which it identifies.

The essential problem with popular sovereignty, and a central problem of American constitutionalism, is that the popular sovereign is difficult to understand and virtually impossible to depict. As Edmund Morgan observes, "[t]he sovereignty of the people is a much more complicated . . . fiction than the divine right of kings. A king, however dubious his divinity might seem, did not have to be imagined."²⁹ With a sovereign that has to be imagined, the state must be embodied before it becomes real. "The state is invisible," Michael Walzer has written, "it must be personified before it can be seen, symbolized before it can be loved, imagined before it can be conceived."³⁰ A well-defined, visible sovereign is so important to the process of representing social

relations that a thinker as capable of dealing with abstractions as Hegel could believe that:

opposed to the sovereignty of the monarch, the sovereignty of the people is one of the confused notions based on the wild idea of the 'people.' Taken without its monarch . . . the people is a formless mass and no longer a state.³¹

Monarchs are necessary, according to Hegel, primarily for their value as symbols of popular sovereignty; they provide the polity with a center that embodies all of its members.³² Even politically powerless monarchs, such as the British sovereign, perform this important cultural role.³³

The importance of monarchy for imagining political relations derives from the three central characteristics of a political symbol: condensation, multivocality, and ambiguity. Condensation refers to a symbol's ability to "unify a rich diversity of meanings;" multivocality involves symbols' potential to "be understood by different people in different ways;" ambiguity denotes a symbol's capacity to express ideas that cannot be expressed precisely or definitively.³⁴ Although the level of debate over constitutional issues and interpretation is enthusiastic testimony for the document's multivocality and ambiguity, the Constitution does not perform the function of condensation well. Because the Constitution involves a multitude of different actors and rules, it does not present a well-unified picture. People can more easily understand government as a single, unified figure than as a group or as a set of rules or as an organization. That Martin Luther King's birthday has become an occasion to celebrate the civil rights and equality of all Americans demonstrates the way in which individuals can effectively function as symbols for abstract political ideals. The ability to understand abstract political concepts is learned. Studies have shown that schoolchildren first associate government with individuals, such as the current president or George Washington, or with icons, such as the flag or bald eagle, and are only later able to associate it with social processes and institutions, such as voting or Congress.³⁵

Unlike justifications for the constitutional monarchy, or even the American presidency, which focus on the capacity for unity,³⁶ explanations of the Constitution almost inevitably lead to descriptions of its capacity for differentiation. The most familiar doctrines of American constitutionalism all testify to this emphasis on multiplicity; the trinity of the legislative, executive, and judicial branches, the doctrine of separation of powers, the idea of checks and balances, and the theory of federalism are all means of dividing government into smaller and more precise elements. Except for the Preamble, which describes the ideals and purposes of the Framers, the document is structured by its internal divisions, which reflect the separation of governmental powers; with the exception of the Preamble's first three words, "We the People," the idea of a unitary actor is foreign to the constitutional framework. Indeed, identifying "the people" as a sovereign body precludes identifying any single governmental institution as sovereign.³⁷ Rather than unifying the complex social relations which make up American government, the Constitution replaces them with a new set of complicated relationships.

The division of functions among several institutions makes good sense as a mechanism for limiting governmental power, but it also makes the representation of society that much more difficult. Walter Bagehot observed that "[t]he best reason why Monarchy is a strong government is, that it is an intelligible government."³⁸ A. V. Dicey, another Victorian analyst of the British constitution, also claimed that the monarchy was the only institution that could be "representative of imperial unity."³⁹ The problem of representing popular sovereignty has required the invention of new national symbols to substitute for the feudal symbols of the monarch. Eric Hobsbawm has noted that, while modern forms of art and technology may have lost much of their symbolic and ritualistic elements,

most of the occasions when people become conscious of citizenship as such remain associated with symbols and

semi-ritual practices (for instance, elections), most of which are historically novel and largely invented: flags, images, ceremonies and music.⁴⁰

Such symbols help to structure the consciousness of belonging to a visible state, a sovereign body, rather than a society, making one a citizen. Symbols of sovereignty are, in the terms of Durkheimian sociology, "collective representations" through which a collectivity represents itself to itself.⁴¹

Collective representations provide citizens with a symbolic vocabulary to use when referring to themselves as a single body. In this respect, the Constitution, and particularly the phrase "We the People," signifies American union and social solidarity. Yet, within American political culture, the ideals of social union and solidarity come into conflict with an individualistic culture characterized by ambivalence about social categories and collective identities. This ambivalence, which Richard Merelman calls "loose-boundedness," results from a lack of consensus on the values and principles that constitute American identity, and makes the process of collective representation problematic in American culture.⁴² The popular sovereign is a creature of historical and social dimensions which can be only partially realized through political forms. Its representation through cultural symbols is no less difficult.

Constructing the Popular Sovereign

In his *Philosophy of Right*, Hegel noted that a "constitution is essentially a system of mediation,"⁴³ a system, in other words, composed of institutions that lie between citizens, and supersede direct social relationships. The political myths animating American constitutionalism both describe contemporary society and tell the story of how Americans transferred part of their sovereignty to the state in a way that created a single if divided identity. The Constitution represents the abstractions of both state and society because America lacks a visible, singular sovereign.

However, because the boundaries of the American state and American society are indefinite and uncharted, the document representing the relationship between society and state is left adrift and becomes, in the terms of modern semiotics, a floating signifier.

A government based on popular sovereignty condenses the social relations of a nation into a single symbol and slights many of the complex system of affiliations that comprise it. Social relations and political relations require distinct forms of representation. As a contract between individual and state, the American Constitution bypasses other forms of association, following those theories of social contract that diminish the importance of intermediate groups because of the emphasis which they place on the individual. As the medievalist Otto Gierke observed, with the advent of liberal political theories the "Sovereignty of the State and the Sovereignty of the Individual were steadily on their way towards becoming the two central axioms from which all theories of social structure would proceed."⁴⁴ However, the connection between the sovereignty of individuals and the sovereignty of the state is often difficult to understand.

Citizens' distinctive identities are difficult to symbolize within a national polity of the size and diversity of the United States. The relationship between citizen and nation is difficult to symbolize in a concrete fashion, and the size and heterogeneity of the national union embodied in the Constitution often leads to portrayals of national identity that are composites of more parochial forms of identity. Images of the Constitution may blend local and national identities to symbolize the document's role in the creation of the Union. One example, currently in the Smithsonian Institution's collection, is an arrangement by artist Mike Wilkins of personalized license plates from all fifty states and the District of Columbia that sounds out the words of the Preamble. Wilkins' piece places the familiar words of the social contract in a contemporary medium accessible to ordinary citizens who might use it for their own forms of self-expression.⁴⁵ An example from the Bicentennial, the

Festival of the States held in Philadelphia in 1987 as part of We the People 200's national celebration there, featured marching bands from each state, and a plan to construct a bicentennial fountain out of rocks from each state in an effort called "Rocks Across America."

Yet American national identity is often unmediated, with individuals claiming their place within the national polity without the intercession of any other intermediate associations. The idea of individuals asserting their membership in the Union through their personal signatures is quintessentially American, resulting from the manner in which American constitutionalism is founded on rhetorical acts of social union. Fundamentally, the Constitution was a "bootstrap" operation in which the people, through both the delegates to the Constitutional Convention and the ratification conventions, renamed themselves, "we the people," as a sovereign that was mythologically coextensive with the national state.⁴⁶ As Jacques Derrida phrases it, "this people does not exist *before* this declaration, not *as such* . . . The signature invents the signatory. The latter can only authorize to sign once it has arrived at the goal, so to speak, of its signature."⁴⁷ Not only are the signatures at the bottom essential defining elements of both the Declaration of Independence and the Constitution, but other forms of civil culture have incorporated the simple listing of citizens names as a way of establishing authorship or membership in a particular class; the Vietnam Veterans Memorial in Washington, D.C. is the best known example of this. During the Constitution's Bicentennial, several programs using names and signatures to signify individuals' direct connection to the document and personal ratification were proposed, but never materialized. A company named Cornerstone Marketing presented the federal Commission with the idea of soliciting signatures for the Constitution that would then be permanently displayed in either an outdoor walk (the "Path of Awareness"), bound volumes, or microfilm; this program was promoted as a way for citizens to "immortalize" themselves.⁴⁸ Similarly, Britten Banners, a

company that manufactured large banners for events, proposed to collect citizen signatures on a banner that would be hung on a Philadelphia office tower behind Independence Hall during the We the People 200 celebrations.⁴⁹

These plans did not come to fruition, but they illustrate the difficulty of portraying American social and political relations. While the representation of citizens according to the identity of the states in which they reside retains the language of the political in describing the composition of the Union, the representation of American citizenship as a social or cultural condition is complicated by the history of the United States as an association of "masterless men."⁵⁰ European democracies evolved out of feudal societies in which each citizen's political status was determined by his or her position in the feudal order; citizenship in America evolved without the aid of corporate associations. In portraying the American nation, commemorators used the states to serve as both mediating political entities and as constituent elements of the larger popular sovereign. To be an American is primarily a matter of political affiliation, while political and national identity in other countries is largely cultural, highly dependent on class, language and folkways.

The creation of a new national entity composed of individual citizens also allowed the delegates to the Constitutional Convention to circumvent the existing intermediate political bodies, the states. Madison argued that the state legislatures would be unlikely to ratify a constitution that transferred many of their powers to a federal government, while a direct appeal to the citizenry might prevail: "The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased."⁵¹ The symbolic link between the Constitution and the people can exist without the aid of other mediating institutions, including the states. During the ratification debates in North Carolina, for example, one Antifederalist even conceded that "[t]he expression, 'We the People of the United States' shows that this government is intended for the individuals."⁵² The "We" who authorized the

Constitution did so without explaining who it was, why it was empowered to do so, or its continuity with past sovereigns.⁵³

By constructing a universal “we,” the Constitution’s Framers represented popular sovereignty without resort to such medieval forms as “corporations” or “estates” which might represent class interests.⁵⁴ This lack of feudal institutions has produced a uniquely democratic tradition, as Louis Hartz, and Alexis de Tocqueville before him, has argued.⁵⁵ The American republic did not tie representation by political institutions to membership within a clearly defined social classes unlike the ancient republics and Britain.⁵⁶ Gordon Wood concludes that the constitutional system was not a republic at all, but “a mixed or balanced democracy.” While governmental power was separated in the three branches of government like the ancient republics, the Framers had

eliminated the substance, thus divesting the various parts of the government of their social constituents. Political power was thus disembodied and became essentially homogeneous. The division of this political power now became (in Jefferson’s words), “the first principle of a good government.”⁵⁷

The Constitution unified the populace through the creation of a new national state and divided that state internally, mirroring the checks and balances of feudal society in a manner compatible with a democratic American society lacking clear social divisions. Without such formal mechanisms as corporations or estates, the relationships and interests that structured early American civil society were less easily defined than are those in European corporatist states. Mistaking the absence of formal “corporations” for a lack of community cohesion, Hegel considered America to be only a form of “civil society,” where social relationships remain primarily private, making democratic Americans incapable of true citizenship.⁵⁸

Democratic citizenship means that an individual is both a private person, living under the rule of law, and a public person, actively engaged in the creation of that law.⁵⁹

Citizens' membership in the sovereign body is coequal with their legal personality, as was made clear in the Supreme Court's most infamous case, *Dred Scott v. Sandford*, where Scott's ability to sue for his freedom, his legal "personality," was denied because he was not a citizen. As Chief Justice Taney wrote,

The words "people of the United States" and citizens are synonymous terms and mean the same thing . . . They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty.⁶⁰

Within the American constitutional tradition, legal personhood and citizenship coincide. To be a member of the sovereign body is to be capable of self-rule, both as an individual and as the member of a polity. The idea of autonomy underlies the connection among citizenship, sovereignty, and personhood. In the liberal, democratic tradition, the figure of the citizen is characterized by autonomy; she obeys only those commands she authorizes. The popular sovereign is the democratic citizen writ large, and capable of legislating for all who are part of the body politic, an artificial person incorporated through social union.⁶¹

In the United States, the creation of a national identity was simultaneous with the creation of a popular sovereign. As Will Harris notes, "the people as a whole" act as the Constitution's authors in an act of collective self-representation; this unity "is a major premise in an argument for the Constitution" as the paramount authority.⁶² The act of "incorporation," which signifies the union of individuals into a single body, is an important part of the process of representing the solidarity of a people who transform themselves into a nation-state. Such an understanding is compatible with social contract theory. If the democratic state depends upon popular sovereignty for its legitimacy, a citizen does not have a contract with the sovereign, but may only contract with fellow citizens as to how they might together rule themselves.⁶³

The creation of sovereignty and the radical revision of a society's political structure are extraordinary events. Bruce

Ackerman describes such moments as “constitutional politics” which differ from “normal politics”—those everyday decisions made by the government which do not require approval by “the people.” Instead, constitutional politics involve qualitatively different acts of law-making that embody the popular will in permanent and fundamental ways.⁶⁴ Ackerman’s distinction between normal and constitutional politics reflects the Lockean tradition, adopted by the Founding Fathers, that sovereignty is only partially transferred to the national state. Locke argued that there was a fundamental form of popular sovereignty, which Locke called “constituent” sovereignty, which required that the people could consent to the government that would rule them.⁶⁵ In this vein, Thomas Paine wrote, “A constitution is not the act of a government, but of a people constituting a government.”⁶⁶ A second type of sovereignty, “ordinary” sovereignty in Locke’s theory, was the government’s capacity to make and enforce laws.⁶⁷ This form of sovereignty is reserved to officials of the state, and cannot be exercised by the people as a whole.⁶⁸ The distinction between constituent and ordinary sovereignty is necessary because “[s]overeignty cannot be represented, and government is distinct from sovereignty.”⁶⁹ Constituent sovereignty in the Lockean tradition is inalienable and indivisible.⁷⁰ The distinction between constituent and ordinary sovereignty gives the Constitution a split personality as a political symbol. As the instrument by which the people expressed their identity and their authority to establish a system of self-governance, the Constitution remains a symbol of popular sovereignty. However, the Constitution also symbolizes citizens’ alienation of ordinary sovereignty to institutions composed of elected officials.⁷¹

Alienation and the Constitution

The Constitution represents all Americans, not as an aggregation of individuals, by incorporating them as individuals into a single artificial person—the American body

politic. As a symbol of the political relationships among a group of individuals, the Constitution becomes confused with the abstract relationships that it embodies. Bertell Ollman expresses this thought succinctly:

As creations of men created to serve them in their communal relations, all forms of the state, like other intermediaries . . . take on the very powers they were meant to mediate.⁷²

The act of incorporation requires that individuals forming a corporation alienate some of their own powers to this artificial person. In the process of incorporation, an entity's powers are placed in trust. Thus the entity's will is alienated so that the entity, and its wishes, become immortal. Corporations have a particular similarity to the body politic. Historically, the degeneration of monarchies, where sovereignty is clearly invested in a single person, was prevented through the legal fiction of a second corporate entity, the king's second body.⁷³

The medieval doctrine of the king's two bodies distinguished between the human king and the national "body politic" of which the king was head. While the monarchy was inherited through family bloodlines, the sovereign power was associated with the king's fictional body, which was only his as the representative of the people.⁷⁴ The immortality of the sovereign, illustrated in the cry "The king is dead, Long live the king," belongs to the entire nation. The body politic also mirrors corporations in its ability to unite the resources and wills of the many into a single (figurative) actor that will outlive the loss of its mortal members.

The process of incorporation is compatible with constitutionalism; Chief Justice John Marshall's definition of a corporation is not far from a definition of a constitutional system:

an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its

creation confers upon it . . . Among the most important are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual.⁷⁵

Both corporations and constitutional democracies are forms of alienated sovereignty which allow for an entity and its powers to survive beyond the life span of any individual and to combine the powers of many individuals while also restraining the ability of those individuals to exercise their powers.⁷⁶ Both corporations and the state are “permanently organized groups of men” to whom “we seem to attribute acts and intents, rights and wrongs.”⁷⁷ And, both corporations and the state draw their legitimacy from the alienation of the personal wills of their members.

This act of alienation has two distinct dimensions. The first is the act whereby one entity transfers certain powers or rights to another; this may involve such acts of agency as a power of attorney as well as formal acts of delegation. The second is the increasing separation and distance between entities that were once in a close relation, which may appear as a split within a single entity. In modern political thought, this second meaning of alienation refers to situations where citizens no longer believe in the ideals embodied in their political institutions, or when citizens do not believe that institutions embody the ideals that legitimate them.⁷⁸ Citizens may be described as alienated when they are no longer emotionally attached to, or participating in, public institutions or processes for collective decision-making.

Citizen alienation from social institutions involves a key tension within democratic theory. Without citizen participation, institutions for collective decision-making lose much of their legitimacy. Yet the term “alienation” also describes the essential process by which a society creates representative institutions. Citizens no longer need to participate, as many of their decision-making functions are assumed by the representatives to whom they alienate their

sovereignty. Moreover, alienation also refers to the process by which a society symbolizes itself through the form of a fetish. As defined in the anthropological literature, a fetish is the product of the alienation of a person or group's properties to another entity, which then acts in place of, or symbolically represents, the first entity.⁷⁹ Although the term has come to mean specifically psychological or religious substitutes for unmet desires or anxieties, the term fetish properly designates entities that embody a wide variety of social relations; a fetish, like a constitution, is always a form of mediation. In all cultures, fetishism properly defined has four characteristics: fetishes concretely represent abstractions; fetishes are given human qualities; the fetish is conflated with what it represents; and it is unclear whether people control the fetish or the fetish controls people.⁸⁰

The Constitution functions as a fetish in all of these ways. The document's image is often used as a symbol of popular sovereignty and the political system. As an artificial person, the Constitution is often perceived to have a capacity for action; individuals may claim that "the Constitution protects" this or that activity.⁸¹ The fetishization of popular sovereignty in the form of the Constitution can be expressed in a number of ways. In the 1920s and 30s, Edward Corwin criticized the "cult of the Constitution" that had turned the document into a way of securing the established order that "harks back to primitive man's terror of a chaotic universe, and his struggle toward security and significance behind a slowly erected barrier of custom, magic, fetish, tabu."⁸² Similarly, Max Lerner identified Americans' need to feel "some link with the invariant" as the basis for "the fetishism of the Constitution."⁸³ More recently, Sanford Levinson's argument that Americans possess a "constitutional faith" has also evinced this fascination with the Constitution as a stable source of national identity, and Michael Kammen has argued that the Constitution has been conceived of as "a machine that would go of itself," without, it seems, human energy or direction, providing an external basis for American political beliefs.⁸⁴

An empirical study by Larry Baas of individuals' attitudes towards the Constitution provides additional evidence that the Constitution functions as a fetish in American political culture.⁸⁵ Baas found three basic attitudes towards the document among the individuals he studied. The largest group clearly manifested fetishistic tendencies, describing the Constitution "in protective and benevolent terms [which] apparently gives them assurances against an uncertain destiny and a belief that someone is in control and will take care of them."⁸⁶ A second group had a negative view of the Constitution and viewed it as failing to protect people against others with more power; the terms of their disappointment suggest that they expected the Constitution to serve the role of protector. The final group viewed the Constitution as a normative framework for interpretation and political action; this view is essentially free of political fetishism, and Baas found it to be disproportionately held among intellectuals.

Similarly, the importance of legalism in American political culture is partially attributable to the fetishization of law. The notions of a nation under law, and the "rule of law, not men" are meant as criticisms of monarchy and arbitrary rule, but they also imply the displacement of popular sovereignty. A radical democrat, Thomas Paine both associated the law with the sovereign and depicted that sovereign in abstract terms when he declared that "so far as we approve of monarchy . . . in America the law is king."⁸⁷ As J. P. Nettl has argued,

In the United States the intellectual tradition of coping with sovereignty has been to deny its existence altogether; in practice only law is sovereign and probably the "function" of sovereignty can indeed best be taken as being fulfilled and institutionalized as law.⁸⁸

Through the process of fetishizing sovereignty in the general form of law, and the particular instance of the Constitution, Americans have come to understand the Constitution as