

The Exceptional Document

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Peter Berkowitz on *The Citizen's Constitution: An Annotated Guide* by Seth Lipsky.

Thursday, April 1, 2010 7 min read By: [Peter Berkowitz](#) Research Team: [National Security & Law Task Force](#)

Seth Lipsky. *The Citizen's Constitution: An Annotated Guide*. Basic Books. 336 Pages. \$25.95

Despite America's manifest exceptionalness, "American exceptionalism" has become an increasingly contested concept. Of course, Americans have always subjected their country to harsh criticism. During the ratification debates of 1787 and 1788, some opponents rejected the proposed Constitution on the grounds that it gave legal sanction to slavery. For the same reason, 19th-century abolitionists denounced the Constitution under which the nation had lived for more than half a century as a pact with the devil. In the 20th century, there was no shortage of voices — sometimes from the right, sometimes from the left, and sometimes at the same time from both — proclaiming that America was corrupt and decadent and headed to hell in a handbag.

Intellectuals, one of whose professional deformations is to be critical to a fault, have naturally taken the lead in exposing America's weaknesses, pathologies, and sins, real and imagined. Recently, they have taken their criticism to a new level. For example, in 2003, reflecting the conventional wisdom promulgated by professors on both sides of the Atlantic, student members of the Oxford Union debated the proposition that America was the greatest threat to world peace; the proposition was narrowly defeated by a few votes out of hundreds cast. Indeed, during the Bush years the idea of American exceptionalism gained new life through a perverse inversion. America was exceptional among the family of nations, argued professors and journalists in America and Europe, inasmuch as it was uniquely immoral and destructive.

In April 2009 at a NATO summit press conference, President Obama, whose historic election should have caused cognitive dissonance among America's critics because of the shining evidence it offered of the exceptional opportunity America continues to provide, weighed in on the question of American exceptionalism. The president began equivocally: "I believe in American exceptionalism, just as I suspect that the Brits believe in British exceptionalism and the Greeks believe in Greek exceptionalism." This could easily be taken for the view that America is not exceptional but ordinary because, like all other countries, it believes it is special. The deflationary implication was certainly of a piece with the numerous apologies for America's misdeeds the president offered in his first year in office in speeches around the world, apologies that were not always carefully balanced by a defense of America's virtues and affirmation of her decisive contribution to world peace and prosperity.

But at the nato meeting, Obama proceeded to declare that whatever other people believe about their countries or about America, American exceptionalism is exceptional. Emphasizing his pride in his country, Obama spoke of America's sacrifices in blood and treasure to restore and preserve freedom in Europe; the U.S.'s "unmatched military capability"; its creation of "the largest economy in the world"; and its "core set of values that are enshrined in our Constitution, in our body of law, in our democratic practices, in our belief in free speech and equality, that, though imperfect, are exceptional."

That's well said, and perhaps is as far as the president reasonably could be expected to go while meeting with nato heads of state to find opportunities for cooperation and partnership. And yet the president would have been speaking empirically verifiable truths if he had gone further and asserted that for all its flaws, the U.S. is the freest, most prosperous, most militarily powerful, most diverse, and most tolerant nation-state the world has ever seen. And that today America is indispensable to maintaining the international system that underwrites freedom and prosperity around the world.

Undoubtedly, American exceptionalism has many causes. No explanation would be adequate that neglected America's favorable location, protected on the east and west by great oceans and for over a century bordered on the north and south by peaceful neighbors; its abundance of waterways, vast expanses of rich top soil, and loads of buried natural resources; and its religious heritage, which predisposed it to prize individual freedom, equality before the law, personal belief, private property, hard work, and the spirit of innovation. And no explanation of American exceptionalism would be adequate that did not assign a place of prominence to the American Constitution, because of the moral principles that it embodies and the form of government it brought into being.

Veteran journalist Seth Lipsky has written a loving tribute to the American Constitution that aims to explain something of its exceptionalness to the nonprofessional. Founding editor of the New York Sun, founding editor of the Forward, and former editorial page writer for the Wall Street Journal, Lipsky begins his book's moving Preface by sharing his wonder at the Constitution's centrality to the great issues of the day:

It is hard to think of a moment in which the bedrock of the American Constitution has glinted so brightly as it does today. A new American president, lofted to office on a campaign for "change," has acceded in a time of war and economic crisis. Our courts — and our newspaper columns — are crackling with the question of habeas corpus. The premier of a Communist superpower, China, is calling for America to stand behind its debt obligations, even as a new administration prepares to borrow on an unprecedented scale. The states are wrestling with whether to permit the laws of marriage to comprise same-sex unions. Technology is making it possible for our privacy to be invaded in ways undreamed of in the past, and the government is taking over our biggest banks and controlling our car companies. Every one of these issues, and countless more, will be worked out with

reference to a parchment of fewer than eight thousand words, written, for the most part, ten generations ago.

And it is hard to think of a nation whose written Constitution has remained as central to the great issues of the day for as long as the American Constitution.

Yet to understand the myriad ways in which the Constitution bears on the great issues of the day is, even for a citizen's understanding, no simple matter. Lipsky's annotated Constitution makes clear that one must begin with constitutional text. But concern with the text quickly takes one beyond it. To make sense of the words on parchment one must consider the historical context in which the Constitution was debated and devised, beginning with the founders' intentions. One must also take into account the numerous moving and interlocking parts of constitutional structure as well as the body of cases handed down by the Supreme Court that have for more than two centuries provided authoritative, though not final, interpretations of constitutional provisions, declaring what they mean and how they apply in changing and unanticipated circumstances.

Lipsky's admiration for the Constitution and his conviction of its surpassing relevance developed over the course of a 40-year career as a newspaper editor in which he

presided at thousands of daily editorial meetings, hardly one of which passed without at least a reference to some provision of the document that established our system of checks and balances. It is a career that has left me astonished at the scale and range of problems that can be, and so often are, reasoned out against the clauses of our national law — whether it be a boat owner in Pennsylvania seeking the right to oyster in the beds of New Jersey, a foreign diplomat in Ohio trying to prevent his American wife from winning a divorce, or a retired security guard wanting to keep a pistol at his home, to name but a few of the situations in which ordinary individuals sought to solve a problem by turning to a law written by giants long before they were born.

It is also a career that left Lipsky wanting a guide to the Constitution that provided more than the many handy, pocket-sized volumes that present the unadorned Constitution in its austere glory, yet stopped considerably short of the daunting tomes, produced by and for scholars, that offer detailed constitutional commentary, constitutional history, and constitutional law.

Despite its combination of flexibility and sturdiness, Lipsky is at pains to point out that not all matters can be solved by appeal to the Constitution: It took a bloody civil war to end the evil of slavery.

Lipsky's guide consists of the text of the Constitution and a running commentary that proceeds clause by clause and often phrase by phrase through the seven articles of the original Constitution and the 27 amendments added since 1788. Many comments are a few sentences in length. Occasionally they extend for several paragraphs. They contain interesting tidbits and digressions, philosophical reflections, arcane questions of law, and

major debates over how the Constitution should be read. Lipsky draws on the various records of the Constitutional Convention, foremost among which were James Madison's notes. He makes generous use of *The Federalist*. Quite appropriately, he also includes fair reference to leading anti-Federalist critics, whose opposition to the Constitution, rooted in the belief that centralizing power in a distant national government would undermine state sovereignty and pose an intolerable threat to individual liberty, reverberates in popular opposition to the Obama administration's domestic agenda. And his commentary refers abundantly to the Supreme Court cases that resolve — at least until the next hard case comes down the pike, or until the nation, in accordance with procedures spelled out in Article V, amends the Constitution — the hard questions about what the Constitution requires, permits, and forbids.

The Constitution that emerges from Lipsky's commentary is both open and immutable; its provisions are susceptible to competing interpretations and it establishes "a standard against which our laws can be measured." Despite its combination of flexibility and sturdiness, Lipsky is at pains to point out that not all matters can be solved by appeal to the Constitution: It took a bloody civil war to end the evil of slavery. But, as Lipsky also notes, Lincoln fought the Civil War to uphold the Constitution, and the Constitution's enduring principles proved a framework for the ratification of the 13th, 14th, and 15th Amendments, which transformed "our fundamental law in an effort to expiate our nation's original sin."

Much as Lipsky admires the founders, great American statesmen throughout American history, and the justices of the United States Supreme Court, his book is above all inspired by citizens and their contribution to American constitutionalism. Whereas law professors tend to concentrate on the technical prowess or the lack thereof displayed by Supreme Court opinions, Lipsky's fascination with cases arises in significant measure from the citizens who bring them:

Ordinary Americans continue to turn to the Constitution, loyalty to which more than anything else — race, religion, national origin, language — defines what it means to be an American. This has led me to the view that the real heroes of constitutional law are the citizens themselves, the litigants who put their faith in the courts and the Constitution and often devote their life savings to the contest.

Foremost among Lipsky's heroes is Clarence Earl Gideon. Poor, homeless, and adamant that he was innocent, Gideon was convicted of breaking into a poolroom in Panama City, Florida. From his jail cell he penned an appeal to the United States Supreme Court arguing that at trial he had been denied his constitutional right to counsel. Remarkably, the Supreme Court was persuaded by the imprisoned man's appeal to hear his case. And in *Gideon v. Wainwright* (1963), the Court eventually agreed with him. Lipsky has "thought about" the case "hundreds of times over the years." But time has not diminished the significance he

attaches to it: “What I keep marveling at is the astounding thing this vagrant accomplished by dint of having at some point either read the Constitution or heard some mortal’s idea of the fantastic things it says.”

Lipsky’s ideas, woven into his commentary about the fantastic things that the Constitution says, are rich in implications about the source of the Constitution’s strength, its enduring promise, and the conditions that preserve it. Designed to secure individual liberty by limiting, enumerating, separating, and mixing the powers of government, the constitution is marvel of checking, balancing, and blending. And the imperative to check, balance, and blend — will and reason, passion and principle, interest and necessity — stems, Lipsky’s commentary shows, from both the political exigencies of weaving a nation together out of 13 diverse states with competing interests and from reflections on man’s mixed nature.

One particularly instructive example Lipsky offers of constitutional checking, balancing, and blending is what constitutional scholar Max Farrand called “the great compromise.” It concerns Article I, Section 1, which provides that “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” It was by no means obvious to delegates to the Philadelphia Convention, or to anybody else, that in the national legislature each state should have equal representation in the smaller upper house and proportional representation in the larger lower house. Or that to make that design palatable direct taxes should be apportioned among the states on the basis of population (Article I, Section 2) and that all revenue bills should originate in the House of Representatives (Article I, Section 7).

And yet,

Absent a bicameral legislature, ratification would have failed. The inclusion of a Senate addressed the concerns of small states, which feared that a Congress apportioned solely on population would leave them at a disadvantage. If the House of Representatives speaks for the people, the Senate protects the interests of the states as sovereign political entities. “This body alone forecast the continued existence of the states,” wrote one historian, as senators were to be chosen by the state legislatures and each state, regardless of its size, had two senators in contrast to the more democratic House; accordingly, the Anti-Federalists favored the existence of a Senate and opposed a unicameral legislature, which existed in several states at the time of the Constitutional Convention.

Were this great compromise better understood — along with the benefits that flow from incorporating in the national legislature representation of citizens through their states and representation of citizens in their local and individual capacity — many of the constantly heard complaints that American has failed to live up to democratic requirements would lose their force. For it is part of the genius of the American Constitution to root government in the

consent of the governed while also providing mechanisms to refine popular will by giving the people's reason a decent opportunity to prevail over their momentary whims and disruptive passions.

Lipsky's Constitution displays a progressive push and contains a conservative imperative. It is a Constitution under which America has for more than two centuries steadily expanded the meaning of individual freedom and enlarged the range of individuals possessing the rights and responsibilities of citizenship. And it is a Constitution that requires us to understand the sometimes conflicting intentions of those who drafted and ratified it, and to understand the struggle of those many preceding generations of Americans to interpret and uphold its principles.

America's exceptional Constitution constitutes, in significant measure, American exceptionalism.

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