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REASONS, RHETORIC, AND THE NINTH AMENDMENT: A COMMENT ON SANFORD LEVINSON

STEPHEN MACEDO*

I

In his important and provocative article,¹ Sanford Levinson appears in two roles. First is Levinson the constitutional interpreter, ally (for the most part) of those who seek to revive interest in the ninth amendment. Second is Levinson the skeptic, warning the reader of his doubts about the possibility of correct constitutional interpretations. In his first role, Levinson critically reviews important claims for and against reviving the ninth amendment. He shows, for example, how the widespread concern with constitutional text and historical intention should bolster the case for taking the ninth amendment more seriously. But Levinson always returns to his second role, framing his analysis of the ninth amendment within a larger skeptical posture about the possibility of “correct” constitutional interpretations (or worse, of a correct “decoding” of the text).² And so, Levinson’s useful contributions to constitutional interpretation are repeatedly hemmed in and even undermined by disclaimers to the effect that all he is doing is situating the ninth amendment, and the phenomenon of its revival, within our evolving legal culture and rhetorical practices.

Levinson wants to argue, on the one hand, that the revival of interest in the ninth amendment is probably a good thing.³ But he also wants, on the other hand, to portray himself as a “skeptic,” concerned with legal rhetoric and culture rather than with “searching for singularly ‘correct’ interpretations of the Constitution.”⁴ Situating “ninth amendment talk” within our legal culture, and making sense of the ninth amendment’s revival in the context of legal practice and rhetoric, are very different enterprises from justifying the revival of the ninth amendment. Can Levinson have it both ways? Can Levinson both engage in argu-

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1. Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131 (1988) (Professor Levinson’s article appears in this symposium issue).

2. *Id.* at 131, 132, 161.

3. *Id.* at 160.

4. *Id.* at 131-32, *passim*.

ments that seem designed to help us better understand the meaning of the ninth amendment, and then retreat to his skeptical posture disclaiming the possibility that the ninth amendment has a correct meaning? Or to put it otherwise, what kind of a skeptic cares enough about better and worse readings of the ninth amendment to put himself to the trouble of research and analysis designed to correct widespread misreadings? Perhaps only a half-hearted skeptic, a skeptic whose doubt is not really corrosive of a serious concern with improving our understanding of the Constitution.

I shall begin by addressing Levinson's substantive arguments about why we should take the ninth amendment more seriously. For the most part, I applaud Levinson's arguments on behalf of the ninth amendment, and try to push the case a bit further. From substantive arguments I will turn to suggest some doubts about Levinson's skepticism: he takes the quality of legal argument too seriously to be a skeptic about the possibility of distinguishing better from worse arguments. All that Levinson's skepticism comes down to is the assertion that neither he nor anyone else has yet attained (or is likely to attain) what could be described as a finally "correct" interpretation of the Constitution. Fine. But one need not believe that our understanding of the equal protection clause, for example, is "finally correct" to believe that it is better than the Court's understanding in *Plessy v. Ferguson*.⁵ And Levinson himself shows that he understands the ninth amendment much better than Judge Bork does (or, at least, than he did at the time of his hearings). So why all the fuss about skepticism? We should take Levinson's "skepticism," I will suggest, as standing in for a kind of theoretical modesty, which is laudable but misleading, and belied by the quality of his own arguments.

II

Reviving the ninth amendment is not quite a matter of restoring the dead to life. As Levinson points out, the ninth amendment has had at least a shadowy existence. It figured in Justice Douglas' justification of an unenumerated right to privacy in his opinion for the Court in *Griswold v. Connecticut*,⁶ it was the focus of Justice Goldberg's concurring opinion in that same case,⁷ and it has been cited since. The ninth amendment received a big boost from, of all things, the Senate debates over the nominations of Judges Bork and Kennedy to the Supreme Court. Judge

5. 163 U.S. 537 (1896).

6. 381 U.S. 479 (1965); see Levinson, *supra* note 1, at 135-36.

7. *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

Bork's unwillingness to regard the ninth amendment as anything more than an unintelligible aberration seriously hurt his cause in the Senate Judiciary Committee.⁸

Levinson does a nice job of showing that, far from what New Right constitutionalists like Judge Bork and former Attorney General Meese claim, emphasizing the authority of constitutional text and historical intention actually lends support to reviving the ninth amendment as a source of unenumerated constitutional rights.⁹ Madison insisted on attaching the ninth amendment to the first eight amendments to preclude a possible implication of an enumeration of rights; namely, that citizens retain *only* those rights specifically enumerated. But proponents of original intent typically use the resort to history as part of an argument that construes judicially enforceable individual rights as only those specifically enumerated and originally intended. The New Right's narrow and specific approach to constitutional rights was precisely the sort of error that the framers of the ninth amendment sought to guard against. It is, then, not surprising that Bork, Meese, and company ignore the ninth amendment.¹⁰ A serious resort to history, it turns out, bolsters rather than undermines the revival of the ninth amendment.

But proponents of the ninth amendment face problems that Levinson considers more substantial than the New Right's selective use of history. First, does the ninth amendment apply to the states?¹¹ And second, might not the fourteenth amendment's privileges and immunities clause serve as a sounder basis for broadening rights?¹² Levinson seems to come around, eventually, to the view that both neglected clauses need to be reexamined. Indeed, anyone concerned with doing full justice to individual rights must see the two clauses as working together: the ninth amendment encouraging us to read individual rights broadly, and the privileges and immunities clause helping to justify the application of even unenumerated rights against state governments.

Among other sources, Levinson cites the interesting historical work of Michael Kent Curtis on the intentions of the framers of the fourteenth amendment. Let me only note one of Curtis' most pertinent observations, not mentioned by Levinson: at least one framer of the bill proposing the fourteenth amendment specifically claimed in the Senate debates

8. Levinson, *supra* note 1, at 135.

9. *Id.* at 139-41.

10. I discuss New Right constitutionalism and its problems at greater length in S. MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* (1987).

11. Levinson, *supra* note 1, at 143-48.

12. *Id.* at 145.

that the privileges and immunities clause would apply the *whole* Bill of Rights *including* the ninth amendment to the states.¹³ The serious resort to history is even more damaging to Meese, Bork, et. al. than Levinson claims.

So Levinson helps proponents of the ninth amendment clear their first important hurdle: applying the ninth amendment to the states. The next problem to be faced is giving meaning to the ninth amendment; we must decide, what unenumerated constitutional rights we have. The first place to begin the search for ninth amendment rights is, as Levinson points out, within the Constitution itself. Levinson also considers how moral sources outside the constitutional text, "natural justice" or other moral standards, could furnish sources of unenumerated ninth amendment rights. Here, according to Levinson, we face the problem of the historical coexistence of the ninth amendment and slavery: can the ninth amendment really constitute a protection for moral rights if it was consistent with slavery? Let me take up these two strategies in turn.

First, the search for the ninth amendment's meaning should certainly begin within the confines of the Constitution's text and structure. This, indeed, seems to me to be basically what Justice Douglas sought to do in *Griswold*. But Levinson, strangely, first heaps scorn on Douglas' opinion, then seems to endorse a roughly similar approach.¹⁴ Douglas' opinion is open, I think, to a more favorable interpretation than Levinson (at first at least) allows.

Griswold struck down a Connecticut statute making it illegal for married couples to use contraceptives. The Court based its decision on an implicit constitutional right to zones of privacy, which emanate from, or form "penumbras" around, the specific guarantees of the Bill of Rights. These implicit, penumbral rights, Douglas argued, help give life and substance to express guarantees. And so:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall

13. M. CURTIS, NO STATE SHALL ABRIDGE 53-54 (1986).

14. Compare Levinson, *supra* note 1, at 135-36 with *id.* at 149-50.

not be construed to deny or disparage others retained by the people."¹⁵

Now Levinson charges that Douglas' "attempt to arrive at marital privacy through an exegesis of the Bill of Rights simply does not persuade."¹⁶ But later in his paper, in asking how life might be breathed into the ninth amendment without relying on extra-textual notions of "natural justice," Levinson seems to endorse a search for meaning based on the "general themes of the entire constitutional document," or what he calls a "true 'penumbras and emanations' approach."¹⁷ Levinson suggests, that is, interpreting the ninth amendment by drawing on themes stressed in the specific clauses and structures of the Constitution as a whole; unenumerated ninth amendment rights might derive from a "close reading of the existing text."¹⁸ That seems to me to be a pretty good description of what Douglas (perhaps with some unhelpful metaphors) was up to in *Griswold*.

Imparting meaning to the open-ended command of the ninth amendment by consulting values underlying the more specific acknowledgments of constitutional rights, is a strategy similar to Chief Justice John Marshall's landmark opinion in *McCulloch v. Maryland*.¹⁹ In *McCulloch*, the question was how to read the necessary and proper clause of article I, section 8. Article I's enumeration of Congress' powers, Marshall said, provides only the "great outlines" of what Congress may do. And so, while the Constitution does not specifically grant the power to establish a national bank, Marshall argued that interpreters should look not only at constitutional specifics, but also at the ends and purposes implicit in the powers that are specifically granted. Constitutional specifics, and overall constitutional themes and structures, help justify implied powers beyond those enumerated in article I. The necessary and proper clause helps signal the existence of unenumerated powers; the Constitu-

15. *Griswold*, 381 U.S. at 484.

16. Levinson, *supra* note 1, at 136.

17. *Id.* at 149-50 (quoting J. ELY, *DEMOCRACY AND DISTRUST* (1980) and Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 349-50 (1981)). It should be noted that while Levinson claims that "there is no constitutional scholar who endorses the Douglas opinion," Ely himself pulls back from condemning *Griswold*; see J. ELY, *supra*, at 221 n.4. Ely's own approach, moreover, is to argue that democracy, not privacy, is the dominant value that emanates from the particular constitutional clauses and the structure of the Constitution as a whole. See *id.* at 73-104. Ely's argument, in other words, looks a lot like Douglas' except one finds democracy where the other finds privacy. And since Ely's preference for democracy over privacy rests on a self-defeating skepticism and an incoherent distinction between "process" and "substance," Douglas' argument (though much more schematic) may be stronger than Ely's. For a useful critique of Ely, see Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

18. Levinson, *supra* note 1, at 150.

19. 17 U.S. (4 Wheat.) 316 (1819).

tion as a whole (and especially article I) helps us decide what those powers are.

The ninth amendment is an elastic clause for individual rights that is at least as explicit as the article I elastic clause for Congress' powers. *McCulloch* and *Griswold* stand for similar ways of fleshing out the meaning of these elastic clauses: going back to the rest of the document and seeking the larger ends, values, and purposes that seem to underlie specific clauses and structures, and then using these to specify additional, implied powers or rights. Levinson's dismissal of *Griswold*, therefore, is too hasty.

Of course, the ninth amendment does not limit unenumerated rights to those implied in the rest of the document, or those supported by values prominently represented in the Constitution's text. Some might want to read the ninth amendment as a point at which the Constitution opens to the claims of moral judgment itself, legitimizing the protection of rights justified on moral grounds. Here we confront Levinson's second worry mentioned above. Since it took the Civil War amendments to put an end to the Court's protection of slavery, Levinson argues, the reliance on the ninth amendment as an expansive source of judicially enforceable moral rights (rights not well-justified by the "penumbras and emanations" approach) is compromised.²⁰ If slavery and the ninth amendment were consistent with one another, he seems to say, then it is hard to read the ninth amendment as importing natural rights as such into the Constitution.

Levinson seems to regard it as especially troubling that figures like Justices Marshall and Story "fully recognized at the very instant they were judging that the practice of slavery was indefensible from the perspectives of natural rights, natural law, and Christianity."²¹ How could the ninth amendment be read as a "legitimator of judicial invalidations of injustice" if morally sensitive characters like Marshall and Story were willing to uphold the constitutionality of slavery?²² Well, Levinson himself suggests (parenthetically) but does not pursue the solution to his problem: there might be prudential reasons that justify accepting certain injustices, like slavery, for the sake of overriding values, such as peace and union.²³ Such prudential arguments might have been sound in the case of slavery (at least for a time) while being unavailable to those who today oppose the protection of, for example, marital privacy.

20. Levinson, *supra* note 1, at 150-53.

21. *Id.* at 154.

22. *Id.*

23. THE LINCOLN-DOUGLAS DEBATES 277 (R. Johannsen ed. 1965).

If one pursues the argument that Levinson raises only parenthetically, one might conclude that the constitutional accommodation of slavery was seen, right from the start, as not only prudential but temporary. Abraham Lincoln argued that slavery was indeed inconsistent with the basic moral values underlying the Declaration of Independence and the Constitution, especially the promise of basic human equality. Aware of slavery's injustice (and indeed, its incompatibility with our basic law) the framers, said Lincoln, "knew of no way to get rid of it at that time."²⁴ But the Union was not, Lincoln claimed, a compact protecting slavery:

[w]hen the fathers of the Government cut off the source of slavery by the abolition of the slave-trade, and adopted a system of restricting it from the new Territories where it had not existed, I maintain that they placed it where they understood, and all sensible men understood, it was in the course of ultimate extinction. . . .²⁵

The original Constitution, then, can be read as making the minimal concessions necessary to bring the Southern States into the Union, while asserting deeper principles at odds with slavery. The Constitution, in this light, appears as an "aspirational" document: composed not just of positive rules, but also of certain ideals and moral principles to be strived for and progressively approached.²⁶ Levinson neglects the aspirational element in the Constitution's moral logic and so does not see how the actual accommodation of slavery even by morally sensitive figures like Marshall and Story (and indeed, the founders) is reconcilable with a deep and serious, though perhaps not fanatical, commitment to the realization of certain moral ideals. The ninth amendment, indeed, would seem to fit nicely into this aspirational logic: it expresses a constitutional desire to protect rights not specifically identified in the document, leaving it to future interpreters to advance the project of discerning and protecting constitutional rights.

I have suggested that, in various ways, Levinson might have gone further than he did in encouraging the revival of the ninth amendment. There is more, in particular, to be said for Douglas' opinion in *Griswold* than Levinson allows, and the method of *Griswold* furnishes a method for fleshing out the meaning of the ninth amendment. How far should we go in encouraging judges to incorporate into the ninth amendment rights, the support of which comes not from the Constitution's text but from

24. *Id.* at 277.

25. *Id.* at 277-78.

26. *Id.* at 304; see also Sotirios Barber's discussion in S. BARBER, ON WHAT THE CONSTITUTION MEANS 169-96 (1984).

independent moral sources? I am not sure. But my reservations have nothing to do with the Court's protections for slavery.

III

Now all this leaves us with a fairly full plate. One item remains, however: Levinson's frequent denials that there are uniquely "correct" interpretations of constitutional provisions.²⁷ How seriously should we take Levinson's professions of skepticism? What sort of skeptic is Levinson? It would hardly be unusual, or even particularly "skeptical," to hold that finally correct interpretations of the Constitution's various passages are not to be had. That's not skepticism, that's just openness to self-criticism, based on the acknowledgment that human beings are fallible. Dworkin, for example, holds that there are "right answers" to hard cases of legal interpretation.²⁸ He does not by that claim mean that we can point to a series of actual interpretations that are indubitable, un-revisable, or finally and absolutely right. He means that among a group of competing positions and arguments about how a particular case ought to be settled, we have no difficulty supposing that one is, all things considered, best. The judge's duty is, then, to weigh the evidence and arguments to the best of his ability, and come down for the position that seems on balance superior to its competitors. We recognize more or less competent exercises of judicial power, more or less satisfactory fulfillments of judicial duty, on the basis of our own judgments about how cases should be decided.

There's nothing mysterious here. Judging legal cases can, no doubt, be difficult, but so can grading student papers. Conscientious graders make an effort to get the grade right because they believe that, while relevant considerations can be complex and mistakes can always be made, the differences between "A" and "C" papers are not arbitrary but real and discernible.

Does Levinson mean to reject even this rather mundane description of the "right answers" thesis? He seems to. The best interpreters can do, he says, is pay "close attention to the narratives by which we constitute our particularistic way of life," and seek to "grasp the deep structures that constitute our political order."²⁹ It is by no means clear to me how Levinson would have judges decide particular cases. Suppose the "deep structure" of legal judgment in our "particularistic way of life" comes

27. See, e.g., Levinson, *supra* note 1, at 132, 154.

28. R. DWORIN, TAKING RIGHTS SERIOUSLY 81-130, 279-90 (1978).

29. Levinson, *supra* note 1, at 156.

down to the following: judges (more often than not) sift arguments conscientiously and try to discern the strongest among competing positions. Suppose, further, that conscientious sifting and weighing is exactly what, in our society, litigants and citizens (for the most part) expect judges to do. In that case, Levinson's interpretive move leads us right back to the conscientious sifting and weighing of evidence and arguments.³⁰

Of course, Levinson might well dismiss my characterization of "our" expectations about judicial behavior as more idealistic and naive than that of most lawyers, judges, and even citizens. Perhaps, but what would the point of such an observation be? Whether the question we are interested in is what judges do, or what judges should do, in neither case does the answer depend on what most people think. The fact is that some (not all) lawyers, judges, litigants, and citizens would approve of my description of our legal practices. And my description would, furthermore, actually fit some (not all) of our legal practices. By this I could only show that my description is not wholly utopian; that is a start, but only a start, on the path to justification.

Let us assume that the question we are interested in is the practical issue of how judges ought to decide cases (Levinson himself seems to say, after all, that they *ought* to take the ninth amendment more seriously). Levinson apparently thinks that "skeptics" like himself can still speak about interesting practical questions by adopting "a quite different tone of voice," one that is "interpretive," that is, one that pays close attention to "narratives."³¹ But if Levinson thinks that "interpretation" is a way of combining a broad skepticism with a capacity for practical judgment, he is mistaken. Interpretations of social practices have normative implications only when they are normatively based, or normatively defensible. The reason is simple: interpretations are controversial, and controversial in many of the same ways that "abstract" moral arguments are controversial. If we want to be governed by "interpretations" of our shared practices, as Dworkin points out, we still have to decide which among a range of competing interpretations is the best one.³² The racist, after all, has his interpretation of the equal protection clause, and of our political practices and "deep structures" and whatever else you care to name. He can tell a story or narrative about what America means, about what our

30. Levinson's interpretive stance raises a host of problems, some of which I have tried to address elsewhere, in the context of a discussion of the "anti-foundationalist" claims of Rorty, Walzer, and others; see Macedo, *Liberal Virtues, Constitutional Community*, 50 REV. POL. 215 (1988).

31. Levinson, *supra* note 1, at 156.

32. See R. DWORKIN, *LAW'S EMPIRE* 77 (1986).

country stands for. If the skeptic thinks he can separate better from worse narratives or interpretations without sifting moral arguments and evidence, he needs to tell us how. If, however, rejecting the racist's interpretation of America depends in part on rejecting racism, then interpretation leads us back to the enterprise of moral argument.

Levinson adds a suggestion that echoes Michael Walzer: if the interpretation of shared meanings is what constitutional interpretation is (should be?) about, "why would one believe that the judiciary is the better interpreter of 'our' political tradition than a legislature?"³³ The interpretive move might shift authority from the judiciary to the legislature if all of "us" shared the same interpretation of "our" tradition. That, however, is manifestly not the case. People disagree about their interpretations. Establishing the superiority of the integrationist to the segregationist interpretation of our constitutional tradition will require more than the counting of heads, more than history, and more than anthropology: it will require just the sort of normative engagement that Levinson flees from.³⁴ And so, adopting an "interpretive" tone of voice does not undermine the usual arguments for judicial review: political majorities should not be allowed to judge the merits of their own case (I mean "interpretation") when minority rights are at stake.

I have much more sympathy with Levinson's final claim that Supreme Court interpretations of the Constitution should not be respected as final interpretations, not only for the judicial branch of government, but for Members of Congress and the President as well.³⁵ Judicial finality is, indeed, an unjustified claim that helps discourage more widespread participation in the process of constitutional interpretation. Constitutional institutions, including legislatures, the executive office, and elections, should be thought of as the settings for a genuinely public process of constitutional interpretation: a process in which Members of Congress, the President, and citizens themselves play a vital role. In our system, this public process should be animated by the responsibilities of three constitutionally coordinate branches each to interpret the Constitution for itself in carrying out its assigned functions.³⁶

There is, as I said above, much to recommend in Sanford Levinson's excellent analysis of the ninth amendment. His skepticism is, however,

33. Levinson, *supra* note 1, at 156. See Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379 (1981).

34. The point is well made by Dworkin. See also Sotirios Barber's discussion of the distinction between history and tradition in S. BARBER, *supra* note 26, at 84-85.

35. Levinson, *supra* note 1, at 158.

36. I expand on this point in S. Macedo, *Liberal Virtues: A Liberal Theory of Citizenship, Virtue, and Community* (forthcoming 1988), and Macedo, *supra* note 30.

ultimately half-hearted and unconvincing, serving mainly to introduce confusion. If Levinson's concern is, as he claims, with "diverse rhetorics of argument,"³⁷ why does he care to show that New Right types like Meese and Bork get their history wrong? If Levinson wants to read law as literature, why not read the real thing instead? As literature, law is pretty bad stuff. The fact is that Levinson has practical concerns about how the Constitution should be interpreted, and he clearly believes that conscientious argument and attention to reasons and evidence helps us better address such concerns.

Let me end by suggesting (presumptuously) another interpretation of what Levinson calls his skepticism. Levinson doubts that he or anyone else has secure possession of what could plausibly be thought of as the final or ultimately true theory of what the Constitution means. Perhaps he doubts (don't we all?) that anyone ever will have the final answer. Perhaps he is struck by the complexity of moral issues and the tendency of moral judgments to be colored by personal feelings, culture, and a host of other factors besides reasons. Human fallibility, moral complexity, and the difficulty of impartial judgment, all argue in favor not of skepticism but of measure, modesty, and moderation in the insistence on what seems to one personally to be the best argument. But if, when we survey the moral or constitutional landscape, we believe that the serious application of self-critical thinking helps us progress from limited to less limited understandings, to discover and correct errors and shortcomings in our own views, then we also have good reason not to fall into the embrace of skepticism.

Levinson's substantive arguments are characterized by an admirable measure and moderation. And at many points, Levinson's article displays too obviously the benefits of careful argument, research, and reflection to allow us to accept the skepticism that he puzzlingly and half-heartedly insists upon.

37. Levinson, *supra* note 1, at 131.

