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## FAITH AND OBLIGATION, OR WHAT MAKES SANDY SWEAT?

Frank I. Michelman\*

*“There is . . . no transhistorical criterion for ‘thinking like a . . . lawyer,’ other than an abiding faith in the basic constitutional enterprise.”<sup>1</sup>*

Is the Constitution of the United States a sort of thing that anyone in this country, acting individually, can choose to reject? In what sense? With what consequence? What is it that one does, takes on, or enters into by “acceptance” of the Constitution, either by a public act (say, an oath), or in focused, private thought? And what, exactly *is* the Constitution, regarded as a possible object of personal commitment? Sanford Levinson takes up these questions in his book *Constitutional Faith*.<sup>2</sup> Below, in Parts II and IV, I engage in a dissection of Levinson’s treatments of them—committing, no doubt, the offense that Kierkegaard wincingly called “slic[ing] the author into paragraphs . . . .”<sup>3</sup> I do so not idly, however, but prompted by questions arising from other work in which I recently have been engaged,<sup>4</sup> so let us begin with that.

### I. CONSTITUTIONAL OBLIGATION

#### A. *The Constitution as Law and as a Basis of Obligation*

The Constitution, no doubt, is many things to many people. To all, however, it is *law* (whatever else it also may be), and it’s as law that we shall regard it here.<sup>5</sup> The Constitution could not conceivably have figured as it has in our country’s history, and as it does in our lives today, had it not from the start and throughout been widely perceived as a body of legal norms, compliance and non-compliance with which carry pivotal legal consequences within our particular system of legal

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1. Paul Brest, Sanford Levinson, J.M. Balkin & Akhil Reed Amar, *Processes of Constitutional Decisionmaking: Cases and Materials* xxxi (4th ed., Aspen L. & Bus. 2000).

2. Sanford Levinson, *Constitutional Faith* (Princeton U. Press 1988).

3. See Søren Kierkegaard, *Fear and Trembling—Preface*, in Søren Kierkegaard, *Fear and Trembling and the Sickness unto Death* 22, 24 (Walter Lowrie trans., Princeton U. Press 1954).

4. See e.g. Frank I. Michelman, *The Constitution as Legitimation Contract*, 8 Rev. Constitutional Stud. \_\_\_\_ (forthcoming 2003).

5. See e.g. Levinson, *supra* n. 2, at 54 (calling the Constitution “the very fountainhead of the American legal system”).

ordering. No decree can count as valid law here if it visibly issues from outside constitutionally authorized institutions and procedures, or otherwise fails to comply with constitutional requirements.<sup>6</sup> We can grant that judgments of constitutionality do not always entirely settle questions of civic obligation. There sometimes may be prevailing reasons—even reasons of civic responsibility—to break evil laws you consider constitutional; just as there also sometimes may be prevailing civic (or other) reasons to abide by evil laws you think are not.<sup>7</sup> But if judgments of constitutionality are not always strictly decisive of civic duties respecting the law, they surely often are and surely always have a bearing. Else what's a Constitution for?<sup>8</sup>

The premise that the Constitution is law leaves open some huge questions. That premise does not settle whether the corpus of normative material of which the Constitution is composed, from which its applied meanings are to be expounded as occasion requires, consists of the parchment text alone or that plus a surrounding interpretive tradition, perhaps viewed through a scrim of truths evident to reason. The former is what Levinson calls a “protestant,” the latter what he calls a “catholic” view.<sup>9</sup> Nor, if we follow Levinson, does the premise of the-constitution-as-law settle who does the expounding. It does not settle whether I, when in doubt, am to learn the concrete requirements of constitutional legality from what some hierarchically paramount, central authority from time to time declares them to be (a “catholic” view), or rather I am to learn them by applying to the case my own relevant powers of research and reason (a “protestant” view).<sup>10</sup>

The fact remains that most American minds posit *something* identifiable as the Constitution, conditioning *someone's* legally potent judgments of constitutionality and unconstitutionality. Suppose we adopt a “catholic-protestant” stance, as Levinson does.<sup>11</sup> We take an expansive, non-literalist, “text-plus” view of interpretative method, while insisting on every individual's

6. In the lingo of jurisprudence, the Constitution acts in our legal system as a “secondary rule” and “rule of recognition.” See H.L.A. Hart, *The Concept of Law* 89-107 (Oxford U. Press 1961); Michelman, *supra* n. 4, at pt. II(B). Perhaps the Constitution-as-law has not at every moment from its birth figured clearly as a recognition-rule in the American legal system. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4, 5-33 (2001) (distinguishing between the Constitution as “fundamental” law and the Constitution as “supreme,” “ordinary” law). It has done so steadily, however, for a very long time.

7. See e.g. John Rawls, *A Theory of Justice* 320-23 (rev. ed., Belknap Press of Harv. U. Press 1999) (discussing “civil disobedience” as distinguished from “conscientious refusal”).

8. I do not mean to suggest that constitutions as a class have no other or broader purpose or effect than to settle certain questions of legal validity or of civic obligation. See e.g. Cass R. Sunstein, *Designing Democracy: What Constitutions Do* 6 (Oxford U. Press 2001) (“[T]he central goal of a constitution is to create the preconditions for a well-functioning democratic order . . .”). I do mean to suggest that constitutions could not very well serve those other purposes, or have those other effects, if they did not *also* figure as law.

9. Levinson, *supra* n. 2, at 18-19, 47. I will sometimes refer to the “catholic” view as a “text-plus” view.

10. See *id.* at 23-27. There are also, of course, less radically individualist non-catholic views to consider: that constitutional interpretive authority belongs to the people collectively (a “Quaker” view?), or to sundry heads of governmental districts and departments to work out among themselves as best they can (an “episcopal” view?).

11. *Id.* at 51; see *id.* at 47.

responsibility to use that method to reach his or her own judgments regarding constitutionality. This need not mean we feel free to obstruct enforcement of any judicial ruling on constitutionality with which we disagree. It does mean we won't allow judicial rulings automatically to displace our own judgments, or in that way to saturate our understandings of civic obligation.<sup>12</sup> In our eyes, issues of constitutionality obviously remain both serious and legal. They are serious inasmuch as we conceive the contents of people's civic obligations to depend on them significantly.<sup>13</sup> They are legal inasmuch as we demand that anyone purporting to decide them do so by honest attempts to discern and apply the law of the Constitution. "[R]ejection of institutional authority," the Levinsonian protestant takes pains to insist, "is not . . . the equivalent of . . . rejection of the binding authority of the Word (or Law) itself."<sup>14</sup>

We speak of effects on people's civic obligations, but what sort of effect have we in view? Suppose there is some act, or process, or form of concentration of the mind, by which an inhabitant of the United States can be said to "accept" or "reject" the Constitution. (*Constitutional Faith*, as we'll see in Part II, is reared upon the conceit that there is, and not just for immigrants and office-takers.) One gives the Constitution the once-over, let us say, finds it up to snuff as far as constitutions go, and says, in effect, "Okay, let's run with it." A commitment of some kind apparently will have been made (otherwise what's the point?), but exactly what sort of commitment? Is "accepting" the Constitution like signing a contract? Does one thereby impose on oneself any new restriction on one's future freedom of action, or even of judgment regarding the moral status of actions you or others might take? Can "acceptance" of the Constitution have any such effect, if one holds a Levinsonian "protestant" view of where the authority lies to construe the Constitution?

### B. Legitimacy

The question of the obligations one assumes by "signing" one's country's constitution is maddeningly elusive and complex, and I want to isolate for consideration here a single strand of it on which I have found *Constitutional Faith* to shed a particular light. In order to get that strand in focus, we'll need to introduce the notion of normative political legitimacy.

Very briefly:<sup>15</sup> As Levinson notes, drily but not disapprovingly, "the state is usually interested in imposing notions of obligation upon everyone . . . ."<sup>16</sup>

12. This, famously, was Abraham Lincoln's view, specifically as directed to the decision of the Supreme Court in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). See e.g. *The Collected Works of Abraham Lincoln* vol. II, at 494-96 (Roy P. Basler ed., Rutgers U. Press 1953) (Speech at Chicago, Ill., July 10, 1858).

13. See *infra* pt. II(B).

14. Levinson, *supra* n. 2, at 25. Levinson adds: "Instead, the most radical protestant might hold, it is up to each member of the faith community . . . to decide what the Word actually requires." *Id.* at 25-26.

15. I have drawn what follows substantially from Michelman, *supra* n. 4.

16. Levinson, *supra* n. 2, at 113.

Governments demand compliance with their laws and use force, when needed, to secure it. Questions arise as to whether anyone ever has a morally justified complaint about such uses of force by the government, and the answers often are said to depend on the “legitimacy” of the laws in question or of the governmental regime that seeks to effectuate them.<sup>17</sup>

It seems that to judge a law (in this sense) legitimate, one need not judge it right, or just, or morally blameless, or a work in which the maker can take pride. One can judge the law unjust and badly misguided, and nevertheless legitimate. One can do so insofar as one judges respect-worthy—worth having, supporting, and preserving—the entire governmental system, or practice, that produced the law, despite that system’s having produced the bad law and maybe others as bad or worse. (The ability combined with the willingness to make such affirmative but troubled judgments turns out, I believe, to be much of what Levinson means by “constitutional faith.”<sup>18</sup>) The core idea is that if the system taken whole is respect-worthy, worth upholding, then the state is, so to speak, within its rights enforcing every law that issues from the system, including even those that you or I or Judge Whosis may consider to be very bad and immoral ones.<sup>19</sup>

It is no mystery why you or I might be disposed to think this way. Our political culture is one in which people associate certain commanding moral and other practical goods with the practice of positive legal ordering, or call it government by law (or by democracy). Government by law prevails to the extent that inhabitants of a country are predominantly disposed: (a) to conform their conduct to rules and principles pronounced to be law there by some distinct class or classes of officials, (b) to organize their activities with a view to compatibility with such official pronouncements, and (c) to support, or at least to accept, the use of social force to secure compliance in general with such pronouncements. Government by law, people feel certain, can carry with it, for everyone, inestimable goods of social coordination, pacification, and justice<sup>20</sup>—and let us not fail to include the communitarian good of respect for and cooperation with fellow citizens engaged in democratic processes of lawmaking.<sup>21</sup> People further believe that achievement of these goods will not be possible, unless laws issuing from an

17. See e.g. Allen Buchanan, *Political Legitimacy and Democracy*, 112 *Ethics* 689, 691-692 (2002). We speak here, of course, of “legitimacy” in its normative, not its descriptive sense. See *id.* at 689.

18. See *infra* pt. II(C).

19. Some may say the case I have just posited is an impossibility, because a regime that insists on enforcing laws that really are immoral is *ipso facto* incapable of deserving respect. I offer no case against such a view. My claim is only that whoever holds it has no use for the notion of legitimacy. Legitimacy, by my understanding, is a concept that finds breathing space *only* within a scheme of thought allowing that people in a state can be justified in supporting the state’s enforcement of bad and immoral laws.

20. This conviction flows from Kantian as well as Hobbesian inspirations. See Jeremy Waldron, *The Dignity of Legislation* 36-62 (Cambridge U. Press 1999); Immanuel Kant, *Metaphysical Elements of Justice: Part I of the Metaphysics of Morals* § 42 (John Ladd trans., 2d ed., Hackett Publ. Co., Inc. 1999); Thomas Hobbes, *Leviathan* chs. 13-17 (Michael Oakshott ed., Collier Books 1962) (1651).

21. See Jeremy Waldron, *Law and Disagreement* 100 (Clarendon Press 1999) (“[T]he demand that interests me . . . is a demand for a certain sort of recognition and . . . respect—that *this*, for the time being, is what the community has come up with and that it should not be ignored or disparaged simply because some of us propose, when we can, to repeal it.”).

on-the-whole respect-worthy, on-the-whole democratic political system are considered generally binding on everyone, regardless of any individual's opinion of a given law's merit or justice.<sup>22</sup> Accordingly, as long we believe the governmental system, on the whole, to be democratically respect-worthy, we will—at any rate, we can—believe that a general, presumptive commitment to enforcement of every law issuing from it is justified. (Note that this is *not* the same as saying anyone has even a presumptive moral obligation to comply with every law.<sup>23</sup> A pacifist patriot can, with perfect logical consistency, reject any moral obligation on his part to comply with military-service orders while conceding that the government is justified in demanding compliance and punishing non-compliance.<sup>24</sup>)

For good reason, then, we want to be a country governed by law. That want ensnares us, inevitably, in a mobilization of coercion upon all to comply with all formally valid acts of lawmaking and legal interpretation, regardless of what any individual may think of the moral and other merits of any given law. For that, we want justification, and “legitimacy” is its name. “Legitimate” is what you plead in response to a fellow-citizen's complaint against compulsion to comply with a legal act that he believes to be wrong on the merits and you cannot demonstrate to be right and maybe are not at all sure is right. In making the plea, you do not take yourself off the hook for supporting enactment of a wrong and bad law (supposing you did support it). You only take yourself off the hook for supporting compulsion against him to comply with the law—which, presumably, you do out of respect for the moral and other practical goods of the general social venture of government by law and for the sake of that venture's success. But of course you cannot stake anything on the venture's success if you do not find respect-worthy, on the whole, the particular system of government by law that is in force in your country.

At this point, we can state with middling precision the question regarding political obligation on which I have found *Constitutional Faith* to shed a particular light, even though Levinson does not ever raise it in anything like my terms. By “accepting” the Constitution, does one obligate oneself never to count as a black mark against the respect-worthiness of American government the enactment or enforcement of any law (or legal interpretation) that is not unconstitutional? Does one, in effect, subscribe to the Constitution as a kind of public contract—a publicly binding statement of the terms of a political association that citizens are morally justified in supporting, using whatever force those terms permit to secure compliance with laws enacted in accordance with them?

For reasons I explain partly below,<sup>25</sup> I had come to doubt that the Constitution's place in our lives and politics is best understood in such a

22. See e.g. *The Collected Works of Abraham Lincoln* vol. 1, at 112-13 (Roy B. Basler ed., 1953 Rutgers U. Press) (Address Before the Young Men's Lyceum of Springfield, Ill., Jan. 27, 1838).

23. See Buchanan, *supra* n. 17, at 693-95.

24. Cf. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

25. See *infra* pt. III.

contractualist frame. My recent revisitation to Levinson's book, undertaken for this symposium, has led me to reconsider my doubt, although not finally to withdraw it. The doubt surely holds—I maintain—if we take a “catholic” view of the social organization of constitutional-interpretative authority. Does it hold if we take up a “protestant” stance? My answer will be that it does, but for different reasons.<sup>26</sup>

Having put *my* concerns on the table, I turn now to a short tour of Levinson's book.

## II. CONSTITUTIONAL FAITH

If what I have said so far is right, we all have reason to concern ourselves with the question of the respect-worthiness of our country's system of government, on which depends the presumptive legitimacy of the laws that issue from that system and, with it, the justification of our own collaboration in the subjection of everyone to pressure to comply with every one of those laws, right or wrong. *Constitutional Faith* fairly may be read as a disquisition on what, if anything, the Constitution has to do with judgments of the respect-worthiness of the American system of government.

### A. *Constitutional “Attachment” and Personal Identity: A Distraction?*

The time is late in the 1980s; the place the historic house of the Second Bank of United States in Philadelphia; the occasion a public display by the National Park Service of the original, parchment charter styled “Constitution of the United States of America.” The Park Service also has placed on the site two scrolls, as if to represent white space at the foot of the original parchment, open to further signatures.<sup>27</sup> Visitors to the shrine—the Service named its bicentennial exhibition “Miracle in Philadelphia”<sup>28</sup>—not only thus are invited to add their names to the list of subscribers to the Constitution, they are explicitly challenged by the exhibitors with the question whether they “will” or will not do so.<sup>29</sup>

In *Constitutional Faith*, Sanford Levinson recalls the scene and in it himself, pondering this unsought-for choice whether to “ratify” or “reject” the Constitution.<sup>30</sup> Now Sandy, as I'll call this character in Levinson's book, figures as a sort of Everyman.<sup>31</sup> Sandy is us, Levinson's tuned-in readers.<sup>32</sup> If we had been there, would *we* have signed?<sup>33</sup>

26. See *infra* pt. IV.

27. See Levinson, *supra* n. 2, at 180.

28. See *id.*

29. *Id.*

30. *Id.*

31. Throughout, I'll use “Sandy” to refer to character who sweats the do-I-sign-or-don't-I question at the Philadelphia exhibit, and “Levinson” to refer to the chronicler-analyst author of *Constitutional Faith*.

32. Levinson addresses “highly self-conscious persons willing to engage in” the sort of reflection that he recounts in his book. *Id.* at 184.

33. Levinson, *supra* n. 2, at 180.

Why worry? What risk if we don't? What risk if we do?

Start with if we don't. If we are foreign born and seeking citizenship, refusal ever to "sign" the Constitution obviously carries a heavy price. Sandy, however, is native born and "Miracle in Philadelphia" is not a naturalization ceremony. It is true that when Levinson turns in his book to explaining and defending the practice of requiring would-be citizens from abroad to declare support for the Constitution, he does so in terms that potentially apply to everyone here, not just to those who arrive from offshore. It's a big country, he notes, inhabited by people who are "strangers" to one another and consequently need some way to know which of their neighbors they can "count on . . . to have agreed on a minimal common way of life . . . ." <sup>34</sup> Vows can provide the requisite signal. "Vows . . . signify . . . a willingness to remain within [the] boundaries" set by a particular community. <sup>35</sup>

Doubtless these signaling functions of oaths are useful and important ones. However, they cannot be what make Sandy sweat in Philadelphia. I mean, picture Sandy, pen in hand, hesitating before those Park Service scrolls. Is he worried that, if he doesn't sign, the absence of his name from the lists might be noticed? Its absence, along with the missing names of two-hundred-odd million fellow citizens who also have not signed, might tarnish his reputation for Americanism? Please.

Very well. What do we risk if we *do* sign? The question, of course, assumes that we take the affair seriously. We don't just dismiss the exhibitors' invitation as "trivial gimmickry," <sup>36</sup> or our "signing" as a meaningless formality, as Levinson reports some of his students do when they sign a statement put before them by bar examiners, pledging them to abide by the terms of a Code of Professional Responsibility that in fact they never have read. <sup>37</sup> To the contrary, one is not, on Levinson's stipulation, to sign unless one then and there believes that the system of governance currently carried on in the Constitution's name is "sufficiently protective of liberty and helpful to achieving justice that it deserves . . . support." <sup>38</sup> So there we glimpse something that one plainly does risk or commit by signing—that is, one's opinion, then and there, that the Constitution one signs is in that way "worthy of respect." <sup>39</sup> But then what, after all, is the risk? That one will sign and be mistaken? That one may at some later time be caught out, if only by oneself, in an error of speculative judgment? An academic's greatest fear, perhaps? Maybe

34. *Id.* at 119.

35. *Id.* at 99. Levinson extends the thought to the oaths prescribed by the Constitution for those assuming judicial and other offices. He recalls approvingly the view of the early, eminent Pennsylvania judge, John Bannister Gibson, who was taking issue with John Marshall's reasoning in *Marbury v. Madison* when he remarked that the judicial oath is not so much designed to bind the taker to an obligation as to provide "a test of the political principles of the man" to whom we are about to entrust a share of the power to govern us. *Id.* at 122 (emphasis omitted) (quoting *Eakin v. Raub*, 12 S & R. 330, 353 (Pa. 1825) (Gibson, J., dissenting)). See *Marbury v. Madison*, 5 U.S. 137, 178, 180 (1803).

36. Levinson, *supra* n. 2, at 182.

37. *Id.* at 183.

38. *Id.* at 191.

39. *Id.* at 54 (emphasis omitted).



for some, but not for Sanford Levinson. To shrink from *that* risk would surely, in his view, be a betrayal of our calling as academics.

As Levinson would have it, Sandy before the scrolls is being tested for something other and more than his good or bad judgment, morals, or taste as a constitution-appraiser. He is being tested for faith. Sandy faces, in a way, the test of his life, because the outcome—so Levinson suggests—carries with it the news that Sandy is or is not, if not exactly among the saved, then at any rate among the faithful and even, in a sense that is not entirely facetious, the elect. Under test are Sandy's faith and along with it his identity, the very stuff of the self. "Our answer . . . is . . . a sign of our willingness to join in affirming a 'constitutional faith . . .'"<sup>40</sup> That faith, in turn, or the lack of it, is a sign of "membership," or the lack of it, in a "particular community."<sup>41</sup> Thus, in signing or not signing, one gains or loses "everything, i.e., one's true identity as a member—or rejector—of a peculiar American fellowship."<sup>42</sup>

Behold, then, Sandy, poised achingly at the chasm.<sup>43</sup> Will I sign or not? Have I faith or not? Am I American or not?

Can all this really be at stake? On what ground does Levinson suggest it is or might be? On the ground that *American* identity—or "the notion" thereof—is peculiar among national identities in having an "ideological nature."<sup>44</sup> (Is this an oddly essentialist claim to be emanating from the likes of Levinson?<sup>45</sup>) According to this view, which Levinson attributes to such widely assorted authorities as Samuel P. Huntington<sup>46</sup> and Frances Wright,<sup>47</sup> national identity for Americans is not, as it is for other peoples, a complex, historically evolved product of common ancestry, experience, ethnicity, language, and culture. It is simply and only a matter of "espousal" of a certain "creed"<sup>48</sup>—one that is identified with the Constitution, or is deemed to be contained in it.<sup>49</sup> America is a "faith

40. *Id.* at 180-81.

41. Levinson, *supra* n. 2, at 184.

42. *Id.*

43. I echo Robert Cover's words describing Abraham with Isaac at Mount Moriah—not the Bible's Abraham, it needs to be said, but Kierkegaard's. See Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 4 (Yale U. Press 1975). On the Cover-Levinson connection, see Aviam Soifer, Speech, *Secular Sectarianism and Perilous Neutrality* (Tulsa, Okla., Nov. 1, 2002).

44. Levinson, *supra* n. 2, at 183.

45. Cf. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. Pa. L. Rev. 1597, 1631-34 (1991) (on the temporal relativity of authenticity).

46. See Levinson, *supra* n. 2, at 95-96. An eminent, longtime Harvard political scientist, Samuel Huntington currently is Albert J. Weatherhead III University Professor at Harvard, Director of the John M. Olin Institute for Strategic Studies, and Chairman of the Harvard Academy of International and Area Studies. See <http://www.gov.harvard.edu/Faculty/Bios/Huntington.htm> (last updated Jan. 14, 2003).

47. See Levinson, *supra* n. 2, at 5. Frances ("Fanny") Wright was "an Americanized Englishwoman of the 1820s." See *id.* at 5 (quoting Werner Sollors, *Beyond Ethnicity: Consent and Descent in American Culture* 152 (Oxford U. Press 1986)). She was a noted commentator on American affairs, and a political and social activist. See *Fanny Wright*, <<http://www.spartacus.schoolnet.co.uk/REwright.htm>> (last updated May 7, 2002).

48. Levinson, *supra* n. 2, at 183.

49. Levinson conceives of "signing" the Constitution as "an act of 'personal ratification' of what is *presumptively* embedded within it." *Id.* at 7 (emphasis added).

community,”<sup>50</sup> and the Constitution is its gospel. So to be renegade from constitutional faith is to be not thickly American, is to be a mere resident alien in this land—happy, no doubt, to accept the benefits of being here but lacking “the density of felt membership”<sup>51</sup> in what is at one and the same time a “political order”<sup>52</sup> and a national “fellowship.”<sup>53</sup>

As American political anthropology, this is entertainable. In Levinson’s hands, it is richly suggestive, informative, and stimulating. As an account of what makes Sandy sweat in Philadelphia, it has problems.

Levinson sets this up, in effect, as a syllogism. *Major premise*: to be American is to be someone who can and does espouse a certain normative object called the Constitution. More precisely, to know oneself as American is to discover, when occasion demands, that one has it in oneself to make the espousal. *Minor premise* (assumed): Sandy makes it. Sandy has it. *QED*: Sandy is American (phew!). That is a tale of self-discovery, or self-confirmation, and it can work as such only if Sandy genuinely finds himself in doubt about his Americanness at that moment on the brink, when his signing or not hangs waiting to be resolved. Now, by Levinson’s own testimony, Sandy has never in his life felt such a doubt! “My refusal to sign the Constitution,” Levinson reports, “would require a much deeper alienation from American life and politics”—he does not say “from the Constitution”—“than I can genuinely feel (or, indeed, have ever felt).”<sup>54</sup> Far from being determined by his act of signing the Constitution, Sandy’s certainty of his Americanness is what determines him to take that act. The certainty does not follow from the act but, to the contrary, precedes it.

So suppose we invert the syllogism. *Major premise*: Sandy is firmly American and knows it. *Minor premise* (assumed): Sandy does not sign the Constitution. *QED*: Being American, or knowing oneself as such, is *not* only and strictly a matter of visitation by constitutional faith. What would follow from Sandy’s not signing, we now see, is only that Sam Huntington’s speculation about what makes a person American is off the mark. Nothing will have been at stake, during that moment of waiting to see whether Sandy will or will not sign, except an academic theory of what American identity is or consists of. Levinson understands this. “If we answer ‘no,’” he volunteers, that *could* be because equating one’s identity as American with one’s attachment to the Constitution is not, after all, a very good “mode of political self-understanding.”<sup>55</sup>

#### B. *Back on Track: Faith, Judgment, Reason*

But there is something more deeply wrong with the self-discovery tale told by the first syllogism. That tale is, so to speak, one of justification by faith and not

50. *Id.* at 94.

51. *Id.* at 181.

52. Levinson, *supra* n. 2, at 181.

53. *Id.* at 184.

54. *Id.* at 192.

55. *Id.* at 181.

by works or by reason. It is one of election by grace and not by will or deed. As such, it is out of kilter with a great deal else in *Constitutional Faith*, and, I daresay, in Sanford Levinson.

In the first place, Levinson simply remains too much the liberal to choose faith over works, or grace over will. For him, to “sign” the Constitution—to accept the Constitution into that place in one’s life that one’s country’s constitution is best understood to occupy—plainly is to *do* something, not just to *show* something. It is to modulate in some way one’s web of civic commitments and obligations. According to Levinson, the idea of consent as the key to civic obligation—notwithstanding that it is incorrigibly “theoretically recalcitrant”—is one of those “aspects of the liberal heritage” worth respecting as best one might.<sup>56</sup> So when Levinson begins his book by asking what “political commitments” an immigrant to the United States assumes by taking the oath of allegiance to the Constitution,<sup>57</sup> we may take him to use “commitment” in the sense of “obligation.” When he demands of us whether *we* would have signed those scrolls in Philadelphia,<sup>58</sup> we may take him similarly to be raising with us the question—perhaps among others—of what obligations we should understand ourselves to incur by doing so.

In sum, in Levinson’s understanding, attachment to the Constitution is an act, or a state resulting from an act, that imposes or implies obligation. Could any doubt remain, two major themes in *Constitutional Faith* surely would quell it: the theme, as we may call it, of anti-nihilism and the theme of protestantism.

Repeatedly, before and after the publication of *Constitutional Faith*,<sup>59</sup> Levinson has demurred to stances of “radical indeterminacy” regarding legal texts and legal reason.<sup>60</sup> His effort has been to understand and clarify, for himself and others, how one can “inhabit” responsibly a “practice of [legal] performance after innocence has been lost” regarding the strict, prescriptive determinacy of legal texts and methods.<sup>61</sup> With such an aim in view, Levinson must and does reject the claim that “any result is possible in any situation . . . .”<sup>62</sup> He objects deeply to legal arguments and judicial opinions that seem to him to reflect such a claim by their bursting of “the bounds of reasonableness.”<sup>63</sup> Yet he does also believe those bounds to be quite lax, at least in constitutional cases where the “ideological stakes” weigh heavily.<sup>64</sup>

56. *Id.* at 113.

57. Levinson, *supra* n. 2, at 3.

58. *See id.* at 180.

59. Most recently in Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 *Geo. L.J.* 173 (2001). *See e.g.* Levinson & Balkin, *supra* n. 45; Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 *Tex. L. Rev.* 237 (1995); Sanford Levinson, *On Interpretation: The Adultery Clause of the Ten Commandments*, 58 *S. Cal. L. Rev.* 719 (1985).

60. Balkin & Levinson, *supra* n. 59, at 179.

61. Levinson & Balkin, *supra* n. 45, at 1658.

62. Balkin & Levinson, *supra* n. 59, at 179.

63. *Id.* at 194.

64. *Id.* at 178-79.

To think, Levinson says in *Constitutional Faith*, that agreement on any corpus of “abstract words” can quiet *serious* political disputes—“the disputes that required negotiation in the first place”—is to indulge in a “dream” of a language immune to “the vagaries of perspective and interpretation.”<sup>65</sup> “[T]he South,” he says, it seems without fear of contradiction, was able to make “cogent” appeal to “the same Constitution available to Lincoln . . . .”<sup>66</sup> Nevertheless, holding such views, Levinson stubbornly resists—indeed, rejects as “devastating”—the “nihilist” conclusion that the Constitution is meaningless, or so close to meaningless as to be not “worth genuinely grappling with as a potential object either of commitment or of rejection.”<sup>67</sup>

So: Our man denies the general proposition that “any result is possible in any situation.” Yet he affirms that, in ideologically loaded, constitutional-legal controversies, it will virtually always be possible for more than one main ideological contender to produce respectable legal arguments for its favored outcomes, among which legal reason cannot select objectively.<sup>68</sup> True, that is not to say that “any” result is reachable; there remain in force those “bounds” of “reasonableness,” lax though they may be. Questions obviously remain to be answered, but it will not be our business here to answer them.<sup>69</sup> Right now, our business is to understand why claims of utter, unbounded, constitutional-legal meaningfulness should bother Levinson one bit.

Suppose commitment to the Constitution matters in people’s lives only as an expression of faith unreasoned and unchosen, only as a *sign* of election or membership. In that case, meaningfulness in the Constitution obviously should be no cause for worry. (To the contrary, it would seem, the more meaningless the better.) For Levinson, meaningfulness is a threat because it erases the *deed* from “attachment” to the Constitution. Subscription to a meaningless text is *nil*. It leaves obligation unaltered. Over and over, Levinson wrestles with the question of how to square interpretative plasticity with the idea that fealty to the Constitution binds anyone to anything. The issue of whether the Constitution has “real” or “stable” content is crucial, he says, because, if it doesn’t, then oaths to support the Constitution fail to establish any “vantage point” by which to assess the oath-takers’ “fidelity to their promises.”<sup>70</sup> We would, in that case, be unable “confidently [to] ascertain when someone is violating the commitment to be

65. Levinson, *supra* n. 2, at 125.

66. *Id.* at 28. Levinson cites Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (Harcourt, Brace & Co. 1955). *Id.* at 28, 202. For vigorous and dedicated disagreement that “the South’s” constitutional arguments could stand up to Lincoln’s for cogency, see Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Rowman & Littlefield Publishers, Inc. 2000).

67. Levinson, *supra* n. 2, at 182.

68. See e.g. Balkin & Levinson, *supra* n. 59, at 194 (“Most cases that appear before the Supreme Court could go either way, and so one’s objections to court decisions must, in the main, be political ones.”).

69. The answers lie largely in the “historicist” view of legal meaning, developed in Balkin & Levinson, *supra* n. 59. See *id.* at 180-82.

70. Levinson, *supra* n. 2, at 121.

bound by [the Constitution's] requirements."<sup>71</sup> And Levinson plainly does *want* attachment to the Constitution to have real, obligatory "bite."<sup>72</sup> It's for that reason, for example, that he distances himself, at the last, from the suggestion by Wendell Willkie, counsel in *Schneiderman v. United States*,<sup>73</sup> that the Constitution's self-stipulated openness to amendment trumps the idea that an oath to support the Constitution commits the taker to any proposition of substance whatever, and that all you really swear to by such an oath is your commitment not to try to change the Constitution (but why then would it matter?) except by the procedures laid down by Article V.<sup>74</sup>

As an icon for the sort of constitutional-legal nihilism that worries Levinson, the late Chief Justice Fred Vinson seems at least as apt as Wendell Willkie. Upholding conviction and punishment of a group of American Communists for conspiracy to "teach" and "advocate" violent destruction of the United States government, Vinson attacked the suggestion that the right of "speech" guaranteed by the First Amendment is or possibly could be "absolute." Nothing is "more certain in modern society," Vinson wrote, than

the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.<sup>75</sup>

As George Anastaplo later pointed out, that "principle" is not one to which men and women "can pledge themselves," and therefore not one they can use in a public process of forming themselves into a "free People."<sup>76</sup> Anastaplo evidently believes that to be a sufficient ground for rejecting the principle, and so it appears would Levinson.

### C. "Faith" as Judgment

If the Constitution is the American gospel, then Levinson is adamantly for a "protestant" view of the social organization of authority to construe the message.<sup>77</sup> A constitutional faith, he declares, is "idolatrous" if it means suspension of one's "independent evaluation" of the tenets of the faith.<sup>78</sup> By devoting a book to showing all the room there is for doubt and debate about exactly what it is, this

71. *Id.* at 122.

72. *Id.* at 148.

73. 320 U.S. 119 (1942).

74. See Levinson, *supra* n. 2, at 137-38, 148, 191.

75. *Dennis v. U.S.*, 341 U.S. 494, 508 (1951) (citation omitted).

76. George Anastaplo, *Abraham Lincoln: A Constitutional Biography* 19 (Rowman & Littlefield Publishers, Inc. 1999).

77. As we have noticed, Levinson's approach to constitutional interpretation also has a "catholic" side. Levinson, *supra* n. 2, at 29 (describing as "catholic" the position that "the source of doctrine is the text of the Constitution plus unwritten tradition"), 47 (endorsing a "Dworkinian" model of constitutional interpretation, in which "the law is intertwined with the ordinary moral understandings of the given social order").

78. *Id.* at 88.

“Constitution” to which one is invited to add one’s signature, and about exactly what one would mean, or what one would do, by signing, Levinson conveys that these are matters that each reader, in the end, must resolve for himself—albeit in legal spirit, with honest accountability to a “Word (or Law)” that is not entirely of one’s own, on-the-spot creation.<sup>79</sup>

In the end, it becomes plain: “faith” for Levinson is inseparable from judgment, albeit judgment under uncertainty. When Levinson says that the question posed to visitors by the Philadelphia exhibitors is one of faith, he really means the opposite. He means that “unthinking devotion” to the Constitution is out of the question for anyone morally alert.<sup>80</sup> He means there is nothing “built into” the notion of law to guarantee that *this* law will be “worthy of respect,”<sup>81</sup> and that, as a matter of fact, *this* law obviously has such a morally clouded past,<sup>82</sup> and stands today as such a morally flawed instrument,<sup>83</sup> that a choice to endorse it *and accordingly regulate one’s conduct* runs a major risk of being wrong—not empty, mind you, but *wrong*.

That is much, but not quite all, of what I think Levinson is doing with the notion of constitutional faith. Additionally, there is the suggestion—and isn’t this the plausible way, really, to understand Huntington and Wright?—that Americans, as a matter of observed fact, show a remarkable tractability regarding the merit of their Constitution and its suitability to them, and hence are remarkably ready to submit to laws and executions of laws that persuasively claim the Constitution as their source and justification. It is not that judging the Constitution favorably (or not) is what “makes” someone American (or not). It is rather that those who *are* American tend in fact to judge the Constitution favorably. The cause could be something in the water here. More likely, it’s something in or about the Constitution combined with something in the American experience or “mind”—caught, foreseen, or instigated by the framers, more power to them. A person who judged the Constitution *unfavorably*, to the point of “rejecting” it, would seem to be standing outside the American mainstream. But that is not to say that what keeps insiders inside is “faith,” in the sternest religious understanding of that notion. In matters concerning civic attachment and

79. See *supra* n. 14 and accompanying text.

80. Levinson, *supra* n. 2, at 54.

81. *Id.* (emphasis omitted).

82. Chattel slavery, he says, and by extension race, “is surely the most difficult problem presented [to] those who would celebrate the Constitution . . .” *Id.* at 186-87.

83. “[W]hat reason,” he asks, “do persons mired in poverty have to be wildly appreciative of negative rights . . .? Should a homeless resident of Philadelphia, whose interest in the Second Bank of the United States might be primarily as a shelter from the storm, necessarily sign *any* extant version of the Constitution?” *Id.* at 190. Levinson suggests that the present system is seriously flawed in other respects, referring to a widely noted report by a group of eminent citizens calling themselves the Commission on the Constitutional System. See *id.*; Comm. on the Constitutional System, *A Bicentennial Analysis of the American Political Structure: Report and Recommendations of the Committee on the Constitutional System* (1987) (twenty page report and recommendations). For an account of some of the Commission’s views, see Lloyd N. Cutler, *Political Parties and Workable Government*, in *A Workable Government? The Constitution after 200 Years* 49 (Burke Marshall ed., W.W. Norton & Co. 1987).

obligation, Levinson will have none of that. What he demands of us there, on moral grounds, is reasoned, reflective choice.

### III. WHY A “CATHOLIC” CONSTITUTIONAL CONTRACT IS UNLIKELY

A major point in Levinson’s teaching, I have said, is that a reasoned choice to endorse the Constitution, and accordingly regulate one’s conduct, runs a genuine risk of being wrong. Among the most important dimensions of conduct to be regulated, I have suggested,<sup>84</sup> is acceptance and general support of the government’s disposition to demand everyone’s compliance with all constitutionally enacted laws and legal interpretations, including the ones that are not at all nice in your eyes or in mine, and to back its demands by force where needed. How far any of us buys into that dimension of civic obligation, I have suggested, must probably depend on the margins (they might be negative) by which we severally judge or assume the overall practice of government in our country to be, on the whole, respect-worthy.

I now can state with considerable precision the question on which I seek light from Levinson. Suppose we make a very optimistic assumption along the lines of that empirical observation I have just been describing, that Americans tend strongly to cotton to the Constitution. Suppose we assume that *everyone* alive today in United States territory has gone on pilgrimage to Philadelphia and signed up. Have we, then, achieved a virtual social contract to treat the overall system as respect-worthy—and each law issuing from it, therefore, as justifiably enforceable against everyone—for as long as the frequency of unconstitutional law-making, or law-interpretation, remains below some threshold of tolerance?

I have argued elsewhere that the answer cannot easily be “yes” for anyone who looks at matters from what we now may call a “catholic” standpoint.<sup>85</sup> That argument can briefly, if crudely, be summarized as follows:

(1) The “contract” we have under consideration is one that would bind the contractors to support coercion against others and accept it against themselves.

(2) We stipulate that no one can accept such an obligation rationally, or with due responsibility to others and to the self, without first having judged for herself, independently, that the terms of agreement really are such that everyone who will be bound by these terms has good enough reasons (of *theirs*, not just of ours) to accept the terms—that being what it is, in a liberal view, for a constituted system of government to be respect-worthy.<sup>86</sup>

84. See *infra* pt. II.

85. See Michelman, *supra* n. 4, at pt. V(c); Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 *Modern L. Rev.* 1 (2003).

86. See John Rawls, *Political Liberalism* 139-40 (Columbia U. Press 1993) (“[S]ince political power is the coercive power of . . . citizens as a corporate body, this power should be exercised . . . only in ways that all citizens can reasonably be expected to endorse in the light of their common human reason.”). See Michelman, *supra* n. 4, at pt. IV(B) (“When we conclude, in the teeth of another’s protest, that it is morally okay for us to join in mobilization of compulsion against that other to comply with a given law, we feel it is incumbent on us to be able to give reasons that *she* has—that *everyone* has—to accept this as the general social practice.”). Because (2) is a stipulation with which not

(3) No one can make such a judgment without knowing what the terms of agreement relevantly are.

(4) Think of the Constitution prior to or apart from the accumulated set of the Supreme Court's interpretive rulings. Whether one conceives of this uninterpreted Constitution as text alone or ("catholically") as text-plus,<sup>87</sup> its terms are relatively open and abstract and a great many of its major applications fairly debatable. The text-plus, after all, is still rooted in language, and Levinson reminds us of "how unlikely it is that presumed agreement on the importance of abstract words will in fact still the disputes that required negotiation in the first place."<sup>88</sup> Now think about a person "catholically" disposed to equate the Constitution's meanings-in-application with whatever the Supreme Court rules. She is trying to decide whether to sign. Can she possibly—rationally—decide without waiting forever to see how the Supreme Court will rule? Only the Court's relatively concrete decisions, and not the un-interpreted text or text-plus, can tell her what the deal is regarding such questions as: which governmental department or branch decides a contested election of presidential electors;<sup>89</sup> which decides the scope of legal protections for women<sup>90</sup> or the disabled;<sup>91</sup> if the unborn are constitutionally protected from harm;<sup>92</sup> if convicts may be put to death by the state;<sup>93</sup> if devotion of public revenues to private or religious education is allowed;<sup>94</sup> if regulatory control of spending in elections is allowed;<sup>95</sup> if affirmative action is allowed;<sup>96</sup> if homelessness and starvation are allowed;<sup>97</sup> how far private hate speech may be regulated;<sup>98</sup> how far liberty may be sacrificed to security (or security to liberty) in times of national danger; and so on.

(5) If we try to avoid the problem by saying that the complete constitutional contract consists of the text or text-plus together with the up-to-the-minute complete series of *United States Reports*, will that be something you or I can say confidently must be deemed respect-worthy by every reasonable American?

(6) If, alternatively, we try to avoid the problem by falling back on the text or the text-plus as the set of terms for a system of government on which we can count for every reasonable American's agreement, is there enough information

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everyone may agree, the argument in the essays cited in *supra* note 85 is expressly presented as one that holds only for those who do agree with it.

87. See *supra* pt. I(A).

88. Levinson, *supra* n. 2, at 125.

89. See *Bush v. Gore*, 531 U.S. 98 (2000).

90. See *U.S. v. Morrison*, 529 U.S. 598 (2000).

91. See *Bd. of Trustees of U. of Ala. v. Garrett*, 531 U.S. 356 (2001).

92. See *Roe v. Wade*, 410 U.S. 113 (1973).

93. See e.g. *Gregg v. Ga.*, 428 U.S. 153 (1976).

94. See *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

95. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

96. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

97. See e.g. *Dandridge v. Williams*, 397 U.S. 471 (1970).

98. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).



there about what the deal is, to make it reasonable to demand everyone's authorization of coercion on the basis only of that?<sup>99</sup>

For present purposes, it does not matter whether you accept this argument as finally conclusive against the idea of a "catholic" constitutional contract, but only that you catch its drift. Assuming everyone is "catholic," an obvious dilemma plagues the case for a constructive constitutional contract. A contract containing the Supreme Court's rulings as terms could be too "thick" to be a plausible object of universal free acceptance, but a contract comprised only of the constitutional text or text-plus could be too "thin"—too short of complete or adequately informative—to bear the weight of justification of civic coercion.

#### IV. TOWARDS A PROTESTANT CONSTITUTIONAL CONTRACT?

If everyone is assumed "protestant," the last-mentioned dilemma seems to disappear. Among protestants—and this would seem especially true of Levinson-style "catholic-protestants"<sup>100</sup>—the Constitution quite easily can be imagined agreeable at every moment to everyone. Everyone, after all, is expected to arrive at his or her own determinations of what the Constitution truly says and requires, by application of morally informed reason to a rich and varied array of sources.

But this, I expect you will say, is craziness. Among protestants, you will say, the claim of a constructive constitutional contract never gets off the ground because there is no "meeting of the minds." The Constitution is the *Peerless*.<sup>101</sup> You have yours in mind, and I have mine, and how shall the twain meet? A protestant-style constructive constitutional contract is an idea doomed from the start. Are you sure? Would Sanford Levinson agree? Let us see.

Some time back, we left Levinson locked in a struggle to find some place of repose between his concern that attachment to the Constitution might lack any real, obligatory "bite" and his belief in the substantial prescriptive plasticity of constitutional-legal materials. As Levinson points out, it does not follow from that plasticity that the Constitution and constitutional law are not constantly presiding over American politics, in a very real way. "Constitution-talk," says Levinson, provides a distinctive American vocabulary for debates over major issues of public policy. It supplies a grid of "common language" for use when Americans collectively choose to process verbally, and not by other means, their disagreements about "the distribution and use of power in our society."<sup>102</sup> In that sense, the Constitution is constantly, so to speak, on duty. But if—as Levinson also says—the linguistic system that the Constitution undoubtedly does constitute is so supple, so "indeterminate,"<sup>103</sup> that one can use it to take any side on "[any]

99. See Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help?*, in *Habermas and Pragmatism* 113 (Mitchell Aboulafia, Myra Bookman & Catherine Kemp eds., Routledge 2002).

100. See *supra* n. 11 and accompanying text.

101. See *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864).

102. Levinson, *supra* n. 2, at 191 (quoting H. Jefferson Powell, *What the Constitution Means for Your Town, and for You*, *Des Moines Register* 13a (Dec. 18, 1986)).

103. *Id.* (Levinson's scare-quotes).

important political issue imaginable”—if nothing is “unsayable” in that language, nothing securely “off-the-wall”<sup>104</sup>—then why should anyone sweat the oath that commits them to nothing except use of this all-but-infinitely plastic language?

The plasticity of the constitutional language turns out to be its saving grace. Sandy can sign, as he wants to, without committing himself to any conversational “closure,”<sup>105</sup> which he doesn’t want to, and yet also without committing himself to nothing, which he also doesn’t want to. By signing, he commits himself to something important, that being respect and support for this very political-conversational non-closure! Linguistic plasticity becomes the kernel of a political and social system to which one indeed can make a heart-felt commitment, incurring thereby a true obligation: to “tak[e] political conversation seriously.”<sup>106</sup> The Constitution, in effect, is reduced to that one principle of obligation, which entails both supporting such conversations and supporting the use of the powers of government to maintain them.<sup>107</sup> Now, this is hardly *nothing*. It is one version—the closing version, one might say—of the new-world “proposition” that Lincoln said the Union armies fought to save: government by the people, conducted by ballots, not bullets.<sup>108</sup>

So have we here—could it be?—a happy ending?<sup>109</sup> Levinson does end up getting two things at once, both of which he values very highly, that it’s not at all obvious how to put together: commitment to a national joint political venture and retention of moral independence (non-“closure”). Why, then, does Sandy sweat? The way I see it, he *doesn’t* in fact sweat over signing, once he’s got the question of *what* he’s signing satisfactorily sorted out. It is the sorting-out—the shaping of constitutional-legal obligation into that one, democratic proposition—that causes the sweat.

May we read this, then, as Levinson’s proposal for a “protestant” constitutional contract? One that would oblige every “signer” to accept without grievance enforcement of whatever laws and legal interpretations emanate from “the system,” as long as the principle of robustly democratic, “conversational” decisionmaking remains substantially unmolested at the system’s heart? Couldn’t everyone in sight—at least everyone who understands and accepts both the need

104. *Id.* at 191-92.

105. *Id.* at 193.

106. *Id.* Compare Mark Tushnet, *Taking the Constitution Away from the Courts* 14 (Princeton U. Press 1999) (“The . . . principles [of the Declaration of Independence] define our fundamental law. Vigorous disagreement over what those principles mean for any specific problem of public policy does not mean that we as a society have no fundamental law in common.”) For Levinson’s subsequent endorsement of Tushnet’s view, see Balkin & Levinson, *supra* n. 59, at 178.

107. See Levinson, *supra* n. 2, at 193.

108. *The Collected Works of Abraham Lincoln* vol. 7, at 23 (Roy B. Basler ed., Rutgers U. Press 1953) (Gettysburg Address) (compare the first and last sentences); *The Collected Works of Abraham Lincoln* vol. 4, at 439 (Roy B. Basler ed., Rutgers U. Press 1953) (Message to Congress in Special Session, July 4, 1861). For persuasive reduction to one proposition of what may look like three—all men created equal, government by the people, ballots not bullets—along with persuasive imputation of the reduction to Lincoln, see Jaffa, *supra* n. 66, at *passim*.

109. See William N. Eskridge, Jr., & Sanford Levinson, *Introduction: Constitutional Conversations*, in *Constitutional Stupidities, Constitutional Tragedies* 1, 8 (William N. Eskridge, Jr., & Sanford Levinson eds., N.Y. U. Press 1998).

for government by law and the created-equal status of all of humankind—be fairly called upon to sign on to *that* Constitution, *that* “proposition?” How could signing on to it compromise independence of anyone’s moral or legal judgment? True, the proposition would commit you to respect the laws found fit for your country by its people acting collectively, through procedures in which you could be outvoted. But you would be bound only insofar as *you* continued to judge that these collective actions have occurred through certain processes, in certain social conditions, under certain rules and guarantees (a bill of rights)—all of these standards existing independently of you (as “the Word (or Law)”) <sup>110</sup> but *being construed by you* in such a way as to add up, in *your* eyes, to a true practice of democracy.

A court might reject as “illusory” a contract based on such a promise.<sup>111</sup> Even so, such a promise maybe too much for anyone truly “protestant” to make, and for that we have the word of Sanford Levinson. “[E]ven my ‘best’ Constitution might at times come into conflict with what I regard as my most important moral commitments,” Levinson writes at the end of *Constitutional Faith*, and then “it would be the Constitution that (I hope) would give way.”<sup>112</sup> May we perceive there the workings of a thought closely akin to one that others often have expressed by denying that democracy trumps justice, and denying also that justice either is reducible to democracy or fully derivable from it?<sup>113</sup> If you buy that denial—and it seems Levinson does—then neither a “catholic” nor a “protestant” constitutional contract is going to seem a very plausible idea.

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110. Levinson, *supra* n. 2, at 25; see text accompanying *supra* note 14.

111. *Restatement (Second) of Contracts* § 2 cmt. e (1981).

112. Levinson, *supra* n. 2, at 193.

113. See e.g. James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211 (1993).