

SANFORD LEVINSON'S SECOND THOUGHTS ABOUT CONSTITUTION FAITH

Jack M. Balkin*

SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (2d ed. 2011). Pp. 262. Paperback \$22.95.

I. ITERABILITY ALTERS

Sanford Levinson republished his 1988 book, *Constitutional Faith*,¹ in 2011.² The book has a new cover (about which more in a moment), but for the most part the text is identical, save for an afterword of about eleven pages that appears after the book's index.³

What does it mean to republish a book? Is it merely saying the same thing once again for a new audience? Jacques Derrida taught us that iterability alters.⁴ And as Jorge Luis Borges showed, the republication of the seventeenth century text of *Don Quixote* in the twentieth century might well transform the significance of the work.⁵

The repetition of the same text in a new context often produces unexpected meanings. Even without the new cover and the afterword, Sanford Levinson's *Constitutional Faith* would mean something different in 1988, directly following the celebrations over the Constitution's 200th anniversary, than it does in 2012, on the Constitution's 225th anniversary. Levinson's discussion of faith in the American Constitution occurred in the shadow of the Civil Rights Movement and the retrenchment that followed it, and the political scandals of Watergate and Iran-Contra. Yet in the twenty-four years since its original publication, much has happened both to test and to reshape our constitutional faith. Consider only as examples the 2000 election and *Bush v. Gore*;⁹ the War on Terror and the government's use of torture; the election of the nation's first black President; that

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School.

1. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1st ed. 1988).
2. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (2d ed. 2011).
3. *Id.* at 245–256.
4. JACQUES DERRIDA, *LIMITED INC* 62–63 (1988).
5. JORGE LUIS BORGES, *Pierre Menard, Author of Don Quixote*, in *FICCIONES* 45 (Anthony Bonner, trans. 1994) (1944).
9. *Bush v. Gore*, 531 U.S. 98 (2000).
12. See generally JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

same President's decision to continue — if not extend — many of his predecessor's policies on executive power and national security;¹² the rise of the Tea Party and the debt ceiling crisis of 2011; the increasing polarization of American politics, the dysfunction of the 112th Congress, and the constitutional struggle over health care reform.

All of these events — and others we might name — likely place the book's discussion of the Constitution as America's civil religion and Levinson's qualified statement of faith in the Constitution in a different light. Perhaps equally important, the ending of the new edition is different.¹⁵ How a story ends has a great deal to do with what we think the story as a whole means.

The 1988 version of *Constitutional Faith* ended in Chapter Six, with Levinson recounting his decision to sign the Constitution at an exhibit in Philadelphia celebrating the document's 200th anniversary.¹⁶ Levinson's signature was a symbolic reaffirmation of his faith in the Constitution as enabling an ongoing conversation about human liberty.¹⁷

What gave Levinson faith is that he believed that the Constitution is not fixed, but changeable.¹⁸ It might become something other than it currently is.¹⁹ Levinson celebrated “the fluidity of the Constitution, its resistance to any kind of fixity or closure, even though some would seek it either in the text or in the authoritative pronouncements of an institution like the Supreme Court.”²⁰

Precisely because the Constitution was changeable and under-determined, Levinson could pledge his faith in it: “signing the Constitution — and agreeing therefore to profess at least a limited constitutional faith — commits me not to closure but only to a process of becoming”²¹ Signing the Constitution means “taking responsibility for constructing the political vision toward which I strive, joined, I hope, with others.”²² The Constitution in which Levinson proclaimed his faith in 1988 is “less a series of propositional utterances than a commitment to taking political conversation seriously.”²³ He rejects the idea that constitutional change is simply what occurs through Article V,²⁴ because “the Constitution is best understood as supportive of such conversations and requiring a government committed to their maintenance.”²⁵

What is remarkable is that Levinson's afterword to the 2011 edition rejects almost all of these propositions. First, he no longer has faith in the Constitution.²⁶ Second, in-

15. LEVINSON, *supra* note 2, at 246.

16. LEVINSON, *supra* note 1, at 180–81; *see* LEVINSON *supra* note 2, at 246.

17. LEVINSON, *supra* note 1, at 180–81.

18. *Id.* at 193.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. U.S. CONST. art. V.

25. LEVINSON, *supra* note 1, at 193.

26. LEVINSON, *supra* note 2, at 245 (“the appropriate question in 2011 is whether I maintain . . . [constitutional] faith. The answers are ‘perhaps’ and ‘no.’ unless one reduces ‘constitutional faith’ to a willingness to embrace the Preamble while being harshly critical of much of what follows it.”).

stead of identifying the Constitution with fluidity and change, he distinguishes between the “Constitution of Conversation” and the “Constitution of Settlement.”²⁷ The Constitution of Conversation consists of the “majestic generalities” and open spaces in the Constitution that judges expound through doctrinal development and that law professors especially like to talk about.²⁸ This Constitution, Levinson believes, is still fluid, but it is no longer the main event.²⁹ The most important features of the Constitution are contained in what Levinson calls the Constitution of Settlement.³⁰ It consists of the Constitution’s hard-wired rules and settled practices of constitutional politics that are never litigated in courts and are almost never studied in law school courses on constitutional law.³¹ Examples of the Constitution of Settlement are the electoral college, the requirement of two Senators for each state, the date of inauguration, the inability to remove a President by vote of confidence, and, perhaps most important, the arduous amendment procedures of Article V, which, in our deeply polarized society, pose almost insurmountable obstacles to constitutional revision.³²

Levinson continues to believe that the Constitution of Conversation is quite flexible.³³ Indeed, he has nothing but praise for the Constitution’s Preamble — whose general statement of constitutional purposes offers “an invitation to [further] conversation” if there ever was one.³⁴ But these days, he thinks, the Constitution of Conversation is far less important than the straitjacket of the Constitution of Settlement, which makes political change enormously difficult and prevents Americans from meeting the very serious problems of governance — not to mention the problems of injustice — that face them in the early twenty-first century:³⁵ “I now believe that the Constitution of Settlement serves to make difficult, if not impossible, the achievement of the magnificent vision instantiated in the altogether commendable Preamble.”³⁶

This change in attitude is symbolized by the change in covers from the 1988 to the 2011 version. The 1988 edition features a man dressed in patriotic garb walking a tightrope, trying to get to safety while balancing a pole with large and heavy weights on either side, shaped like a large dumbbell.³⁷ On each weight, moreover, stand figures from the past: churchmen, statesmen, scholars, scribes, and judges.³⁸ This cover captures the idea that constitutional faith is a gamble, and a burden that we inherit from the past. The tightrope is flexible, but dangerous. Nothing is certain, and we must exercise balance and care in moving forward into the future.

The 2011 cover features the stone tablets of the Ten Commandments, on which the

27. *Id.* at 246–47.

28. *Id.*

29. *Id.* at 247.

30. *Id.*

31. *Id.* at 247–49.

32. *Id.* at 249; see also SANFORD LEVINSON, FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012) (offering a detailed list of criticisms of the current Constitution).

33. LEVINSON, *supra* note 2, at 246.

34. *Id.*

35. *Id.* at 247–49.

36. *Id.* at 251.

37. LEVINSON, *supra* note 1.

38. *Id.*

text of the Constitution has been superimposed.³⁹ It symbolizes Levinson's shift of attention from the Constitution of Conversation to the Constitution of Settlement. In this portrait, the Constitution is not flexible. Quite the contrary, it is hard as a rock, and the words of the Constitution are literally written in stone. The Constitution is a heavy object, difficult to move, and therefore difficult to employ in the pursuit of change.

Moreover — and this is the subject of the second half of Levinson's afterword — the placement of the Constitution's words on tablets of stone symbolizes the reverence that Americans have toward their Constitution.⁴⁰ This reverence is unjustified, Levinson believes, and it borders on the pathological: "I therefore believe that it is basically delusional to 'love' the Constitution — or to express particular faith in its current instantiation — unless," Levinson remarks dryly, "one benefits mightily from the status quo it tends to entrench and self-servingly wishes to keep it that way."⁴¹ On the 2011 cover, the man dressed in patriotic garb balancing the heavy weights is gone.⁴² Patriotism is no longer a commitment to conversation in difficult circumstances. "I now define American patriotism," Levinson explains, "as requiring a willingness in substantial measure to *reject* the Constitution rather than proclaim one's devotion to it."⁴³

The effect of the afterword is bracing. It is as if twenty years later, J.K. Rowling added a few pages to the Harry Potter saga remarking that perhaps Voldemort killed off Harry Potter after all, or Thomas Jefferson followed the Declaration's pledge of the delegates' "[l]ives, . . . [f]ortunes and . . . sacred [h]onor"⁴⁵ to the new nation with a short postscript saying "eh, not so much."

Needless to say, the afterword to *Constitutional Faith* changes the meaning of the entire book. It alters the significance of all of the previous chapters. It changes the location and object of political faith. And it alters the story that Levinson wants us to tell ourselves about the course of American history.

II. A NEW STORY FOR A NEW NATION?

In the final pages of Chapter Six of the 1988 edition, Levinson acknowledged that the very idea of constitutional faith was inevitably limited by the fact that the Constitution might someday end.⁴⁷ "It would be essentially misleading," he notes, "to attribute to constitutional faith the longevity that we associate with the great religious faiths[,] . . . particularly Judaism and Christianity."⁴⁸ Americans' faith in the U.S. Constitution might turn out instead to be more like "the great Egyptian, Greek, and Roman religions that today stock museums with their treasures but are otherwise dead as informing visions of

39. LEVINSON, *supra* note 2.

40. *Id.* at 252–55.

41. *Id.* at 251.

42. LEVINSON, *supra* note 2.

43. *Id.* at 251.

44. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

47. LEVINSON, *supra* note 1, at 193–94.

48. *Id.*

how we the living might structure our own lives.”⁴⁹ He concludes that “[w]hether constitutional faith maintains itself depends on our ability to continue taking it seriously,” and “this is no easy task.”⁵⁰

But suppose, like Levinson in 2011, that one can no longer take the Constitution seriously. Then perhaps the Constitution is more like the religion of the ancient Egyptians, Greeks, and Romans than contemporary religions. Yet the comparison is not quite apt. As long as the constitutional system continues, the hard-wired rules and the decisions of the courts will continue to have real world effects. The appropriate comparison is not to seeing the artifacts of a long dead Roman religion in a museum. It is more like being a Christian in the middle Roman Empire: surrounded by the effects of a religion that few people actively believe in, but that most certainly affects one’s life.

Moreover, replacing the Constitution is about more than the irrelevance of an old faith. It is a traumatic event. American reverence for the Constitution — and indeed American constitutional culture generally — is a result of a peculiar fact about the American political experience, which most other nations do not share. In the story that Americans tell themselves, the American nation (i.e., the United States), the American people (i.e., “We the People”), and the American Constitution come into being almost at the same time. This is not true of most other nations. The French also had a revolution in the late eighteenth century, but the French nation and the French people predate it. Our Canadian friends to the north, who share so much with Americans, do not have a revolutionary political tradition. Their nationhood and their constitution arrived in phases, beginning with the British North America Act of 1867,⁵³ written not by “We the Canadian People” but by their colonial overlords, the British Parliament. The Charter of Rights and Freedoms came over a century later.⁵⁴

Because in American memory the nation, the people, and the Constitution emerged from an act of revolution, all three are grouped together in collective memory as the work of the Founders; Americans habitually associate each with the others. As a result, Americans identify with their Constitution in a way that few other nations do. This is a powerful reason why Americans, unlike the French — also heirs to a revolutionary tradition — still cling to their ancient Constitution. The French are on their Fifth Republic and counting.⁵⁵ America still believes itself to be in its first.

This belief, of course, is fictitious. From 1776 through 1781, the American government was the Continental Congress, and from 1781 through 1789, the new nation operated under the framework of the Articles of Confederation.⁵⁶ But these episodes are

49. *Id.* at 194.

50. *Id.*

53. Constitution Act, 1867, 30 & 31 Vict. (U.K.), available at <http://www.ccrh.org/comm/river/docs/1867.htm>.

54. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, available at <http://www.efc.ca/pages/law/charter/charter.text.html>.

55. 1958 CONST. (France).

56. ARTICLES OF CONFEDERATION OF 1781; Office of the Historian, *Continental Congress, 1774-1781*, U.S. DEPARTMENT OF STATE (Nov. 4, 2012), <http://history.state.gov/milestones/1776-1783/ContinentalCongress>.

conveniently collapsed in collective memory. Americans do not view the Articles of Confederation as the First Republic, with the 1787 Constitution creating a Second Republic. Instead, Americans mostly think of the Articles — if they think of them at all — as a sort of trial run for the real Constitution — the Constitution of 1787.

Levinson's project — a new Constitution — is about more than just changing the country's fundamental law. He is trying to convince Americans to separate We the American People and the American nation from the American Constitution.⁵⁸ The people and the nation will go on, but the present Constitution will not. Because Americans view the founding of the nation, the people, and the Constitution together, they treat the three as mystically connected. An attempt to separate them is likely to encounter fierce resistance.

Thus, in his call for a new convention, Levinson is not simply fighting against irrationality or inertia; he is taking on Americans' very self-conception. He is trying to change Americans' understanding of themselves. Currently Americans associate their American-ness with their Constitution, which they revere as constitutive of their nation. If Levinson wants to succeed in his political project, he must do more than make good arguments of policy. He must fundamentally revise this picture. Drawing on the examples of the past, he must craft a new story about our history that resonates with Americans and that they can recognize as true of their identity as a people.

What would this story look like? Here is a basic outline. Americans are the people who, in the words of the Declaration, repeatedly exercise their right “to alter or to abolish” government “whenever any Form of Government becomes destructive of the[]Ends” of protecting “Life, Liberty, and the Pursuit of Happiness.”⁵⁹ That is why, Levinson believes, it is high time for Americans to replace their outmoded Constitution and, in Jefferson's words, “to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”⁶⁰

In short, Levinson must offer a counter-narrative to the one that Americans unquestionably accept and know to be true. In this story, “We the People” existed before our Constitution. The Constitution is merely a device that we used to fulfill our purposes. The British Constitution failed us, and so we revolted. Our first constitution, the Articles of Confederation, also failed us, and so we discarded it unceremoniously. And throughout the fifty states, new constitutions are constantly being amended and replaced.⁶¹ This restless and unsentimental construction and discarding of new constitutions, Levinson would insist, is not foreign to our history. It is characteristic of our political experience. It is as American as apple pie.

With this new story comes a new account of faith. It is not *constitutional* faith, but rather *political* faith. It is not faith in the adaptability of the 1787 Constitution to new circumstances. Rather, it is faith in the ability of the American nation and the American

58. See LEVINSON, *supra* note 2, at 193–94.

59. THE DECLARATION OF INDEPENDENCE, *supra* note 45.

60. *Id.*; LEVINSON, *supra* note 2, at 250–52.

61. See, e.g., LEVINSON, *supra* note 32, at 332 (discussing rates of state constitutional amendment).

people to adjust to new circumstances through creating new constitutions. Here Levinson might quote the opening sentences of Alexander Hamilton in Federalist No. 1. “[T]he important question,” Hamilton says, is “whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”⁶² The new political faith that Levinson wants us to adopt is faith in Americans’ ability to establish good government — that is, a new Constitution — from reflection and choice, and not be destined to cling helplessly to an ancient and outmoded basic law.⁶³

III. FROM MIDDLE GAME TO ENDGAME

Suppose that we take up Levinson’s call. Suppose that we lose faith in the Constitution, and gain faith in political transformation outside of it. Then the Constitution can no longer serve as American’s civil religion, and all of the themes of the book are transformed, sometimes subtly, sometimes profoundly.

When people no longer believe that they are in the middle of an ongoing, workable relationship, and have come to believe that it is best to end the relationship and transition to a new one, their attitudes and strategies change. To borrow from the language of chess, people are no longer in the middle game, but in the endgame of their relationship.

For example, consider a marriage or a partnership that is breaking up. In the middle of such a relationship, both parties have incentives to keep things going, and to make concessions in the interest of preserving the long-term benefits of the relationship. But in the endgame of a relationship, individuals no longer feel the need to go through the motions of pretending that the relationship will continue forever. They no longer make concessions as a matter of course because they expect reciprocity later on. Rather, their strategy changes. Their negotiations become more hard-nosed. In an endgame situation, people attempt to protect their interests as they transition to a new mode of living.

In the “middle game” of an ongoing relationship, one can hope for redemption. Perhaps a marriage or partnership is not perfect now, but we hope that it can get better. But in the endgame, we know that the partnership is dissolving, and the marriage will not last. And so we act accordingly.

In the same way, our attitudes about the Constitution change when we move from the middle game to the endgame — when we stop believing that the Constitution is a workable system of government and conclude that it must be replaced. In the middle game of a constitutional system, we can believe that present injustices may be remedied and that the constitution will get better over time if we commit ourselves to its improvement. That is why we believe that it is better to work for political change within the constitutional system. But in the endgame of a constitution, we know that the current political system will not be redeemed. Rather, it will be replaced. Therefore, our primary concern becomes not how best to interpret it but what should replace it.

Put another way, once we have decided that we need a new constitution, it makes increasingly less sense to fight about the best interpretation of the Equal Protection

62. THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Henry Cabot Lodge, ed. 1897).

63. LEVINSON, *supra* note 2, at 250–52.

Clause for the long run — although that interpretation may certainly affect current litigation and real world controversies. Rather, we fight about the interpretation of equality that we want to enshrine in the new constitution, and that depends both on what interpretation we think most just and what interpretation we think we can get a supermajority of our fellow citizens to agree to. Note, however, that the divergence between the two interpretations may cause us to agree to open-ended language that deliberately leaves things unclear or ambiguous.

Levinson's 1988 book is written from the perspective of the middle game; his 2011 afterword is written from the perspective of the endgame. How does the shift from the middle game to the endgame alter our perception of the rest of the book? We have already discussed the final chapter, Chapter Six, which discusses what it means to sign the Constitution. Let us now go through the rest of the chapters one by one.

IV. THE TRANSFORMATION OF SANFORD LEVINSON'S CONSTITUTIONAL FAITH IN SANFORD LEVINSON'S *CONSTITUTIONAL FAITH*

Chapter One is entitled "The 'Constitution' in American Civil Religion."⁶⁵ Its central purpose is to develop the analogy between the Constitution and religious faith and religious adherence.⁶⁶ This analogy makes particular sense if we are in the middle game. But suppose that we have decided that the Constitution has outlived its usefulness, and that we should replace it with a new one. Then the analogy to religious belief and practice becomes more complicated. Everyday life may go on under the Constitution, but the document can no longer inspire much reverence — much less serve as the basis of an American civil religion.

Religions work as going concerns, but they do not work at all in endgame situations in which adherents have given up on the faith and are running for the exits. We should not confuse what I am calling the *endgame* of a relationship or institution with the *eschatology* of a particular religion's beliefs. Christians might think that the End Times are coming and prepare accordingly. But this preparation is premised on very strong adherence to Christian theology. People do not sell all their possessions and act as if the world is going to end because they have lost faith in their religion, but because their belief in the certainty of religious dogma is particularly powerful. When we move to the endgame of a cooperative venture, the analogy to religion breaks down. It would be a bit like a religion whose adherents recognize that they and others have lost faith in its central tenets.

Indeed, once we realize that the religion we are practicing is obsolete, the perpetuation of theological beliefs and the practice of religious rituals seem increasingly beside the point. The new Constitution is a bit like the founding of a new religion — as

65. LEVINSON, *supra* note 2, at 9.

66. *Id.* at 10–11.

71. ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, *reprinted in* 1 UNITED STATES CODE, at XLIII-LXXIII (Office of the Law Revision Counsel of the House of Representatives ed., 2006).

Christianity is to Judaism. Christianity — especially after St. Paul — eventually deemphasized the need for Christians to adhere to the laws of Moses, and it reinterpreted the Old Testament as an older dispensation that gave way to the New Testament.

To be sure, one might want to retain certain features of the old Constitution in the new one. But in that case, one no longer identifies the American civil religion with the Constitution itself. The old Constitution is an honored but superseded document that at most forms part of the American political tradition, like Magna Carta or the Northwest Ordinance.⁷¹ We see things in it that are worthy of praise, deservedly part of the American tradition, and that we continue to cite in political and legal arguments. But we also see things in the Constitution that we reject or that no longer resonate with who we are now. The old Constitution then becomes like other documents in the American political tradition. It might be treated like the Declaration of Independence — without current binding legal force, but containing aspirational ideals; like Magna Carta — symbolically important but of no legal effect; like the English Bill of Rights — a source of historical information about the origins of the new Constitution's terms; or even like the Articles of Confederation — rejected as inadequate and therefore neglected.

Moreover, once we have decided to transition to a new basic law, it makes little sense to place faith in the old Constitution. Instead, we must place our faith elsewhere — perhaps in the American people. As noted above, replacing the Constitution means that we must separate it from American identity and American nationalism. We must redefine We the People of the United States in terms other than adherence to the 1787 Constitution. We must craft a new story about America in which the old Constitution is merely a stage in the development of the nation, in which the old Constitution gives way to the new one.

Even here, appearances might matter a great deal. The new Constitution might retain much of the old text and simply change parts of it. Perhaps constitutional change might simply involve the addition of a series of new amendments tacked on to the existing ones, in order to create a sense of continuity. It is worth noting that the Confederate Constitution was substantially identical to the Constitution as it existed in 1860, with a few important differences designed to protect states' rights and the institution of slavery.⁷⁶ By employing an almost identical text, the Confederacy sought to preserve the belief that it had not lost faith in the Constitution, and that it, and not the North, was the true protector of the American constitutional tradition.⁷⁸

76. See E. MERTON COULTER, *THE CONFEDERATE STATES OF AMERICA 1861-1865*, at 29-30 (1950)(summarizing differences between the Confederate and U.S. Constitution).

78. See *id.* at 31 (1950)(quoting Jefferson Davis' remark that "The Constitution framed by our Fathers is that of these Confederate States").

The second big idea in Chapter One of *Constitutional Faith* is Levinson's comparison of attitudes about the Constitution to Protestantism and Catholicism.⁷⁹ In fact, the protestant/catholic distinction is actually two distinctions.⁸⁰ The first question is whether a single, unitary institution — like the Supreme Court — should determine the meaning of the Constitution (catholic) or whether all citizens may interpret the Constitution for themselves (protestant).⁸¹ The second question is whether constitutional interpretation should be primarily textual (protestant) or whether it should employ multiple and diverse modalities (catholic).⁸² As Levinson notes, one might be a protestant on one of these questions without being a protestant on the other.⁸³

Yet once we take the arguments of Levinson's afterword into account, the distinctions between protestant and catholic conceptions of the Constitution collapse, or at the very least, are totally transformed.

Begin with the question of institutional authority. Once we are in the endgame, the Supreme Court has no special authority on the meaning of the proposed replacement Constitution, at least until after it is ratified and new cases start arriving on its docket. During the drafting and ratification process, the meaning of the new document is up for grabs. It is not in the hands of the courts but in the hands of the framers and ratifiers. In this sense, everyone in the process is a constitutional protestant. Moreover, the new Constitution's text may be designed specifically to invalidate prior interpretations of the Supreme Court — as the Eleventh Amendment overturned the decision in *Chisholm v. Georgia*,⁸⁴ and the Fourteenth Amendment rebuked the decision in *Dred Scott v. Sandford*.⁸⁵ And after the text is ratified, courts may be interested in the various protestant interpretations of the participants as evidence of original understanding or original meaning.

Next, consider the question of unitary versus multiple interpretive modalities. When we add text to a constitution, or create a new constitution, we produce a new document, rather than interpret an old one. In this sense, our focus is primarily textual. We are all protestants; not because we think that the text is the only source of interpretation, but because what goes into the text (and what stays out) is paramount at this stage in the proceedings. To be sure, we write the text in anticipation of what courts will do with it, and we may adopt old language in the expectation that courts will transfer the old glosses to the new language. For example, the Reconstruction Framers crafted the language of Section One of the Fourteenth Amendment based on their understanding of what due process (in the Fifth Amendment) and privileges and immunities (in Article IV, section 2) meant.⁸⁶ In response to a critic's objection that he did not know what was

79. LEVINSON, *supra* note 2, at 27–30, 51.

80. *Id.* at 29 (explaining the distinction between “protestant” and “catholic” viewpoints). Like Levinson, I place these terms in lower case when referring to ideal types about interpretation and in capitals when referring to an actual religion.

81. *Id.* at 29–30.

82. *Id.*

83. *Id.*

84. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

85. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

86. U.S. CONST. amend XIV, § 1; U.S. CONST. amend. V; U.S. CONST. art. IV, § 2. *See* JACK M. BALKIN,

meant by “due process” in the proposed Fourteenth Amendment, John Bingham famously retorted that “the courts have settled that long ago, and the gentleman can go and read their decisions.”⁸⁷ Yet even in drafting the Fourteenth Amendment, the Reconstruction Republicans were guided by protestant interpretations of the existing Constitution that differed from those held by most federal judges.⁸⁸

Chapter Two is entitled “The Moral Dimension of Constitutional Faith.”⁸⁹ Its theme is the connection between law and morality.⁹⁰ The Constitution has a dual character: sometimes we treat it as a source of inspiration or moral aspiration, with a strong moral character, and sometimes we treat it as merely positive law which need not be just, and may in fact be very unjust.⁹¹ When this happens, we face a conflict between fidelity to the Constitution — and thus our constitutional faith — and fidelity to morality or divine command.⁹² Levinson’s example is two opinions by Chief Justice Marshall.⁹³ One, in *Fletcher v. Peck*, assumed that the Constitution incorporates “general principles which are common to our free institutions.”⁹⁴ The other, in *The Antelope*, in which the Court voted to return slaves on a captured vessel, strongly distinguished between law and morality.⁹⁵ Americans treat their Constitution neither as purely moral nor as purely legal. Rather, the moral and legal aspects of the Constitution appear continuously in constitutional discourse, sometimes together and sometimes opposed, and the relationship between them is always ambiguous. The Constitution’s dual status as positive law and a symbol of moral aspiration often leads people to make excuses for the Constitution, or to strive to interpret it so that it always produces happy endings.⁹⁶

This ambiguity, however, would soon resolve itself if Americans experienced a general loss of faith in the Constitution. Then it would be possible to say that the Constitution was an experiment that failed. With the loss of faith comes the loss of reverence. One no longer needs to make excuses for the old Constitution. More people could say, forthrightly — as we do about the Articles of Confederation — that while the document

LIVING ORIGINALISM 189–90 (2011) (describing the origins of the language of the Fourteenth Amendment); BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS 1865–1867, at 106 (Columbia Univ. Press 1914) (noting the Committee’s reliance on Article IV and the Fifth Amendment); CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham) (“The residue of the [proposed Fourteenth Amendment], as the House will see by a reference to the Constitution, is the language of the second section of the fourth article, and of a portion of the fifth amendment . . .”).

87. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham).

88. See Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 152–56, 185–86 (1998) (arguing that many Reconstruction framers believed that, despite the Supreme Court’s decision in *Baron v. Baltimore*, states were bound by the Bill of Rights)

89. LEVINSON, *supra* note 2, at 54.

90. *Id.*

91. *Id.* at 88–89.

92. *Id.*

93. *Id.* at 66–67.

94. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810); *id.* at 143 (Johnson, J., concurring) (defending the result “on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity”); LEVINSON, *supra* note 2, at 66–67.

95. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); LEVINSON, *supra* note 2, at 169.

96. See LEVINSON, *supra* note 2, at 87 (noting that constitutional interpretation will inevitably link legal interpretation to morality, but warning that the Constitution cannot always produce happy endings).

98. *Id.* at 90.

had its strengths, it also had bad features, which were either unjust, unworkable, or both. Once we find ourselves in the endgame, the Constitution cannot function as a source of morality, except in the sense that we identify documents from the past as sources of aspiration, or treat them, like Magna Carta, as stages on the path to moral progress. Once we have determined that we will replace the old Constitution with a new one, we are far more likely to distance ourselves from it, historicize it, soberly consider its strengths and weaknesses, and treat it as a reflection of its time.

Chapter Three is entitled “Loyalty Oaths: The Creedal Affirmations of Constitutional Faith.”⁹⁸ It features a discussion comparing fidelity to the Constitution with fidelity within marriage, and comparing oaths to defend the Constitution with marriage vows.⁹⁹ People may stay in marriages—even unhappy ones—for many reasons: out of convenience or inertia, or out of fear that dissolving the marriage might lead to worse consequences. Similarly, people may decide to stay with a constitution even if it is inadequate or unjust, because, after all, things could be worse.¹⁰⁰

However, once one loses faith in a marriage, and finds oneself in the endgame of a relationship, the meaning of the marriage may change rather drastically. The marriage becomes either an obstacle to one’s happiness or at best a *modus vivendi* to get one to the next stage of one’s life (or the next relationship). Similarly, once we have lost faith in the Constitution as our basic charter of government, it no longer seems to be a worthy object of reverence. Rather, it too becomes an obstacle to effective politics, or merely a political *modus vivendi* — a way of conducting politics for the time being in order to get us to the next Constitution.

A constitutional convention and a subsequent ratification campaign is more than the contemplation of a new marriage. It is also like a decision about whether to have a divorce, or at the very least, whether to have a new kind of marriage. The convention and the ratification process are as much like the endgame as the opening. We hope that during this period of transition we can be civil to each other, and avoid political breakdowns (and violence), just as couples during a divorce hope that they and their soon-to-be ex-spouses can remain civil so that they can transition to a better life.

The period of transition from the old Constitution to the new one may mean that we do not revere the new Constitution at first, at least until time has hallowed it. The new Constitution is the work of the current generation, and therefore, until a new generation takes the reins of government, it will be easy to see it as compromised and imperfect. It may take many years for it to gain the same degree of reverence as the old Constitution, if, in fact, it ever does. Levinson is fond of quoting the statement, attributed to Roland Barthes, that you can say, “I will love you forever” truly and unreservedly only once.¹⁰¹ In like fashion, once we have jettisoned a constitution of long standing for a new one, it is hard to view the new one as perfection. Perhaps new constitutions, like second marriages, are the triumph of hope over experience. And perhaps Americans will not treat a

99. See *id.* at 108–11, 120–21.

100. *Id.*

101. See Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1632 (1991)(quoting LIONEL TRILLING, *SINCERITY AND AUTHENTICITY* 97-98 (1972)).

second Constitution as being as divinely inspired as the first.

But what about the Articles of Confederation, you might ask? Why didn't the failure of the Articles keep Americans from revering the 1787 Constitution? The answer is cultural memory. Americans do not remember the Articles as our First Constitution, even though that is what it was. Rather, they remember it as a transitional document. It was less like a first marriage than an early live-in relationship that quickly fell apart. Or perhaps it was what is now called a "starter marriage" — a union entered into too early that soon gives way to a more lasting, and permanent union.

In Chapter Four, "Constitutional Attachment: Identifying the Content of One's Commitment," Levinson is interested in the nature of constitutional commitment.¹⁰³ How thin or thick a conception of the Constitution's meaning must a person have to truthfully state that they are committed to the Constitution?¹⁰⁴ Levinson's central example is the case of *United States v. Schneiderman*, in which the Supreme Court held that Schneiderman could truthfully state attachment to the principles of the Constitution for purposes of naturalization law even though he was a Communist.¹⁰⁵ Schneiderman's principles and those of the Constitution, the Court argued, could be seen as consistent when described in a sufficiently abstract way; moreover, Schneiderman believed that communism should be achieved through peaceful transformation of the political order, including, among other things, through Article V amendment.¹⁰⁶

If we reason as the Court did in *Schneiderman* — that one is committed to the Constitution as long as one is committed to peaceful and legal change through amendment — then many different people of many different views could claim fidelity to the Constitution.

But what is the relationship between the position the Supreme Court ascribes to in *Schneiderman* and Levinson's current view? On the one hand, if Levinson merely seeks new amendments to the Constitution — for example, by changing the date of inauguration, the composition of the Senate, allowing for votes of no confidence against the President, and limiting the President's power to veto legislation — then Levinson's position is really no different from that attributed to *Schneiderman*. Levinson is committed to the Constitution because he is committed to reshaping it through Article V amendment. On the other hand, suppose that Levinson wants to scrap the Constitution entirely and hold a new constitutional convention under the procedures described in Article V. Could we still say that as long as he is committed to those procedures he is committed to the principles of the Constitution? Or should we say that he is only committed to the principles of Article V?

In one important sense, advocates of a new constitutional convention are not really

103. See LEVINSON, *supra* note 2, at 122–54.

104. *Id.* at 125–26.

105. *United States v. Schneiderman*, 320 U.S. 118 (1943); see LEVINSON, *supra* note 2, at 125–27 (explaining *Schneiderman*'s importance).

106. See *Schneiderman*, 320 U.S. at 137–46.

108. There is an irony lurking in the naturalization statute at issue in *Schneiderman*. It assumed that the Constitution would never be displaced because it required applicants for citizenship to be "attached to the principles of the Constitution of the United States." *Schneiderman*, 320 U.S. at 121, 162n2.

committed to the Constitution, although they may be committed to some of the principles in the Constitution that they want to carry forward into the new instrument. In fact, they may want a new Constitution because they want to expand or develop these principles further than the current Constitution does. The whole point of demanding a new Constitution, after all, is that one finds the current document inadequate, even given the possibility of Article V amendment. Once again, a shift from the middle game to the endgame means that the current Constitution provides only a *modus vivendi* — a method of transitioning to a new political system.¹⁰⁸

Chapter Five is entitled “The Law School, The Faith Community, and the Professing of Law.”¹⁰⁹ Levinson’s concern is what it means to “profess” law, and he offers the example of the distinction between a department of religion and a school of theology.¹¹⁰ Levinson explains that “[t]he world of the believer, represented in the divinity school, and that of the scholar, represented in the department of religion, are fundamentally different.”¹¹¹ In a department of religion one does not really need to believe in the religious views one studies.¹¹² One could be an atheist or an agnostic studying religion from the perspective of a sociologist, anthropologist, or economist. One might well be sympathetic to the believers that one studies, but one does not have to think that their beliefs are correct. On the other hand, a school of theology is devoted to producing students who carry on a particular religious tradition. To teach in such a school, one might think, the teacher would at the very least have to believe that the religious tradition is true or substantially true.¹¹³ To inculcate others in the faith, one must share that faith. And thus, Levinson asks, should we understand the contemporary law school as more like a department of religion — in which faith in law is not necessary — or like a school of theology — in which faith is a requirement?¹¹⁴

Suppose that we think that a law school is more like a school of theology; that is, that law professors should at the very least believe in law. Does this mean that they must also believe in the particular subject matter — tort law, constitutional law — that they teach? For example, should a theology professor who does not believe in the virgin birth or the resurrection of Jesus — but still believes in Jesus’s divinity and saving powers — teach a course on Christology?

Suppose, then, that a professor of *constitutional* law, like Levinson, believes that the current Constitution is inadequate and seeks a new one. On the one hand, the person no longer believes in the object of study — the U.S. Constitution. On the other hand, the professor may clearly believe in following the legal processes associated with the Article V conventions. So perhaps there is no reason why such a person could not be part of the “faith” community of law professors. A rough analogy would be a professor of tort law who wanted to replace the entire common law field of torts with a statute akin to the Uniform Commercial Code. No one could justly accuse this person of no longer believing in

109. See LEVINSON, *supra* note 2, at 155.

110. *Id.* at 155–57.

111. *Id.* at 163.

112. *Id.* at 162.

113. *Id.* at 156.

114. *Id.* at 162–64.

“law.” The most one could say is that the professor does not believe in this particular instantiation of law.

The law professor who advocates a new constitutional convention presents a somewhat different set of problems for legal education than the law professor who does not believe in “law” — whatever that means. The latter (call him Professor A) might replace the teaching of doctrine in favor of sociological or economic explanations of the law. But the former (call her Professor B) might also deemphasize legal doctrine. She might have the students read literature on constitutional design, comparative election systems, and so on. In either case, students may come away from the class on constitutional law with far less knowledge than they would like about how to reason from existing precedents to new factual situations. Both professors believe that attending to internal doctrinal arguments is a waste of time. If we are concerned about the students of Professor A, should we not be equally concerned about the students of Professor B?

Perhaps the difference is that Professor B, unlike Professor A, is only *temporarily* uninterested in doctrine. As soon as the old, defective, constitution is replaced with a new one, she will return to teaching legal “theology,” whereas Professor A would not. Thus, Professor B, who teaches constitutional design in her constitutional law class, is teaching the equivalent of comparative religion — but her ultimate goal is to enable her or those who come after her to someday return to teaching theology.

There is a second objection to teachers of religion in schools of theology. The non-believer cannot convey a faith that he or she does not share. In the context of law school, the objection is that even if Professor A teaches black letter doctrine, he cannot do the job properly because he does not believe in what he is teaching, and therefore he cannot properly inculcate the “faith” to his students. He does not approach the subject as a believer, and if anyone asks him, he will candidly say that he thinks that the law is just a game by which more powerful people oppress less powerful ones.

But couldn't the same objection be leveled at Professor B? When she teaches the intricacies of the separation of powers and debates the theory of the unitary executive, she is secretly thinking to herself that we would all be much better off with a parliamentary system. And in the course of conversation, she might well tell her students so.

Again, is the difference that Professor B thinks that *some* law — just not the one she teaches — is worthy of praise, whereas Professor A is skeptical of law generally? If so, this simply leads us back to *Schneiderman*, and the level of generality at which we describe our commitments. For suppose that Professor A responds that he could admire some possible systems of law, but that the current version found in the United States is not one of them. How, then, is he different from Professor B, who would really rather have the sort of constitutional system one finds in most other modern democracies?

In any case, the example of Professor B, who seeks a new constitution, shows the limits of the analogy between law schools and schools of theology. Presumably few law deans would have a problem with a course on constitutional design, if named as such, because such a course would fit comfortably into a tradition of law reform. The only difference is that the law to be reformed is foundational. A school of theology, however,

would probably not feel all that comfortable in offering courses on how to create a new religion. In fact, the question of “reform” within theology may be posed very differently than the question of reform within law. Religion is not reformed through popular vote; rather it comes from persuading people about the best interpretation of God’s will. That is closest, perhaps, to debates in law schools about the best way to interpret existing legislation and constitutional provisions. Yet, a standard path toward legal reform is new legislation.

V. CONCLUSION: THE ROLES OF LAWYERS IN A NEW CONSTITUTIONAL CONVENTION

Chapter Five’s discussion of the professional roles of law professors brings us to a final question. Once we lose constitutional faith, and move from the middle game to the endgame, the crucial issue is no longer how to interpret an existing constitution. It is how to design a new one. The task is no longer sustaining constitutional faith, but the creation of a new civic religion. And if that is our task, what role, if any, should lawyers — much less law professors — play in a new constitutional convention?

The most obvious answer is that constitutional lawyers should play a major role because they are supposed to be experts in constitutional law. But the whole point of Levinson’s distinction between the Constitution of Conversation and the Constitution of Settlement is that vast majority of American constitutional law professors are experts — if at all — only with respect to the former. Most American law professors spend most of their time teaching others to reason about how to interpret and reinterpret cases and statutes. They do not teach, nor do they spend much time thinking about, basic principles of constitutional design. And unless they are constitutional comparativists, they have little experience with different ways of solving the sorts of political problems that a constitution is designed to solve. Indeed, most experts in American constitutional law not only know little about the constitutions of other countries, they also know little about the constitutions of the fifty states, which, as Levinson has argued elsewhere, are a treasure trove of ideas, completely native to the United States, about how to construct and design a constitutional democracy.¹¹⁶ All this suggests that lawyers, and especially constitutional law professors, are much less qualified to participate in constitutional conventions by virtue of their professional role and status than we might think.

To be sure, most of the Framers at the Philadelphia Convention and many of the key participants in the debates over ratification were lawyers or trained in the law.¹¹⁷ But several of the Framers had also participated in the drafting of new state constitutions in the early period of independence, and some, like James Madison (a non-lawyer), had thought deeply about what we would now call comparative constitutional law through their study of the political history of other nations.¹¹⁸

116. LEVINSON, *supra* note 32.

117. See *America’s Founding Fathers: Delegates to the Constitutional Convention*, CHARTERS OF FREEDOM, http://www.archives.gov/exhibits/charters/constitution_founding_fathers_overview.html (last visited Dec. 21, 2012) (“Thirty-five [of the delegates to the Philadelphia Convention] were lawyers or had benefited from legal training, though not all of them relied on the profession for a livelihood. Some had also become judges.”).

118. See RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 183–85 (Univ. Press of Virginia 1990) (1971)(describing Madison’s study of ancient and modern confederacies in preparation for the Philadelphia

What truly distinguishes the founding generation, in contrast to our own, is their lack of reverence for existing constitutional systems, and their willingness to experiment. They rejected the parliamentary system then emerging in Britain, improvised on existing state constitutional experiments, and created a new federal republic with a system of separated powers.

Levinson, one expects, would applaud the daring of the Framers, and their willingness to think anew, but he would not necessarily ascribe those traits to the fact that the Framers included many lawyers. In fact, he has argued elsewhere that we might be best served by choosing the delegates to a new constitutional convention by lottery.¹¹⁹ Levinson does not think that legal interpretation is “rocket science,” and the same point, he believes, applies to “constitutional design.”¹²⁰ Indeed, he argues, “[m]any of the issues” of constitutional design that he raises “involve basic value choices that ordinary Americans are capable of making.”¹²¹

Ironically, if lawyers can play a valuable role in a new constitutional convention, it will be because of two qualities that also limit their imaginations as delegates. First, some lawyers — especially those who work for legislatures or on law reform projects — are accustomed to drafting legislation by thinking ahead about how other lawyers will read and interpret the language they craft. Lawyers, then, have the ability to engineer constitutional language given what they know other lawyers will likely do with such language. Lawyers are also the carriers of institutional memory about what phrases in the old Constitution meant, and what they might mean when inserted into a new constitutional text.

Second, and equally important, lawyers, because of their professional role and professional training, are part of a community of faith. They tend to believe in the power of law and in the importance of upholding it. They are not only theologians, but also evangelists for law and for the rule of law. Although they may have particular difficulty in giving up on the existing constitutional regime, they will adjust to political change once it has occurred. They always do. And when they do, they will prove important players in developing the new constitutional faith that will sustain a new Constitution.

Convention).

119. See LEVINSON, *supra* note 32, at 391 (“I would advocate that delegates from each state, proportionate to overall population, be selected by lottery, with very limited restrictions on selection (the most obvious one being age).”).

120. *Id.* at 392 (“I earlier rejected the analogy between interpretation and ‘rocket science.’ This is also true with regard to ‘constitutional design.’”).

121. *Id.*