Constitutional Fideism

Sanford Levinson. *Constitutional Faith.* Princeton, N.J.: Princeton University Press, 1988. Pp. xii, 250. $19.95.

Harvey C. Mansfield, Jr.

Pencil in a question mark after the title. Sanford Levinson means to question whether faith in the Constitution, or indeed in anything, is possible. At the end of his book, exhausted by his doubts and by the effort to overcome them, he does subscribe to the Constitution, signing ceremoniously less as a proud citizen than as a "privileged member of the American class structure" (p. 193) who feels guilty about his privileges and hopes the Constitution can be used to subvert them. If this hope comes true, Levinson's faith that the Constitution is more than a mere endorsement and concealment of the American class structure will be justified. But there is no ground for this faith, he believes, in either reason or revelation. Levinson's constitutional faith is like religion in not being rationally supportable, but unlike religion in not being conveyed to us from on high. Since there is no ground for faith, how can there be ground for guilt? But Levinson's guilt is his second skin. He needs his faith to tend his guilt, not absolve it. Better, then, that his faith not be justified.

Constitutional faith, as Levinson presents it, substitutes for a nonexistent common good, and even for morality as a whole, which is also nonexistent. His first chapter is on the Constitution in American civil religion, where he develops "Catholic" and "Protestant" views of the Constitution. His second examines the morality of the Constitution, particularly the moral difficulty of respecting a document that seemed to protect slavery. The third is on loyalty oaths and what they mean; the fourth is on the naturalization of citizens and whether the "attachment" of such citizens to the Constitution can be defined; and the fifth, about Levinson's own status as professor of law, considers whether Law Schools should teach respect for the American Constitution (not too much, is his answer).

From this outline one can see that Levinson's book is about the relationship between the moral individual and the Constitution. Despite Levinson's excellent background in political science, his book is not at all about the Constitution as a form of government. Since Levinson seems to make the Constitution bear the weight of resolving all moral questions (and despite Levinson's disclaimer, even all philosophical questions), the difficult business of self-government is lost sight of or subordinated to

moralizing. The heavy academic load carried by the Constitution leaves no time for extracurricular activities such as the political concerns that led to its creation by the Philadelphia convention. The faith of the framers in the capacity of mankind for self-government (see the first page of *The Federalist*) is transformed into a faith in the possibility, through the Constitution, of dialogue or conversation (pp. 8, 194) about moral ambiguities. Levinson says that such faith would make the Constitution "the center of one's (and ultimately the nation's) political life" (p. 4), but in this view politics seems to be nothing but talk. To his credit, Levinson discusses the place of slavery under the Constitution at length. But he does not say what should have been done about slavery; he only tries to formulate the correct mixture of disgust and anguish that an observer today should feel.

In consequence, Levinson does not appreciate the wonderful delicacy of the Constitution's treatment of slavery, which would incidentally have given him a valuable lesson in the relationship between morality and the law. As Robert A. Goldwin has recently reminded us, the original Constitution did not contain words indicating race or color, and its drafters used circumlocutions to avoid using the word "slave."[1] Even as the Constitution protected slavery, it passed over the ugly fact. But it did so, as Lincoln noted, with evident shame rather than indifference. In the Constitution's very embarrassment, there was a muted moral teaching consistent with its avowed principle, asserted eloquently in the Declaration of Independence, of government by consent of the governed. The reason for not fully applying the principle was that one cannot reform everything at once. Any prudent reformer must take account of the resistances to reform.

Moreover, in government by consent, it is morally required, as well as prudent, to do one's best to gain the consent of fellow citizens even when they are prejudiced or self-contradictory. The Constitution did not persuade slaveholders of the wrong they were committing, but the government it established ended the evil and removed the constitutional protections of slavery. Here was a moral compromise that did not corrupt a people, but in the end enabled them to rid themselves of a corruption. For it was in defense of the constitutional union that the slave power was defeated and the Constitution itself cleansed.

Early in his book Levinson discloses that he is a "Catholic-Protestant" in interpreting the Constitution. The "Catholic" view regards the Constitution as a tradition and its proper interpreter as an institution, the Supreme Court; the "Protestant" view regards the Constitution as a Scripture or sacred text and allows, encourages, or requires every citizen to interpret it. By accepting the Constitution as tradition rather than text

1. Goldwin, *Why Blacks, Women & Jews Are Not Mentioned in the Constitution*, Commentary, May 1987, at 28.

(Catholic) while insisting on individual rather than institutional interpretation (Protestant), Levinson shows that in his adaptation, the two items of faith in Catholicism and Protestantism have no connection to each other. One might have thought that if every citizen is to interpret the Constitution, he needs a text to read every night, like a good Protestant, or that if the Constitution is a tradition too complex for ordinary citizens, there needs to be an institution of experts to care for its complexities and to prevent oversimplification. But Levinson wants uninstructed citizens to read cases and journal articles as well as the Constitution. Or am I overlooking the role of Law Schools and law professors in preaching to such citizens? In which case, the citizens' interpretations are not really their own.

Oddly enough, Levinson overlooks the fundamentalists and other conservative citizens who have reacted in recent years against liberal judicial activism. They are the best example of "Protestant" unrest with experts who excel in nimble, or rather brazen, interpretation. It was in appeal to such citizens that Edwin Meese offered his doctrine of "original intent." Levinson does not accept Meese's doctrine, but he does not share the usual horror at the very idea. Perhaps he senses its political empowerment of ordinary citizens, even if he does not care for the implication that professors in constitutional law ought to return to scholarship in the Constitution.

A false dichotomy between the text and the tradition of the Constitution has been created for us by those liberals who wanted to break with both text and tradition, but who saw they could "interpret" the tradition freely if it were separated from the text. The conservative attempt to recover the text may appear to be one-sided and sometimes is so. But it is on the right track—the one that leads toward the reintegration of text and tradition. The reintegration can occur only if both text and tradition are understood as law of a certain kind—*constitutional* law—and not as subject to the unelected authority of moral and political philosophy. Levinson's Catholic-Protestant schema fails to contribute to the reintegration we need because it seems to legitimize the dichotomy of text and tradition, and because it does not identify the problem caused by those who put the authority of their theories above both text and tradition.

Most law school theorizing of our day is well characterized by a critical remark of Levinson's on Justice Murphy's majority opinion in the *Schneiderman* case:[2] "The Constitution ends up seeming trivialized . . . even as the cause of civil liberties has probably been vindicated" (p. 148). In that embarrassing case, concerning a Communist who had become a naturalized American citizen, Murphy proves at length that no incompatibility exists between attachment to the Constitution and adherence to the

2. *Schneiderman v. U.S.*, 320 U.S. 119 (1942).

Communist party. Levinson might have elaborated his insight in a general discussion of professors today who similarly trivialize the Constitution, but he is too busy considering the weighty question of whether he would have a Communist on a Law School faculty (of course he would). Another remark of Levinson's with potential for wisdom is a reference in a subordinate clause to the "protection of civil liberties that I consider necessary to maintain a republican form of government" (p. 170). But this promising reversal of the usual view, according to which republican government exists to sustain civil liberties, is left undeveloped. It would be interesting to see the Bill of Rights understood as amendments to the Constitution, rather than the other way around.

On the whole, then, this is a book in our contemporary constitutional idiom, more literary and philosophical than legal, on what it means to interpret a text. Levinson claims not to be a philosopher, but he surpasses most of our philosophers because he discusses,and does not simplify, real political and legal questions. But what is interpretation? Levinson presents two views of it that are inconsistent with each other.

On the one hand, he proposes a principle of "interpretive charity" by which one interprets "in a way that maximizes the ability to respect what is being said" (p. 75). To respect means to look up to; to respect a text is to regard it as an authority for us, something above us. This view of interpreting accords with Levinson's idea of what it means to be "morally serious," which, he says, consists in being concerned with the welfare of others and the likelihood that they might suffer (p. 57 n.). To achieve moral seriousness, one would have to be capable of a certain detachment from one's self-interest; one would have to be able to rise above oneself. Throughout his book Levinson stresses the importance of oaths as signifying consent. But there are many ways to signify consent. With an oath, one consents by calling oneself before a higher authority (God or conscience or whatever will keep you from grinning). This kind of consent establishes a duty in regard to a course of action to which one may not be reliably inclined merely by interest or pleasure. Interpretive charity, moral seriousness and oaths all seem to require that we accept an authority of some sort above our normal, selfish desires.

On the other hand, Levinson offers an expressly Nietzschean view of interpretation as subduing, obliterating, and redirecting—in sum, as mastering—a text. This view, he admits, is difficult to make constitutional (p. 131 n.), but he helps along our adjustment by denying that the Constitution is "above" us, that we live "under" it. In this view the Constitution is an instrument of our desires and partisan interests, and anyone, including a judge, can "master" or "beat" the text so as to make of it what he can (p. 177). Constitutional faith would merely be faith in oneself as an assertive interpreter. No sense of duty would be present to restrain the interpreter; no moral seriousness, only a pleasurable sense of manipulation,

would prompt him to be concerned with the welfare of others. His highest virtue would be Nietzschean sincerity or intellectual honesty (p. 172). The successful or authoritative interpretation, which others would be compelled to respect, would be the one backed by the strongest will, either one's own or the people's. In this mood Levinson will not deify the law (p. 170). He will, however, admit the authority of what persuades student audiences (p. 172) or, more generally, of what a "particular conversational community" decides (pp. 177-78). If that community talks its way to a conclusion it calls a law, by what right except his own will can Levinson judge that law? And is not this what it means to "deify" law—to put it beyond human judgment?

The critical question facing Levinson is whether interpretation is charity or mastery, and he cannot quite decide. Cute distinctions like Ronald Dworkin's between "concept" and "conception" (pp. 77-78) will get him nowhere if it is always possible for some masterful person to say: "I have the concept; yours is merely a conception." But in his chapter on the Law School, Levinson does not take up the accusation of nihilism made against adherents of Critical Legal Studies. Even though he attacks the opponents of CLS and not its adherents (on whom he maintains a notable silence), Levinson is the one who got away. Such, at least, is my respectful interpretation of his "constitutional faith." He is on the very edge of left liberalism, next to CLS, and this book is, in part, his unsteady response to it. He is troubled by the morality of nihilism.

Nietzsche defined nihilism clearly and succinctly: nothing is true, everything is permitted. Levinson agrees that nothing is true; he disagrees that everything is permitted. The trouble, however, is that the two points are connected: if nothing is true, then everything is permitted. If nothing is true, why should one be obliged to tell the truth? How can one be?

Levinson's desire to retain his respect for moral seriousness works retroactively, therefore, against his assertion that nothing is true. He contradicts himself. Although he repeats time and again, especially against conservatives, that nothing is true, he himself speaks of "multiple visions of the truth" (p. 171) as if they were the same as "political visions" that are not political truths (p. 172). And for some reason he does not like lies (p. 172). In explaining his interpretive charity as it applies to Hitler's *Mein Kampf*, he adds "plausible" to the requirements of interpretation; an interpretation must be plausible as well as charitable. People who are afraid to say "true" or "reasonable" often say "plausible." And I am sure that Levinson is aghast at the recent revelation that Paul de Man of Yale, on whom he relies to tell us that truth is an illusion (p. 175), practiced what he preached by concealing his early Nazi writings.

"Lawyers are interested not in truth, but in winning" (p. 174). Don't blame the lawyers, Professor Levinson! People expect lawyers to want to win, and mechanisms exist to control this desire, based on the still prevail-

ing popular belief that there is a difference between seeking the truth and desiring to win. What happens to those mechanisms, and, indeed, to all the practices and institutions of constitutional government, when the professors convince us with their fancy theories—in fact copied clumsily out of Nietzsche—that seeking truth and desiring to win are the same thing?

To conclude, this is an unusually honest and thoughtful book. Even, or especially, in his questioning of truth, Levinson bears witness to the power of truth. He follows the argument where it takes him, which is not always where he wants to go, and he ends up with a "constitutional faith" that is not as comfortable as he would like. However, I wish to make two suggestions lest the judgment of this review be thought overfriendly. The first concerns a certain thoughtless partisanship in Levinson. He lives in a milieu where it is almost impossible to respect a conservative, and in his book he does not discuss any conservative except to attack or dismiss him. Such a habit is not beneficial to his thinking, and it is not even sincere in feeling, since it is less generous than he means to be.

Second, Levinson questions "our ability, as children of the twentieth century, to take seriously the ideas, intellectual structures, and rhetoric of an earlier time" (p. 171). Here, in a statement that verges on despair, is unforced testimony to what has been called "the closing of the American mind." In no other century, not even the nineteenth, would such a thing have been said. It is pure prejudice—the self-created, self-enslaving alienation peculiar to our century known as historicism. If, ignoring this prejudice, Levinson were to return to *Federalist 49*, he would find the opportunity for a fresh beginning. Levinson notices (p. 9) that Madison remarks on the "veneration" that the new government will need in order to have stability. But in that same place Madison's theme is the necessity, for popular government especially, that reason control the passions. Somehow "veneration," which seems closer to passion than to reason, can be made to cooperate with reason in controlling passion. The problem of constitutional faith, for Madison, is how to establish a constitution that gets its authority *out of* the people as an authority *over* the people—so that government will not be used as an instrument of popular passion. This problem is perfectly intelligible to children of the twentieth century, as, in different circumstances, it is still our problem today. Levinson never gets to it because, for him, veneration or constitutional faith substitutes for the reason underlying the Constitution instead of cooperating with it. Thus faith becomes its own object; it is no longer faith *in* the Constitution because faith *is* the Constitution. What kind of popular government is it that has no faith in the people's reason? What kind of self-government is it that has no faith in self-control?

Response

Sanford Levinson

I am, of course, pleased that Professor Mansfield finds my book "unusually honest and thoughtful." I don't know that many readers will find his review "overfriendly," save in the Socratic sense that the highest sense of friendship is to point out the errors of one's ways. Such seeming errors Mansfield, a teacher from whom I learned much (though apparently not enough), points out with alacrity. However, perhaps like Callicles in the *Gorgias* (with whom I suspect Mansfield believes I have some affinity), I refuse to mend my ways.

Whatever our obvious disagreements, I do not take serious issue with his general reading of the book. The most important disagreement is suggested by my reference to Plato's *Gorgias*, a dialogue about the purported antagonism between rhetoric and philosophy. Today that antagonism is found between devotees of one variety or another of what can be called historicism, post-modernism, post-structuralism, and the like, and adherents of belief in one variety or another of timeless, transcendental moral and political truth, whether religiously derived or, as in the case of Plato, philosophically founded. For moderns Nietzsche is certainly a prototypical figure, although "modernity" is more accurately typified, at least in contemporary American academic culture, by the writings of philosophers like Richard Rorty and social theorists like Clifford Geertz. Professor Mansfield is known as one of the leading contemporary followers of the late Leo Strauss, and his invocation of "the closing of the American mind" obviously links him with Allan Bloom, who denounces much modern thought in the name of the eternal truths revealed in Greek philosophy.[1]

As Mansfield suggests, I do indeed find historicism more plausible than views defended by Professor Bloom and others. I am also skeptical about the purported opposition between "reason" and "passion" invoked by Mansfield, who in turn is invoking Madison. Instead, I find all notions of "reason" to be historically contingent and thoroughly mixed with the passions of a particular epoch (or set of ruling elites). They are ideological to the core. I cannot resist quoting from a recent commentary by Rorty on the work of Roberto Unger and Cornelius Castoriadis:

> [I]t is tempting for us liberals to say that the slogan "everything is

1. See the exchange between Rorty and Mansfield over Bloom's *The Closing of the American Mind* in The New Republic, April 4, 1988, at 28.

> politics" is too dangerous to work with, to insist on a role for "reason" as opposed to "passion."
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> The problem we face in carrying through on this insistence is that "reason" usually means "working according to the rules of some familiar language-game, some familiar way of describing the current situation." We liberals have to admit the force of Dewey's, Unger's, and Castoriadis' point that such familiar language-games are themselves nothing more than "frozen politics," that they serve to legitimate, and make seemingly inevitable, precisely the forms of social life . . . from which we desperately hope to breakfree."[2]

Whether this position is "nihilistic" rather than merely "anti-foundational" is an important question, especially to those sensitive to rhetorical nuance. The persons who have influenced me most, such as Rorty, Geertz, Stanley Fish, Thomas Kuhn, and Michael Walzer, surely have not embraced "nihilism" as an appellation for their approaches, nor do I, whatever my perhaps unwise willingness in the past to accept the label "legal nihilism" as a description of my position. The Straussian tradition would, I suspect, be disinclined to differentiate "anti-foundationalists" from "nihilists." Perhaps Mansfield agrees with Alasdair MacIntyre's proclamation in *After Virtue* that one must choose between Nietzsche and Aristotle (though I suspect Mansfield would prefer Plato). These arguments cannot, of course, be resolved in the space of a short exchange. I do think it worth adding, though, that one cannot refute deconstruction by invoking the awful personal history of Paul de Man anymore than one can legitimately dismiss religion simply by referring to the Inquisition or the Straussian tradition's own Greeks by pointing to the evils committed by persons claiming to know "the good."

I turn now to specific points raised by Mansfield:

1. As he notes, slavery plays a major role in the book, particularly in relation to the connection, if any, between the norms of constitutional law and the demands of morality (however defined). I am less admiring than Mansfield of the "wonderful delicacy of the Constitution's treatment of slavery." I take some pains, however, to show that Frederick Douglass presented a theory of interpretation that indeed made the Constitution profoundly anti-slavery, and I certainly do not want to suggest that it was necessarily pro-slavery. Still, I believe that Mansfield too easily defuses the tension generated by the place of slavery within the American constitutional order.

Mansfield might consider the implication of the fact that as late as his inauguration Abraham Lincoln, for all of his genuine and profound hatred of slavery, supported the so-called Corwin amendment that would

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2. Rorty, *Unger, Castoriadis, and the Romance of a National Future*, 82 Nw. U.L. Rev. 335, 347 (1988).

have guaranteed to the existing slave states the retention of slavery in perpetuity. At the very least, this indicates his belief that the Constitution did not *necessarily* set itself against slavery but could indeed be used to entrench it. This indeed is the central issue raised in my discussion of the *Schneiderman* case in Chapter Four: Are there *any* limits to what could be added to (or taken from) the Constitution through Article V amendment?

Similarly, though I agree with Mansfield that a war fought in behalf of "constitutional union" ultimately became the vehicle by which "the slave power was defeated," I would emphasize the contingent, rather than necessary, link between the value of "constitutional union" and the demise of slavery. The value of "constitutional union" as easily supported continued acquiescence to the tyranny of slavery. Indeed, as noted in the book, Justice Story in *Prigg v. Pennsylvania*[3] presented "constitutional union" as one of the justifications on behalf of a debatable theory of congressional power that served to validate the Fugitive Slave Act of 1793.

I am unclear precisely what point Professor Mansfield means to make by stating that "the government [established by the Constitution] ended the evil and removed the constitutional protections of slavery." True enough, but also contingent enough. It is just as accurate to say that "the government [established by the Constitution]" has, at one time or another, supported slavery, oppressed labor, placed Japanese-Americans in concentration camps, and deprived women of basic attributes of citizenship such as suffrage. It would be tendentious in the extreme to claim either (a) that this is *all* that the government has done (for it has also done some quite splendid things) or (b) that these dreadful things were required—or even encouraged—by the Constitution itself. But it is no less tendentious to emphasize only the attractive things that government has sometimes done or to claim that the Constitution *per se* was responsible for them.

Finally, one should recognize that it is highly debatable that the mode of ending slavery—a bloody, brutal war, resulting in the death of 600,000 Americans—was that contemplated even by anti-slavery framers of the Constitution, even if one accepts as unproblematic the constitutional propriety of preventing the secession of the Southern States. Furthermore, as Bruce Ackerman is currently arguing, the presence of the Fourteenth Amendment in the Constitution is explained as much by the barrels of Northern guns occupying the defeated Confederacy as by any immanent values within the pre-reformed Constitution.

2. To go from slavery and bloody battlegrounds to Edwin Meese is truly to descend from the sublime to the ridiculous. For the record, though, I want to clarify my treatment of Meese in *Constitutional Faith*, for Mansfield's description might mislead those who have not read the

3. 41 U.S. (16 Pet.) 536 (1842).

book. The view of Meese's about which I do "not share the usual horror" is his attack on judicial supremacy. I spend several pages placing that attack in a tradition beginning with Thomas Jefferson and extending through Frederick Douglass, Abraham Lincoln, and Franklin Roosevelt. I do not, however, extend similar sympathy to Meese's views on original intent, which I think rest on fundamental philosophical errors well pointed out by Mark Tushnet and Paul Brest, among others.[4] Still, a main point of my book is to attack any facile linkage between one's abstract theories of constitutional interpretation or judicial authority and "liberalism" or "conservatism." Indeed, as a relative youngster, I had as one of my jurisprudential heroes Hugo Black, with his ringing affirmations of plain-meaning textualism and the historical intent of the framers of the First and Fourteenth Amendments. For better or worse, I have become more "sophisticated" in my approach to constitutional interpretation, but I continue to admire Justice Black's vision of constitutional government (whether or not it is the one suggested by the text or attributable to the framers). The central point, though, is that I deny *any* necessary relationship between one's interpretive theory and one's politics. It therefore would be profoundly mistaken to be "horrified" by any such theory, though one might well be horrified by the malign political purposes (such as the former Attorney General's) for which any theory is in fact rhetorically presented.

3. I do not know whether Mansfield seeks to deny the proffered distinction between text and tradition or simply to argue that they can be more easily harmonized than I seem to recognize. I do not wish to "dichotomize" them; indeed, inasmuch as some of my own theoretical views are much influenced by Stanley Fish and similar writers, who emphasize that our very notion of a "text" is the product of traditional conventions, I am very skeptical of any such dichotomization. My purpose in *Constitutional Faith* is not so much to participate in the contemporary debates about meta-theories of literary interpretation, about which I have written elsewhere,[5] as to analyze the rhetorical operation of American constitutional argument. I continue to believe that one can hardly understand the culture of such argument without paying some attention to the role played by appeals to text, on the one hand, or the American tradition, on the other.

I am confident that Professor Mansfield and I both share a passionate (and maybe even reasonable) concern for the maintenance of a govern-

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4. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 234 (1980); Tushnet, *Following the Rules Laid Down*, 96 Harv. L. Rev. 781 (1983), *both reprinted in* Interpreting Law and Literature: A Hermeneutic Reader (S. Levinson & S. Mailloux eds. 1988), at 69 (Brest), 193 (Tushnet).

5. *See* Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982), *reprinted in* Interpreting Law and Literature, *supra* note 4, at 155.

ment that is both popular and republican. I explicitly presented *Constitutional Faith* as an invitation to dialogue rather than an attempt at closure through knock-down argument. Professor Mansfield's review is a notable example of precisely the kind of dialogue I hope to encourage—passionate, pointed, and serious—and I thank him for it.