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Elizabeth Reilly

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# PRIEST, MINISTER, OR “KNOWING INSTRUMENT”: THE LAWYER’S ROLE IN CONSTRUCTING CONSTITUTIONAL MEANING

Elizabeth Reilly\*

*“We measure greatness not only by the answers provided by a scholar, but also by the depth of the questions they leave the rest of us to work on.”<sup>1</sup>*

It is quite an honor to be asked to comment upon the scholarship of a scholar as productive, insightful, and influential as Sandy Levinson. Reading his work permits one to engage in the very dialogue that his theory promotes. With someone as prolific as Professor Levinson, it is also a humbling reminder that some people write faster than I can read.

Sandy’s scholarship is deceptively easy to read. His synthetic incorporation of the insights of other interpretive disciplines<sup>2</sup> and other constitutional theorists<sup>3</sup> never seems to detract from the coherence and consistency of his own interpretive stance.

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\* C. Blake McDowell, Jr. Professor and Associate Dean, The University of Akron School of Law. The author wishes to thank Brant Lee, Stewart Moritz, Molly O’Brien, Tracy Thomas, Wilson Huhn, and Jane Moriarty for their insights and comments on earlier drafts, the participants in the symposium for their comments and discussion, and the editors of the *Tulsa Law Review*.

1. Sanford Levinson, *The Lawyer as Moral Counselor: How Much Should the Client Be Expected to Pay?*, 77 *Notre Dame L. Rev.* 831, 839 (2002) (discussing the work of Thomas L. Shaffer).

2. E.g. Sanford Levinson & J.M. Balkin, *Law, Music and Other Performing Arts*, 139 *U. Pa. L. Rev.* 1597 (1991) (music); *Interpreting Law and Literature: A Hermeneutic Reader* (Sanford Levinson & Steven Mailloux eds., Northwestern U. Press 1988) [hereinafter *Hermeneutic Reader*] (literature); Sanford Levinson, *Constitutional Faith* (Princeton U. Press 1988) [hereinafter Levinson, *Constitutional Faith*] (religion); Sanford Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373 (1982) [hereinafter Levinson, *Law as Literature*] (literature).

3. In addition to mentioning how Professor Levinson incorporates insights from other scholars, one must comment upon the extraordinarily productive co-authoring relationship that he and Professor Jack Balkin have formed.

Other authors whose insights have influenced Levinson strongly include especially Bruce Ackerman, see Sanford Levinson, *Transitions*, 108 *Yale L.J.* 2215, 2215 n. 4 (1999) (“No one has had more influence on my own work over the past decade”), Philip Bobbitt, see J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 *Tex. L. Rev.* 1771, 1774 (1994) [hereinafter Balkin & Levinson, *Constitutional Grammar*], and Mark Tushnet, see e.g. 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, 176 (2001) [hereinafter Balkin & Levinson, *Legal Historicism*].

His clarity in expressing fascinating and complex ideas invites one to digress and add reflections of one's own. His scholarship rewards such digression, by making it easy to continue and pick up the thread of his argument and thought.

But, of course, this ability to be conversational in the exposition of complex ideas has another effect. It makes readers talk back, think of the next thing that should be addressed, and expect response. So it is that I began reading and rereading Professor Levinson for this paper looking for how his teaching of both constitutional law ("interpretation," as he puts it) and professional responsibility affect his theory of the Constitution.

Simply stated, my question is something like: "What is the professional responsibility a lawyer has to the Constitution?" The thesis of this piece is that lawyers need to construct an ethical framework for themselves that helps to explain and guide behavior<sup>4</sup> in their role as client representatives who are also public citizens with a sworn fealty to the Constitution. In other words, lawyers need a framework that helps them understand and define their role as constructors of constitutional meaning.

In exploring this question, I propose to use the lens of Professor Levinson's protestant constitutionalism,<sup>5</sup> rather than the lens of professional responsibility law. The "law of lawyering" perspective focuses simply upon the relationship between the lawyer and the client. Conversely, the lens of protestant constitutionalism focuses attention upon the relationship between the lawyer (in the role of client representative) and the Constitution as well. Using Professor Levinson's approach permits the inquiry to avoid some of the problems of self-interest and self-protection that have accreted into the law of lawyering, *i.e.*, professional responsibility law.

Professor Levinson's characteristic focus on process and context is a promising focus for attending to the lawyer's role. It provides a lens sensitive to the indeterminate nature of both constitutional interpretation and the lawyer's role, an indeterminacy that is being lost in our understanding of the operation of professional responsibility law.<sup>6</sup>

This project celebrates the prescriptive power of Levinson's theory, by using it to analyze an important and defining participant in the constitutional

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4. See Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 Mich. L. Rev. 2010, 2022 (1993) (discussing how vague aspirations are insufficient guides for lawyer behavior).

5. In *Constitutional Faith*, Professor Levinson uses an extended religious metaphor to explore two questions about constitutional interpretation. The first is the question of what are the sources to be consulted when engaging in interpretation; the second is the question of who are authorized interpreters. The protestant answer to the second question is that all engaged with the Constitution are authorized to interpret it, at some level. See Levinson, *Constitutional Faith*, *supra* n. 2, at 29-30. It is this sort of protestant constitutionalism I propose to use in looking at the lawyer's responsibility as an interpreter.

6. See discussion at *infra* Part III(A) and (B). This does not deny the extraordinarily rich discussions about the nature of lawyers' ethical responsibilities, see *infra* pt. III(C); it simply recognizes that discussions of *the law* of lawyering are less nuanced.

conversation and negotiation of meaning.<sup>7</sup> Finally, the pursuit of this question treats seriously the meaning of the oath to support the Constitution—an oath that underscores the lawyer's constitutional commitment and underlies the lawyer's role during client representation.

If these reasons for adopting the lens of protestant constitutionalism are not enough, perhaps I can simply add that I trust Sandy Levinson more than I trust the American Bar Association<sup>8</sup> to define an analytical approach that will ask hard questions and permit pursuit of them while addressing the question of lawyer responsibility to the Constitution.

Professor Levinson is interested in these issues, but to date he has not engaged in a sustained inquiry into this issue as broadly stated. He recognizes that "we very much need to integrate lawyers into our operating conceptions of law."<sup>9</sup> However, his writings about professional responsibility or constitutional theory rarely intersect on this most intriguing of questions. To be sure, Professor Levinson does not ignore the subject. He acknowledges it, and its importance, periodically in his writings.<sup>10</sup> His explorations into some aspects of the question are tantalizing enough to evoke further study.

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7. Professor Levinson's meta-theory of constitutional interpretation and process has great descriptive power, as his references to the Bank of the United States, arguments about the constitutionality of slavery, and the like demonstrate. See Levinson, *Constitutional Faith*, *supra* n. 2, at 38-39, 74-77, 185-87 (Jackson veto of Second Bank, Jefferson and Lincoln challenging the "catholic" concept of judicial supremacy, and exclusivity in constitutional interpretation); Sanford Levinson, *Why Professor Lynch Asks the Right Questions*, 31 Seton Hall L. Rev. 45, 48-49 (2000). What I find most promising, however, is the power of the theory to be prescriptive as well.

8. The ABA promulgates the model rules and codes that govern professional responsibility, and that are adopted in large part by the individual state courts. Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 3-6 (5th ed., Aspen L. & Bus. 1998); Deborah L. Rhode, *Ethics in Practice*, in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* 1, 12-16 (Deborah L. Rhode ed., Oxford U. Press 2000) [hereinafter Rhode, *Ethics in Practice*] ("[T]he debates over ethical standards make clear that on many issues the overriding purpose has been to protect the profession from the public. . . . The result has been to codify the minimum requirements that a highly self-interested constituency is prepared to see enforced in disciplinary or malpractice proceedings."); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, in *The Legal Profession: Responsibility and Regulation* 170 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988) [hereinafter Rhode, *Ethical Perspectives*] (detailing how the organized bar consistently capitulates to lawyer pressure in limiting the scope of its disciplinary and ethical standards and in giving little to no priority to public or social good as a part of routine lawyer ethics); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, in *The Legal Profession: Responsibility and Regulation* 109, 111 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988) (the ABA ethical standards "consistently resolve[] conflicts between professional and societal objectives in favor of those doing the resolving . . . [and] serve first and foremost the interests of the bar").

9. Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 Osgoode Hall L.J. 353, 363 (1986).

10. In general, each branch of Professor Levinson's scholarship treats the role of the other branch simplistically. For example, during professional responsibility discussions, the client role in proposing constitutional interpretation is dismissed: "No one, for example, expects the lawyer to ask for the client's views about how to construe the Fourteenth Amendment . . ." Levinson, *supra* n. 1, at 835. But Levinson also posits that the descriptive reality of client-centered lawyering is a premise for realistic discussions of constitutional theory: "we assume that [lawyers] will mask whatever their genuine beliefs are and instead present only such evidence and testimony as will serve the interests of their respective clients." Sanford Levinson, *What Do Lawyers Know (And What Do They Do with Their Knowledge)? Comments on Schauer and Moore*, 58 S. Cal. L. Rev. 441, 456 (1985).

Although he has not yet proposed a full answer to the question posed here, Professor Levinson has issued an invitation to address it more fully: "I am strongly confident . . . that the actual practice of law by lawyers, especially in what are sometimes regarded as its most routine aspects, presents puzzles that are worth our most serious attention. Certainly our jurisprudence and perhaps even our legal practices would benefit from . . . a closer look at lawyers."<sup>11</sup>

It thus seems fitting to honor Professor Levinson's scholarship by meshing his constitutional work with his dedication to the importance of professional responsibility.

This article will first explain how the theory of protestant constitutionalism requires an examination of the role that lawyers do and should play in constitutional interpretation. It then looks at three of Professor Levinson's articles that address this issue in particular contexts. Second, the article addresses the challenge of defining the lawyer's role, in light of the role of client representation. After presenting a sample case raising many of the difficult issues involved in addressing this question, the article proceeds to examine the lawyer's role by mining Professor Levinson's scholarship for the features of a well-executed lawyerly role. The article proposes that there are three models one can use to describe the lawyer's role: priest, knowing instrument, and minister, and argues for adopting the minister role as that most consistent with protestant constitutionalism and good professional responsibility theory. Finally, this article proposes a simple rubric to help guide lawyers in executing their dual responsibilities to client and Constitution.

## I. LEVINSON'S THEORY OF INTERPRETATION AND LAWYERS

### A. *Constitutional Faith*

*"[T]he United States Constitution can meaningfully structure our polity if and only if every public official—and ultimately every citizen—becomes a participant in the conversation about constitutional meaning . . . ."*<sup>12</sup>

Professor Levinson's process-oriented view of the Constitution focuses upon interpretation, sources, and interpreters.<sup>13</sup> One of his most helpful analogies is that which he develops between constitutional theory and religious interpretation and thought in *Constitutional Faith*. *Constitutional Faith* presents two basic questions that underlie the development of a theory of interpretation: First, what are the sources of revelation (and, hence, authority) that can be used in the interpretive enterprise? Second, who is authorized to interpret?<sup>14</sup> For each

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11. Levinson, *supra* n. 9, at 378.

12. Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and To Whom, Do I Write the Things I Do?)*, 63 U. Colo. L. Rev. 389, 406-07 (1992).

13. Cf. Sanford Levinson, *Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer*, 45 Hastings L.J. 1035, 1044-45 (1994).

14. Levinson, *Constitutional Faith*, *supra* n. 2, at 18-23, 30-37.

question, there is the classical "catholic" answer and classical "protestant" response.

With respect to the first issue, a catholic theory recognizes that there are many sources of revelation that can be interpreted and brought to bear in the process of interpreting sacred text,<sup>15</sup> whereas the protestant theory insists upon the exclusiveness of the sacred text as the source of revelation and interpretive insight into it.<sup>16</sup>

Given the purpose of this paper, I am more interested in the answer to the second question. The catholic answer to authorized interpreters is to designate the single, superior, and ultimate interpreter (*i.e.*, the Pope, or for constitutional law, the United States Supreme Court).<sup>17</sup> The protestant response recognizes the interpretive capacities of everyone: for law, courts, legislators, executive actors, citizens<sup>18</sup>—and I would emphasize—lawyers. Of course, some actors are far more influential than others, particularly those whose positions in government give them not simply the "bully pulpit" for gaining adherents but also the coercive force of law to enforce their interpretations.<sup>19</sup> Nonetheless, the process of interpretation is complex, requiring a dynamic interrelationship among those exercising interpretive powers.<sup>20</sup> What arises as an important correlate principle is that everyone should have a relationship with the Constitution.

Sandy, as you all know by now, is catholic as to the first issue, but decidedly protestant on the question of authorized interpreters.<sup>21</sup> One can almost see him asking citizens: "Do you have a personal relationship with the Constitution?"<sup>22</sup>

15. *Id.* at 18.

16. *Id.*

17. *Id.* at 37-46.

18. *Id.* at 37-53; Levinson, *supra* n. 10, at 453 ("if legal texts have meanings, then they speak to all participants in the legal system . . .").

19. See Levinson, *Constitutional Faith*, *supra* n. 2, at 84 (discussing the sense of deferring interpretation at times to primary decisionmakers); Sanford Levinson, "Democracy in a New America": Some Reflections on a Title, 79 N.C. L. Rev. 1559, 1565 (2001) (adverting to the power and "special role" of the Supreme Court).

20. Levinson, *supra* n. 13, at 1036 ("a vibrant constitutionalism . . . requires a certain disposition on the part of all who participate in the work of a constitutional republic"); Levinson, *supra* n. 7, at 46-47.

21. Levinson, *Constitutional Faith*, *supra* n. 2, at 47-50; Levinson, *supra* n. 12, at 407. Levinson writes, "I do have a theory of the Constitution, and it is one that treats it as the object of deliberation by all citizens . . . [in] opposition to . . . citizen passivity . . ." Levinson states that all citizens should "devote themselves to safeguarding what is indeed valuable in our constitutional tradition." *Id.*

This way of looking at the Constitution is an interesting blend (a) of using power, belief, and action to describe and infuse meaning and (b) of using interpretation to infuse content into text. (The latter point has some resonance with Sandy's law as literature scholarship as well.) While drawing attention to how the Constitution is constructed by the actions of those who refer to it and apply it, this view also invites all of us to interact with the Constitution and other actors construing it in a dynamic process designed to influence the meaning and application of our constitutional values.

It thus encourages a peculiar blend of humility in that it is not up to any of us in an individual, official, or even collective official capacity to be the sole interpreter of the Constitution. This humility is one especially to be recommended to prime government actors.

This view also promotes assertiveness—it is up to each of us to engage with the Constitution when a question arises with respect to our own behavior as citizens or public actors. We should do so in the spirit of contributing, which includes being willing to disagree when others do not convince us of the correctness of their proposed interpretations. I propose that this assertiveness is one lawyers should fairly share in during client representation.

Professor Levinson refers to his views as reflecting that the Constitution is always in the process of being “negotiated” by major actors, *i.e.*, the judiciary, executive, and legislative actors charged with interpreting, enforcing, and acting consistently with it. How those actors interact on issues of constitutional concern is very meaningful for what the Constitution itself means.<sup>23</sup> Failing to see this leads citizens, as well as the executive and legislative actors, to undervalue their roles as constitutional interpreters, thus undermining the Constitution in practice and altering what it “is.”<sup>24</sup>

Finding the balance between what the Constitution means and how actors seek to find and apply that meaning requires an understanding of the nature of interpretation, its boundaries, and indeterminacies. It also requires that the actor’s position in the process be defined and understood. What one can and cannot do is a part of that actor’s role in the processes of decisionmaking. How much credit and persuasive force an interpretation has depends upon its content and the arguments used to advance it, but also on the position of the actor and the deference likely to accompany that position.<sup>25</sup> Thus, the actor’s institutional affiliation plays a role in how the actor advances an interpretation, how persuasive that interpretation may be, how likely that interpretation is to result in positive law as well as in a contribution to the ongoing dialogue about constitutional meaning, and how the actor injects the interpretation into the conversation.

22. Professor Levinson describes his own view as “catholic-protestant” and “hostile” to the traditional way of teaching and talking about the Constitution that focuses almost exclusively on the Supreme Court and its opinions. *E.g.* Levinson, *supra* n. 12, at 407; J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, pt. III (1998). In *Constitutional Faith*, he professes a “catholic” view of the sources of proper interpretation and tradition, but a “protestant” view of the competence of all to advance authoritative interpretations of the Constitution. Levinson, *Constitutional Faith*, *supra* n. 2, at 47-50.

23. *E.g.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045 (2001). In Professor Levinson’s view, it seems that much of what should be going on is the use of institutional constraints and restraints, often imposed from within a branch but sometimes created by interbranch interaction and agreement or disagreement (*i.e.*, negotiation), to define the content as well as the structure of the Constitution we know. *See* Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 178-79; Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 Conn. L. Rev. 843, 843-44 (1993).

24. *See* Balkin & Levinson, *supra* n. 22, at 1003, 1016 (seeing interpretation as the “exclusive province” of the United States Supreme Court is a “pernicious” theoretical proposition and a “preposterous” empirical proposition); Levinson, *supra* n. 10, at 453 (“Interpretation is the task of everyone . . . . [The] court-obsessed jurisprudential tradition . . . [leads to] bad jurisprudence and . . . a debased legal and political system.”); Levinson, *supra* n. 12, at 406-07; Sanford Levinson, *Experience and Legal Education*, 26 Cumb. L. Rev. 751, 754 (1995-96) [hereinafter Levinson, *Experience*]; Levinson, *supra* n. 10, at 453-54; Sanford Levinson, *Could Meese Be Right This Time?*, 61 Tul. L. Rev. 1071, 1077 (1987) [hereinafter Levinson, *Meese*] (touting the value of reinserting citizens into interpretation and questioning the judicial role). This view further leads to a query on what the process of constitutional amendment is really about. Sandy queries whether there are more than twenty-seven constitutional amendments, less than twenty-seven, twenty-seven, or all of the above amendments, because the way that the Constitution gets practiced (by the powers that act pursuant to it) indeed affects the meaning and content in ways that can match, approach, and perhaps exceed the impact of an actual Article V amendment. Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 Constitutional Commentary 101 (1994).

25. For instance, the role of stare decisis on “inferior” federal judges. Levinson, *supra* n. 23, at 843-46, 848.

B. *The Importance of Constitutional Faith and Practice for What the Constitution Is*

Professor Levinson argues that the Constitution, in and of itself, is not "good" simply because it is law. Rather, there is "no necessary connection between law and morality . . ." <sup>26</sup> The two are "mutually differentiated," but also "mutually dependent."<sup>27</sup> "Goodness" can only come from what we make of the Constitution as we interpret and use it.<sup>28</sup> He compellingly offers the example of slavery to those disposed to approach the altar of law worshipful of the document that founded our nation and upon whose principles we have based ourselves. Given that example, it is hard to argue that the existence of the document is tantamount to its moral worthiness. Rather, as Professor Levinson urges, the Constitution is worthy of our respect only based upon what we make of it.<sup>29</sup> Thus we have the responsibility to ensure that it is infused with moral goodness and that its meaning develops in accord with a commitment to its being "good" as well as being law.<sup>30</sup>

This requirement that goodness and worth be infused from outside the document itself imposes tremendous responsibility on the believers in protestant constitutionalism, *i.e.*, in the authority of all to interpret. It makes us reflect upon the importance and meaning of oaths to "uphold, defend and protect" the Constitution, and upon how we can fulfill those oaths.<sup>31</sup> It should make us wary of assuming an interpretation is either or both right and good.<sup>32</sup> It should humble us in the face of conflicting views about meaning and goodness, as it empowers us to seek and profess our own views on those issues.

26. Levinson, *Constitutional Faith*, *supra* n. 2, at 169, ch. 2.

27. Balkin & Levinson, *Constitutional Grammar*, *supra* n. 3, at 1782-83 (discussing how justification and legitimacy of law and Constitution cannot be strictly separated, even though they differ from each other). The legal is thus not necessarily the good (the positivist insight). See Balkin & Levinson, *supra* n. 22, at 1017 (stating that "the American constitutional tradition—and, beyond that, the notion of the rule of law itself—has often been intertwined with and used to promote the enforcement of evils like slavery").

28. *E.g.* Balkin & Levinson, *supra* n. 23, at 1088 (constitutional meaning and its worthiness is judged by the substantive political justice of its principles, *i.e.*, of the results of the interpretation given to those principles).

29. See Levinson, *Constitutional Faith*, *supra* n. 2, at ch. 2.

30. See *id.* at 54-89, especially 87-89; Sanford Levinson, *Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 *Fordham L. Rev.* 2189, 2189 (2001); Balkin & Levinson, *supra* n. 22, at 1024; Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 196.

31. See Levinson, *Constitutional Faith*, *supra* n. 2, at 92-93, 121-23; Sherman J. Clark, Speech, *Oath, Faith, and Identity: The Constitutive Function of Sworn Allegiance* (Tulsa, Okla., Oct. 31, 2002).

32. Mark V. Tushnet, Speech, *The Constitutional Universe: Building on Sand* (Tulsa, Okla., Oct. 31, 2002); see Sanford Levinson, *Allocating Honor and Acting Honorably: Some Reflections Provoked by the Cardozo Conference on Slavery*, 17 *Cardozo L. Rev.* 1969, 1978-81 (1996) (discussing lawyer autonomy in systems of apparent evil, and how one must judge, yet cannot be sure of that judgment of good or evil: "the linked necessity to judge political actors, both past and present, and, at the same time, to recognize the perils of exercising such judgment"); Levinson, *Constitutional Faith*, *supra* n. 2, at 124 (discussing the Constitution as being an "essentially contested concept") (quoting W.B. Gallie, 56 *Proc. Aristotelian Socy.* 106 (1956)).



However, the Constitution does have text, and interpretation does have sources.<sup>33</sup> It is also a mistake to assume that one's views of the moral or political can translate directly into authoritative (or persuasive or correct) interpretations of constitutional meaning.<sup>34</sup>

I come to this project aware that Professor Levinson is interested in meta-theory of the Constitution, without being concerned in the first instance with how that translates into everyday judicial (and, one might extrapolate, legal) practice.<sup>35</sup> But it seems it is not entirely outside of his enterprise, not only because he also teaches people to be lawyers and believes that that role imposes responsibilities upon him to assist in their development as practicing members of the bar<sup>36</sup> rather than meta-theorists, but also because a theory as powerful as this theory at some point needs to be reducible to practice in order to achieve its goals.<sup>37</sup>

Professor Levinson asks each of us to ask ourselves the crucial questions of what the Constitution is and how we are bound to it, and to have some fidelity to that in our own actions.<sup>38</sup> He seems to have a prescriptive (not merely an ex post

33. *E.g.* Levinson, *supra* n. 10, at 442 (recognizing that only some "readings [of constitutional text] are truly 'possible,' at least within the present legal culture, as opposed to readings so aberrant as to be at best 'off the wall' and at worst signs of insanity").

34. *See* Levinson, *Constitutional Faith*, *supra* n. 2, at 170 (discussing the need for an awareness that one's views are not necessarily "true" or even "best"); for a discussion of Professor Levinson's use of Philip Bobbitt's work with the modalities of constitutional argument, and his discussion of the need to have both legitimation and justification (a normative role) understood separately, *see* Balkin & Levinson, *Constitutional Grammar*, *supra* n. 3; Balkin & Levinson, *supra* n. 23, at 1078; Sanford Levinson, *supra* n. 23, at 849-50; Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 179; Levinson, *Law as Literature*, *supra* n. 2, at 393-95; *cf.* Levinson, *Constitutional Faith*, *supra* n. 2, at 65-68 (using the example of slavery), 70, 80, 85.

William Simon states this proposition in a somewhat different context, but quite similarly: "Decisions about justice are not assertions of personal preferences, nor are they applications of ordinary morality. They are legal judgments grounded in the methods and sources of authority of the professional culture." William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* 138 (Harv. U. Press 1998).

35. *See* Levinson, *supra* n. 12; Levinson, *supra* n. 4. Note that Professor Levinson is more interested in debunking the notion that the proper role of legal scholarship, at least scholarship of the genre of theory in which he engages most often, is to guide judges in the work of interpretation in particular cases (what he refers to as being an unpaid clerk for the federal judiciary). He does not necessarily eschew having significant influence upon the direction of interpretation and law. Indeed, he sees his role as including propounding what is, according to his best lights, the "best" interpretation of the Constitution. *See* Levinson, *supra* n. 12, at 407; Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 196 (duty, at least on occasion, to express own views as guidance for others). And, were his theories to affect the way in which courts and other actors go about their business of interacting with the Constitution and with each other on the issues of what that Constitution means, I think Professor Levinson would be pleased.

36. *See* Levinson, *Constitutional Faith*, *supra* n. 2, at 165; Balkin & Levinson, *supra* n. 22, at 1024; Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 196.

37. The great promise of this theory is in assisting constitutional actors in not only doing their own interpretive work better, but also in understanding their roles as negotiators. Thus, the theory can assist constitutional actors in pursuing implementation of their agendas without denying or denigrating the validity of interpretive input from others. This could lead to all engaging in more productive conversation and dialogue toward creating better constitutional meaning, and thereby a better Constitution. *Cf.* Morton Deutsch, *Constructive Conflict Management for the World Today*, 5 *The International J. Conflict Mgt.* 111, 111-129 (Apr. 1994).

38. *See* Levinson, *Constitutional Faith*, *supra* n. 2, at ch. 6 (built around answering the question of would you sign the Constitution today, knowing what we know); Levinson, *supra* n. 19, at 1565 (stating that the Supreme Court's "excesses" can be "tame[d]" if "we pay more attention to the Constitution as we believe it to be best interpreted"); Levinson, *supra* n. 12, at 406-07; Levinson, *supra* n. 10, at 453-54

facto descriptive) role in mind, as he challenges constitutional interpreters to take account of all the varied inputs into meaning and value, and to carve a course that accomplishes worthy goals in worthy ways.<sup>39</sup>

An overly simplistic but I hope not too inaccurate description of Professor Levinson's thought on constitutional interpretation proceeds:

The Constitution IS what it MEANS<sup>40</sup>

It MEANS what it is INTERPRETED to mean by the actors using it or acting pursuant to it<sup>41</sup>

Its INTERPRETATION is DEPENDENT upon inputs and factors accepted by the decisionmaker/actor as legitimate<sup>42</sup>

There are ACTUAL interpretations, which we see from experience draw upon many kinds of inputs, whether all of us would agree upon the legitimacy of those inputs or not<sup>43</sup>

There are MODALITIES by which interpretation proceeds, and which place some limitations upon how the Constitution can be interpreted at any given point in time, but the interpretive enterprise is by definition INDETERMINATE in both means and ends<sup>44</sup>

The inputs and factors that lead to interpretation, and hence meaning and the very being of the Constitution, come from MANY SOURCES.<sup>45</sup>

Importantly for my argument, those sources frequently include lawyers, and the inputs provided are heavily influenced by lawyers—(a) in the statutes that are passed (and their language), (b) in the cases brought, the facts found and proven,

(arguing that it is "absolutely vital that all public officials, including citizens, confront the question of what it might mean to take the Constitution seriously as a source of guidance").

39. See Balkin & Levinson, *supra* n. 23, at pt. I, in which he and Balkin contrast disagreements based upon fundamental constitutional visions with those based upon illegitimate uses of power to accomplish one's "low" political agendas.

40. *Id.* at 1094 (discussing "the vision of the country that our Constitution exists to redeem"), 1088 (we should be debating what "underlie[s] America's higher law," *i.e.*, "the meaning of the country and what it stands for"); Levinson, *Law as Literature*, *supra* n. 2, at 385 (citing Robert Cover, Book Review, *New Republic* 26, 27 (Jan. 14, 1978)).

41. See Levinson, *Constitutional Faith*, *supra* n. 2, at 49 (discussing the lack of "thoughtful contemplation" of the Constitution in decision and action); Levinson, *Law as Literature*, *supra* n. 2, at 385 (stating that he "increasingly find[s] it impossible to imagine any other way of making sense of our own constitutional universe").

42. Levinson, *Law as Literature*, *supra* n. 2, at 390; Balkin & Levinson, *supra* n. 23, at 1062-66, 1068 (an analysis of the difference between high politics—debates about fundamental visions and constitutional meaning—and low politics—ordinary everyday politics with mundane goals and agendas).

43. *E.g.* Balkin & Levinson, *supra* n. 22, at 1020-23; Balkin & Levinson, *supra* n. 23, at 1068 (discussing the role of political parties in constitutional change and meaning); *id.* at 1092 (discussing types of arguments that are legitimate in constitutional interpretation and negotiation); *id.* at 1101 (choice between two constitutional visions is played out in the choice of arguments deemed plausible and persuasive).

44. Balkin & Levinson, *Constitutional Grammar*, *supra* n. 3, at 1775; Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 179.

45. Balkin & Levinson, *supra* n. 23, at 1066; *id.* at 1079; *id.* at 1078 n. 132.

and the arguments made, adopted, or altered in the rulings and opinions,<sup>46</sup> and (c) in the impact their ideas have on lay citizens, especially including their clients. Thus I would add:

Interpretation is heavily influenced by inputs, and lawyers heavily influence those inputs while performing their roles

Therefore, what and how lawyers do what they do is important to the IS of our Constitution.

### C. *Why Lawyers Matter*

So, it behooves us to ask: What *should* lawyers do during their representation of clients in matters affecting constitutional meaning?<sup>47</sup>

It seems crucial that a theory of infusing value and meaning into the Constitution be complemented by a theory of how the actors that do so can and

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46. Lawyers set the agendas, frame the issues, and gather the facts in all cases. This limits what the judge has as raw materials for working with in deciding the case. Judges are not entirely free to recast the issues, make up facts, or control the text of the debate; judges must depend upon what lawyers provide to a large extent. (This reality has led Deborah Rhode to question how an adversary system that permits and understands that there will be misleading facts and arguments presented can possibly work toward achieving truth or justice in any effective way. See Rhode, *Ethics in Practice*, *supra* n. 8, at 9.). E.g. Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers without Clients or Law*, in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation*, *supra* n. 8, at 177, 181 (noting how lawyers confine judges with what they present and how they frame issues, and significantly influence the law-building process both through courts and other avenues).

When a lawyer does not see a potential argument about constitutional meaning or application, the entire case will be prepared without addressing that argument. This inevitably means that facts and evidence will never be thought of, much less developed and presented, that are relevant to thinking and deciding about that issue. It also means that legal arguments, interpretive sources, and the like will not be uncovered or presented to the court. Whereas a court may be free to fashion its own legal arguments, engage in its own analysis, or draw upon additional appropriate sources for interpretation, the court cannot find or develop the facts that would present the issue or sharpen it if the lawyers have not done so. (We all recall the cases of courts refusing to deal with an issue because the parties did not raise and brief it or noting that the factual record is too sparse to permit them to address the issue raised.).

47. Asking the question of lawyer responsibility to the Constitution and its meaning in many ways echoes the question of lawyer responsibility for morally and politically good judgments during representation generally. However, it is a bit easier of a question. First, the lawyer has clearly accepted an independent duty and relationship to the Constitution when taking the very oath that authorizes the attorney to act in a representative capacity on behalf of another. Second, the full panoply of difficulties in moral pluralism is not implicated in attempting to fashion some guides for lawyer contemplation during decisionmaking on constitutional meaning as opposed to morality. For some questions of morality, the Constitution has already selected a value or made a decision. Democracy, equality, due process, carefully circumscribed state power against an accused, and free religious exercise without establishment of religion, for instance, have all been selected as values, however unclear their meaning and boundaries may be. The Constitution itself, and the traditions and sources accreted over several hundred years, provide some of the boundaries and input that cabin lawyer discretion to formulate interpretations and to determine them to be superior meanings (even as we recognize that morality in all its pluralism has inevitable effects upon how we view worthiness, superiority, and the meaning itself).

Therefore, engaging the lawyer and client in the constitutional conversation as a necessary part of doing good law and good practice and good constitutional interpretation is a somewhat easier case to make. It is also somewhat easier to propose a framework that helps lawyers and clients identify mere low politics and personal preference. This identification then permits both to eschew low politics in advancing worthy constitutional meaning. It also assists the lawyer in avoiding paternalism (in the guise of responsible constitutionalism) within the attorney-client relationship.

should do it. Sandy Levinson appears to believe this as well, because he is self-consciously reflective about what it means for him as a law professor to both write and teach about the Constitution. For himself, he recognizes the need to construct an ethical framework for measuring his own contributions to the construction of constitutional meaning.<sup>48</sup>

Inputs and interpretations matter in ultimately determining whether or not the consequences our Constitution authorizes render it a document or foundation worthy of respect. Since the inputs are so affected by lawyers in their roles with clients, it also behooves us to ask: What about *lawyering* makes it worthy of respect—and trust—as a way of infusing meaning into our Constitution?<sup>49</sup>

The enterprise of explaining the inputs and makers of constitutional meaning is incomplete without grappling with the peculiar role that lawyers play in advancing suggested meanings, interpretations, and applications of constitutional principles. Levinson's theory requires a recognition that the lawyer has an interpretive role, and a serious responsibility to fulfill it.

Unless there is some normative dimension to the lawyer's interpretive enterprise, the goal of infusing the "best" meaning and thus constructing the "best" Constitution will be influenced heavily by actors who have been given no charge (or perhaps ability?) to contribute to the dialogue by exercising their own powers of constitutional interpretation and by advancing meanings normatively in tune with those powers.<sup>50</sup> Or, conversely, those lawyers may never engage their clients in the pursuit of constitutional meaning in the course of dealing with the reality of how the Constitution affects their lives.<sup>51</sup> Either result seems inconsistent with Levinson's enterprise of empowering all to take a stake in constitutional meaning. If the participants (*i.e.*, clients and their lawyers) in the

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48. Levinson, *Constitutional Faith*, *supra* n. 2, at 159-60, 163-70.

49. *Cf. id.* at 167 (suggesting that "good citizen"—one committed to a polity most worthy of respect—might trump "lawyer" as a "source of desirable identity," because lawyers can make arguments they affirmatively believe lead to a less worthy polity); *id.* at 168-70 (discussing the importance of this question).

50. *See id.* at 168-70 (meditating on lawyering and its meaning for the lawyer's contributions to constitutional worthiness, and wondering how the lawyering enterprise intersects with a Constitution that is "good," rather than merely the positive law whose moral goodness is at best irrelevant). Simply relying upon the adversary system to correct the wrong interpretations advanced by lawyers is a misplaced trust.

One can defend the moral life of the lawyer . . . only by also defending the entire system of adversarial argumentation, a system that requires lawyers to accept as their peculiar role in life the presentation to others (including judges) of arguments they do not believe. All of this posturing is supposedly for the best, though, because the judges, by some quite mysterious process, will see through distortions and misleadings to the genuine truth of the situation. Moore- (and Dworkin-) trained judges will overcome any obstacles placed in their path by lawyers who march to a different drummer than truth. Perhaps Moore believes that this process describes (and justifies) the operation of our adversarial system, but I do not.

Levinson, *supra* n. 10, at 458. *Frivolous Cases* also notes that there is always the risk of non-Herculean judges being misled by lawyer arguments and proposed legal interpretations. Levinson, *supra* n. 9, at 363-64; Rhode, *Ethics in Practice*, *supra* n. 8, at 9 (discussing the flawed assumption that good judgments can emerge from misleading lawyer inputs).

51. *Cf. Levinson, supra* n. 1 (discussing the lawyer's professional responsibility to engage in moral reflection individually and in conversation with clients).

actual playing out of the Constitution as it affects lives are not considered in the theory of giving meaning, then they will not necessarily accept moral or civic responsibility for fulfilling their roles reflectively and well. Yet, their cases will be influential in developing meaning. Levinson would surely not leave it to judges to do all the work of constructing meaning, or he would over-empower the judicial role again.<sup>52</sup>

The actors seeking governmental action on their behalf should self-consciously exercise public responsibility in some way (this is neither to suggest nor pretend that self-interest can be separated out entirely). Otherwise, one cannot hope for a Constitution that is worthy of respect because it strives to be moral in the values self-consciously adopted by those who are negotiating its meaning by engaging in “a conscientious analysis of what fidelity to the Constitution requires.”<sup>53</sup>

Of course, Professor Levinson recognizes the roles of lawyers in cases, and he adverts to lawyers and professional responsibility with some frequency. But he does not engage the systematic and general question of how constitutional law and professional responsibility interact with each other during the exercise of the lawyering function.<sup>54</sup>

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52. Professor Levinson is quite emphatic about the wrong-headedness of overempowering judicial actors as constitutional interpreters. Balkin & Levinson, *supra* n. 22, at 1016 (stating that a purported exclusive judicial power of interpretation is “pernicious”).

53. See Levinson, *Constitutional Faith*, *supra* n. 2, at 48; see *id.* at 47-48, 54, 168-70 (discussing the need to act to maintain such respect).

54. Characteristically, Professor Levinson does not fail to see the question, or to engage it on some level, particularly with respect to his own role. E.g. Balkin & Levinson, *Legal Historicism*, *supra* n. 3; Levinson, *supra* n. 4, at 2014. However, he does not give it any sustained treatment. Instead, he leaves us with tantalizing discussions that recognize that lawyers have a role, but do not deeply analyze what that role should be or how a lawyer would fulfill that role in the course of representation. See *infra* nn. 64-79 and accompanying text. These discussions fall short, however, because one focuses more on the citizenship issue than the lawyering issue, see Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 *Yale J.L. & Human.* 49 (1995), and the other focuses on only public attorneys (attorneys general), within the narrow context of making arguments about what constitutes a compelling state interest, see Levinson, *supra* n. 13—an admittedly narrow slice of lawyering, even for public attorneys.

*Constitutional Faith* recognizes the counseling function of the public lawyer should go beyond that of merely predicting what a court will do, especially if the predictable court decision does not comport with the public attorney’s vision of what is constitutionally correct. Levinson, *Constitutional Faith*, *supra* n. 2, at 47-49. This, however, is limited to public attorneys, and to their actions with clients in the counseling function alone.

A more typical example of his engagement with the question is in a piece devoted to lawyering and the meaning of a frivolous argument. Levinson, *supra* n. 9. That article focuses on lawyering and professional responsibility, without explicitly addressing the impact of the question of the lawyer as a constitutional actor with respect to a constitutional issue. Professor Levinson talks about how lawyers are permitted to make any argument within the bounds of the law as long as it has a good faith basis in law and fact and is not frivolous, and notes the move to using an objective test for good faith arguments (*i.e.*, one reasonable lawyers would recognize as being a good faith interpretation or argument for extension of existing law, etc.) rather than a subjective basis (*i.e.*, “Well, I thought it was a good argument, no matter how absurd and beyond the legal pale.”). He notes that lawyers can convince themselves of just about anything on behalf of a client (and in pursuit of legal fees—especially since none will be shifted onto them by the English rule if they are wrong). He claims it is the very nature of advocacy and the adversary system that makes this necessary. He contrasts this lawyerly role with that of judge and scholar, who are instead obliged to present the best interpretation of which they are capable, and to “retain our integrity” by not presenting a public argument that one privately believes is weaker than an alternative. *Id.* at 363. He even seems to say lawyers *must* make arguments they don’t

In fact, he seems almost to eschew engaging the question, asserting that his students will rarely if ever be engaged in the practice of constitutional law, as differentiated from the course in professional responsibility, which has a direct impact upon the future professional lives of every student he teaches.<sup>55</sup> One piece devoted to professional responsibility analysis explicitly states that “[n]o one, for example, expects the lawyer to ask for the client’s views about how to construe the Fourteenth Amendment . . . .”<sup>56</sup> This relatively quick dismissal of the likely engagement of lawyers—and clients—with constitutional meaning seems misplaced. There has been a rise in the development of practices seemingly devoted to creating and litigating constitutional issues—the impact litigation, public interest sorts of practices that are proliferating at all sides of the political and economic spectrum.<sup>57</sup> There has also been the renewed interest in finding limits to Congress’s abilities to regulate commercial enterprises and a generation of lawyers seeking assistance for their and their clients’ goals by developing a body of state constitutional law. These trends make it more likely that during representation lawyers will reach for a constitutional argument or pursue legislative or regulatory initiatives with potential connections to constitutional meaning.

Thus, one should not be sanguine on this issue, nor assume that legal ethics and constitutional theory properly leave the decision about how to argue constitutional meaning solely to the lawyer (or, conversely, to the client).<sup>58</sup> It is time to focus sustained attention and inquiry onto the question of the lawyer’s role in constructing constitutional meaning.

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believe in and believe are bad interpretations and will lead to bad law and results, and that somehow the lawyer maintains some integrity despite this. Levinson questions this conception as being desirable, but seems not to question whether it is appropriate lawyer behavior under extant understandings of lawyer ethics. Levinson, *supra* n. 4, at 2019-21, 2024; Levinson, *Experience*, *supra* n. 24 (recognizing Kronman’s vision and also critiquing some of its potentially dangerous aspects). One wants more before ceding all this territory. The fact that a lawyer MAY do something hardly answers the question of whether he or she SHOULD or MUST do it. Note the dangers of substituting one’s personal preferences for the client’s good flow most often from a failure of humility on the part of the lawyer, rather than from a taking of some responsibility in the first instance as a per se matter.

55. Levinson, *supra* n. 1, at 831-32.

56. *Id.* at 835.

57. *See infra* n. 211.

58. Sandy himself has represented clients, presumably motivated by his view that the client’s cause contributed to upholding the core values of the Constitution as he saw them. *See* Levinson, *Constitutional Faith*, *supra* n. 2, at 170 (discussing how, when conducting litigation, Professor Levinson is particularly aware of making “arguments that are useful in gaining what I consider meritorious results”). Did he then have a professional responsibility to make all plausible arguments for his client even if they undermined his view of the Constitution? (Despite lawyerly desires that these two always coincide precisely, *i.e.*, that serving the client’s interests by definition serves the public interest due to the nature of the adversary system, most of us—including Sandy, *see supra* n. 50—probably recognize that that is an apology and rationalization that permits lawyers to avoid hard questions of ethics and to avoid balancing duties that do not coincide. Not every lawyer believes that the single-minded pursuit of a client’s objectives—heedless of tactics, arguments, costs, etc.—is the ultimate public service that a lawyer can perform.). *Cf.* Robert W. Gordon, *Why Lawyers Can’t Just Be Hired Guns*, in *Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation*, *supra* n. 8, at 42, 50-53 (lawyers need to take a public-regarding perspective into account when representing clients, especially in causes that implicate fundamental public policy).

Levinson's theory has greater prescriptive power when it addresses not only the interpretive process but also the interaction of role with that process. Professor Levinson has engaged that question with respect to some roles, for instance, of attorneys general,<sup>59</sup> judges,<sup>60</sup> legal scholars,<sup>61</sup> and, to some extent, citizens.<sup>62</sup> Thus, he appears to recognize the importance of the inquiry for the theory's prescriptive power.

Actors can be conscious of their roles, and of their part in the ongoing conversation that negotiates constitutional meaning. If so, Sandy Levinson's theory enables us to envision a process of appropriate, dynamic, often tense interactions among courts, legislators, executive actors, lawyers, citizens, and law professors. This interaction has some ground rules for engagement that keep us all involved both in making the Constitution part of the dailiness of what we do and in listening to each other during the search for both meaning and a Constitution deserving of respect. Presumably, a well-executed dialogue and negotiation that recognizes its own power coupled with its own organic and therefore changeable nature would assist us in reaching more consistently respectable interpretations that shy away from being claims to usurp power.

It is into this context that I seek to place the role of the lawyer who is handling a client matter that implicates the meaning of the Constitution. The lawyer's status as a client representative is already a complex role. Adding to it an independent relationship with the Constitution complicates it even further. Therefore, sustained inquiry addressing the interrelationship is called for if we are to have lawyers who function effectively as constructors of meaning and as client representatives.<sup>63</sup>

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59. Levinson, *supra* n. 13 (which also has implications for legislator roles).

60. *E.g.* Levinson, *supra* n. 23; Balkin & Levinson, *supra* n. 23, at 1078.

61. *E.g.* Balkin & Levinson, *Legal Historicism*, *supra* n. 3; Balkin & Levinson, *supra* n. 23; Levinson, *Constitutional Faith*, *supra* n. 2, at 165-70; Levinson, *supra* n. 4, at 2014.

62. Balkin & Levinson, *supra* n. 23, at 1003-04, 1021-22 (citing the importance of citizen engagement and duty); Levinson, *supra* n. 10, at 453-54; Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637, 651 (1989); Levinson, *supra* n. 54.

63. These levels of complexity may help explain why Professor Levinson does not engage this issue in his theoretical writings. We all must determine the complexities that we drive to the side in pursuit of an understanding of the main issue under discussion. But at some point, this issue deserves to be the main issue under discussion, as it is an important piece in the actuality of how our Constitution is constructed, interpreted, and practiced. *Cf.* Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 196 ("Levinson . . . feels much more pointedly a sort of modernist anxiety about conflicting roles simultaneously pressing their conflicting demands on a single self."). See Lynn Sharp Paine, *Moral Thinking in Management: An Essential Capability*, in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation*, *supra* n. 8, at 59, 60 (assuming responsibility to one as an agent does not extinguish existing responsibility to others, especially those within the constitutive communities to which one belongs).

One should note, however, that the complexity of defining the relationship between role and interpreter is not unique to the lawyer's role. In a constitutional regime dependent upon all actors—especially those charged with governmental responsibility—to engage in the process of negotiating and constructing the meaning of our fundamental document, all actors have a complex role to define and play. Indeed, Professor Levinson's well-known penchant to focus upon the processes of constitutional decisionmaking (the very title of his co-authored text in this area, Paul Brest, Sanford Levinson, Jack Balkin & Akhil Reed Amar, *Processes of Constitutional Decisionmaking: Cases and Materials* (4th ed., Aspen L. & Bus. 2000)) directs us to examine both (1) how each actor appropriately exercises his or her own responsibility to engage in constitutional interpretation, and (2) how that actor practices the

D. *Brief Review of Professor Levinson’s Statements about Lawyering as a Constitutional Interpretive Enterprise*

Lawyers need to understand and define their role as constructors of constitutional meaning. Fortunately, Professor Levinson has some models of how he would approach looking at constitutionalism and professional responsibility. His three key pieces in this vein are his *Frivolous Cases: Do Lawyers Really Know Anything at All?*<sup>64</sup> (on lawyers, belief and the freedom to make nonfrivolous argument, and how one can define the bounds of acceptable argument), *National Loyalty, Communalism, and the Professional Identity of Lawyer*<sup>65</sup> (“reflecting on

skill of advancing her interpretation as definitive from her perspective while acknowledging that it is part of the ongoing negotiation of meaning with others.

An interesting discussion of “authoritarianism” on the CONLAWPROF list demonstrates the complexity of this process, as participants struggle to define when a government branch has improperly asserted (even abused) power to interpret the Constitution as it sees fit. The discussion from the constitutional “protestants” regarding power seems to focus upon the willingness and ability of the respective government spokespersons to present their interpretations convincingly, but without insisting that other government actors should not disagree or alter the premises of the constitutional discussion by their input. Professor Levinson himself decries as authoritarian those pronouncements of the Supreme Court (and Congress or the executive) which insist that the proffered interpretation is the only authorized interpretation, from the only authorized interpreter, and that continued disagreement with that interpretation is a denial of constitutional meaning and somehow unconstitutional. *See Post, CONLAWPROF* (Oct. 23, 2002, 13:08:18)—“It is the extreme claim for judicial supremacy . . . that is authoritarian” (citing *Casey* on stop arguing with us, and *Cooper* and perhaps *McCulloch*), as contrasted with rhetoric derived from *Marbury* that is more consistent with a position: “This case is before us, we have to decide it in accordance with the Constitution, and this is what we think the Constitution says.” The major difference seems to be between the arrogation of sole and final power to interpret—and the call to dissenters from any source to cease and desist challenge and presentation of alternative interpretations—and the willingness to perform one’s role as constitutional interpreter, and even to make positive law from that interpretation, while remaining open to and cognizant of input from others that may well affect the ultimate meaning of the Constitution as it gets practiced every day and how it becomes understood over time. (In Sandy’s inimitable words: “the claim to utter finality and a demand that all other institutions simply shut up.”).

Jack Balkin and Randy Barnett have a nice exchange that highlights an important distinction between constitutional meaning and the content of constitutional law at a given time. Randy Barnett, *Post, CONLAWPROF* (Oct. 21, 2002, 12:41:26), and Jack Balkin, *Post, CONLAWPROF* (Oct. 22, 2002 11:42:16). The exchange notes the difference between the process of making law through interpretation (the positive law impact of government actors, especially the judiciary, who apply constitutional law within the framework of what Philip Bobbitt calls modalities and Sandy Levinson calls “law-talk”) and the meaning of the Constitution. As Balkin puts it:

[T]he Constitution has a dual nature. At one level it is a set of political institutions around which positive law accumulates. At another level it is a source of political ideals that are used to critique the positive law that emerges. But there is also a baseline here, that refuses to countenance substituting opinion, ideology, or mere desire for meaning with the Constitution itself, or as Professor Barnett puts it “the Constitution has some meaning (however discovered) independent of elections to which [we] can turn to assess the performance of [interpreters], rather than judges [or any other government actor or citizen] determining on their own the content of the rules they take an oath to uphold.”

*Id.*

64. Levinson, *supra* n. 9. *Frivolous Cases* recognizes the “standard conception” of lawyering—that lawyers will make any argument in behalf of perceived client interests, whether or not it is believed or considered to be a sound (much less the soundest available) argument. *Id.* at pt. V. Elsewhere, Professor Levinson notes his willingness to critique this conception. Levinson, *supra* n. 10, at 456-57; Levinson, *supra* n. 4, at 2019-21, 2024. In *Frivolous Cases*, however, he seems to accept this vision as not only the accurate (perhaps only accurate) vision of the profession, but as a legitimate vision and practice. Levinson, *supra* n. 9, at 378.

65. Levinson, *supra* n. 54, at 51.



the intersections, if any, of the duties of citizenship and the roles of modern lawyers”), and *Identifying the Compelling State Interest: On “Due Process of Lawmaking” and the Professional Responsibility of the Public Lawyer*<sup>66</sup> (exploring the responsibility of a state attorney general arguing to uphold a state statute against constitutional challenge).

The latter two pieces are of particular interest in looking at these questions. One looks at the question of whether it is a sensible thing to require that a lawyer be a citizen if one wants to have a constitution upheld. This was a view vigorously, even stubbornly, championed by lawyers during Levinson’s visit as a constitutional consultant to Eastern European emerging democracies.<sup>67</sup> The unyielding allegiance to this view exhibited by one Latvian lawyer in particular led Professor Levinson to explore more deeply what might be legitimate rationales in support of that position. Although Professor Levinson ultimately retains his own view that citizenship should not be a prerequisite to being a lawyer within a particular constitutional democracy, in considering the reasons in support of the position, he found the claim was not as easy to dismiss as he had originally thought.<sup>68</sup> One reason he believes citizenship is not a prerequisite for lawyering is that he believes lawyers in their roles, having taken an oath to uphold the basic tenets of the system within which they operate, are sufficiently constrained without need for the additional responsibility of citizenship to support their fealty to the system.<sup>69</sup> This conclusion, however, recognizes not only a distinction between citizenship duties and those of a lawyer, but seems to implicitly recognize that the lawyer’s duty might incorporate some duty to the fundamental tenets of the system through the vehicle of the oath.

The second article looks at whether a public lawyer (*i.e.*, a state attorney general) has a professional duty to argue the state’s asserted compelling interest in ways other than simply making any plausible argument on behalf of one’s client (the state). Levinson examined the question in the context of the Oregon law that led to *Employment Division v. Smith*.<sup>70</sup> In *Smith*, the plaintiff’s use of peyote during a Native American religious ceremony led to his being fired and denied unemployment benefits. Levinson notes that the state attorney general argued the state had a compelling interest in addressing the problem of drug use, and that only a blanket prohibition could meet the urgency of that interest.<sup>71</sup> This was not a rationale present in the legislative history. Indeed, after the United States Supreme Court upheld the law (eschewing the compelling interest test), the state legislature passed another law exempting peyote use during religious ceremonies.

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66. Levinson, *supra* n. 13.

67. Levinson, *supra* n. 54, at 50, 61-62.

68. *Id.* at 72-74.

69. *Cf. id.* at 68 (discussing the proxy aspect of citizenship and public-regarding action, but noting its difference from the standard conception of lawyering in the United States); *id.* at 70-73 (preferring a nationalistic bent that is more “thin” than that envisioned by a strong identification of citizenship duties as encompassing strong public-regarding action rather than self-interest, especially in a pluralistic society).

70. 494 U.S. 872 (1990); *Empl. Div., Dept. of Human Resources v. Smith*, 485 U.S. 660 (1988).

71. Levinson, *supra* n. 13, at 1053 n. 31.

This belied the argument that the legislature had made a considered decision to have a blanket prohibition even if that prohibition would have a negative impact upon an individual exercise of religious freedom.<sup>72</sup> Professor Levinson's point is that the attorney general is a high public official representing a sovereign. Thus, an attorney general has an obligation not to win, but to achieve justice. Thus, the attorney general should require the state actors to at least consider and decide beforehand that the impingement on a right was justified by a state interest,<sup>73</sup> rather than coming up with a "neutral yet compelling" rationale for the state action after the fact. This role of active monitor of others' conscientiousness is both a substantive and a process responsibility. Professor Levinson suggests the attorney general should not create an argument to support upholding a state law if the state legislature never considered that rationale when considering the appropriate balance between individual rights and state interests: "More should be expected from the high-level public attorney."<sup>74</sup>

Professor Levinson limits this "active monitor" role by focusing it on an executive actor confronting legislators with their own role.<sup>75</sup> He does not present the role as consistent with a more generally understood lawyer-client relationship.<sup>76</sup> At most, the analysis appears to reflect upon the meshing of the executive actor with the lawyer role. Added to the reality that the client in question is a significant constitutional actor/institution, the article primarily proposes a sensible way for each government actor to fulfill his or her governmental role with fidelity and integrity vis-à-vis the Constitution, while recognizing the impact that the lawyering relationship may have on how the attorney general might otherwise understand his or her role during the litigation.<sup>77</sup> In the end, it is not the lawyering role per se that leads to this suggested responsibility. Instead, Levinson supports this view of a public duty<sup>78</sup> by reference to the different professional responsibility of a public attorney.<sup>79</sup>

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72. *Id.* at 1048-49; Or. Rev. Stat. Ann. § 475.992(5) (2001).

73. Levinson states, "perhaps executive due process of lawmaking can cure any defect in the legislative process." Levinson, *supra* n. 13, at 1050; *see id.* at 1051-52. Note how this analysis is consistent with holding that all constitutional actors have a duty to interpret the Constitution during their actions; here the attorney general is fulfilling a duty to have the legislators examine their legislation under constitutional norms and to support their legislative actions consistent with their reflective interpretation of what the Constitution would or would not permit.

74. *Id.* at 1059.

75. *Id.* at 1036.

76. *Id.* at 1051.

77. Professor Levinson recognizes that a lawyer might not think of this because he or she is used to making any plausible argument for a client, and he recounts the Attorney General's profound disagreement with Levinson's proposal, a disagreement that is founded in the nature of the lawyer-client relationship rather than in the nature of the executive and legislative actor interaction with respect to expectations about constitutional duty. *Id.*

78. *I.e.*, the duty to require the state to consider constitutional implications before upholding the constitutionality of their actions. This insistence upon visible deliberation is reminiscent of Justice Stevens' view of the commerce power and federalism as requiring Congress to at least consider if it wants to have that impact on a state and to state its findings. Levinson, *supra* n. 13, at 1047.

79. *Id.* at 1051-52, 1059; *see* ABA Model R. Prof. Conduct 3.8 cmt. 1 (2001) (a prosecutor's responsibility is "not simply that of an advocate"); ABA Model Code of Prof. Resp. DR 7-103(A)

Can we extrapolate from these articles to explore a role for lawyers during representation on matters involving constitutional interpretation? They do broach the idea of using protestant constitutionalism to analyze the role of the attorney general, who is, indeed, a lawyer representing a client. They urge a role of making conscious—and conscientious—decisions to hold other constitutional actors to reflecting upon constitutional meaning while performing their roles. The articles also urge a conception of a lawyerly role that encompasses fidelity to constitutional meaning, performing as a contributor to a good process of constitutional decisionmaking.

If public lawyers have some such role, is a lawyer always a public “stand-in” in a case involving constitutional interpretation, more so than in other cases affecting the public interest?<sup>80</sup> How does the need to mesh duty to the system with duty to the client operate when the lawyer has taken an oath first to uphold the Constitution and then to represent clients? Even if the latter takes precedence over the former, presumably it does not do so to the exclusion of the values represented by allegiance to the former.<sup>81</sup> Does the lawyer’s responsibility differ from the “normal” balancing of client and public duty that lawyers, per the Model Rules of Professional Conduct, have already in the prosecutorial role?<sup>82</sup>

(2001); ABA Model Code of Prof. Resp. EC 7-13 (2001) (the prosecutor’s “duty is to seek justice”); Ronald D. Rotunda, *Professional Responsibility: A Student’s Guide* § 29-1, 528-29 (West 2002-03).

80. See Gordon, *supra* n. 58, at 53-54 (lawyers representing clients in contexts that address major policy level actions have additional responsibilities to safeguard the legal and political framework and to reconcile client and public interests).

81. E.g. ABA Model R. Prof. Conduct, Preamble, §§ 1, 8 (2001):

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person[,] . . . issues of professional discretion . . . [that] must be resolved through the exercise of sensitive professional and moral judgment . . . .

*Id.*; Julian Friedman & Jody King, *Lawyers in the Regulatory Context*, PLI Litig. & Admin. Prac. Course Handbook 109, 11, 114-15 (June 1999) (practitioners recognizing the public duty of lawyers as in tension with client service, and advocating that lawyers in the securities regulatory context owe an additional duty to the public during their representation); Anthony V. Alfieri, *Ethical Commitments*, 38 Wm. & Mary L. Rev. 199, 200-01 (1996) (noting how Cramton and Koniak locate lawyering tensions among “obligations of courts, third persons, the public, and the law itself”). Cf. Russell Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 Fla. St. U. L. Rev. 9, 19-20 (1999) (noting the decline in lawyers’ conceptions of their role as being for the public good to being one of “extreme partisanship on behalf of clients and moral non-accountability in pursuit of clients’ goals” that mirrored societal consciousness changes).

In a recent news article by Andrew Welsh-Huggins, *Attorney General Must Back Law, Suspend Personal Belief*, Associated Press Newswire (Sept. 26, 2002) (Okay, I admit I suggested that the reporter read Professor Levinson’s Hastings article, and he called him instead!), Professor Levinson agrees that an attorney general may have a duty to refuse to make an argument on behalf of her client, the state, if the consequences of that argument would be what the attorney believes to be “disastrous.” Thus, he recognizes the need for some balancing test here, apparently of the “substantially outweighs” sort, although, to be fair, the format and content of the comment hardly permit of much interpretation beyond speculation.

82. See ABA Model R. Prof. Conduct 3.8 & cmt. 1; ABA Model Code of Prof. Resp. EC 7-13. There may be some question as to the frequency with which prosecutors exercise this responsibility, perhaps preferring to ignore it rather than to engage in balancing in hard situations.

If the Constitution is always in the process of being negotiated by primary actors, especially those holding constitutionally granted power who are sworn to uphold the Constitution, aren't lawyers some of those actors, key judicial officers, legislative consultants, lobbyists, or agency operatives during their representation of clients? If so, it seems lawyers' influence may rival or exceed that of judges speaking for the judiciary.

## II. DEFINING THE LAWYER'S ROLE IN RESPONSIBLE CONSTITUTIONAL INTERPRETATION AND CLIENT REPRESENTATION

### A. *A Sample Problem and Its Challenge to Lawyers Committed to the Constitution*

Lawyerly dilemmas as to the interpretation that should be proposed during representation are not fictional or unlikely. Indeed, "when the nation's most fundamental values are at stake, lawyers and lawyers' ethics are likely to play a crucial part."<sup>83</sup> These dilemmas may arise in several different guises. We might take a recent example<sup>84</sup> to explore some of them.

*The lawyer practices in a conservative religious interest organization<sup>85</sup> that lobbies and litigates to get prayer back into the public schools as one of its agenda items. The University of North Carolina decided to respond to September 11 in its entering freshman seminars. It determined to expose entering eighteen-year-old freshmen to some of the substance of the Koran as a historical and cultural text. Students who objected to reading the Koran at all were permitted to write a short paragraph explaining their objection in lieu of reading the assignment.<sup>86</sup> Let us assume, given his or her employment and previous positions on behalf of clients, that the lawyer believes religion and the reading of religious texts belong in public*

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83. Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 Stan. L. Rev. 269, 351 (2000) ("At those defining moments, we want a profession capable of reaching its highest aspirations. And that will require reassessment of professional rules, roles, and responsibilities.").

84. This example is "ripped from the headlines", and is based upon news articles that appeared in major United States newspapers. *E.g. Rights and the New Reality; No Blinders on Education*, L.A. Times B22 (Aug. 17, 2002) (available in 2002 WL 2497263); Stephen Braun, *Students' Reading of Koran Text Is Upheld*, L.A. Times A10 (Aug. 20, 2002) (available in 2002 WL 2497855); *Mandating the Koran*, Wall St. J. A20 (Aug. 13, 2002) (available in 2002 WL-WSJ 3403280); Yonat Shimron, *Required Reading on Koran Provokes Bitter Battle; Islam: The University of North Carolina Requirement for Freshmen Incenses Lawmakers and Others*, L.A. Times B20 (Aug. 17, 2002) (available in 2002 WL 2497238); Terry Eastland, *Houses of Worship: Instructed, Not Converted*, Wall St. J. Weekend J. W13 (Aug. 23, 2002) (available in 2002 WL-WSJ 3404240). The case discussed is *Yacovelli v. Moeser*, 02-CV-596 (M.D.N.C. 2002).

85. Such as the Family Policy Network ("FPN"), a Virginia-based conservative Christian group. The organization's website is available at <<http://www.familypolicy.net/>>.

86. There is some indication in the news articles about the situation to the effect that this concession followed an objection by the FPN, and was something the FPN counted as a partial victory. A New York Times article quotes the FPN lawyers objecting to the opt-out as being too difficult to expect a young student to take, an indication that the opt-out was not acceptable to the client. Jennifer Medina, *Schools Plan Curriculums That Focus on September 11*, N.Y. Times 14 (July 28, 2002) (available in 2002 WL 24465886).

*institutions,<sup>87</sup> and, indeed, that the inculcation of values derived from those texts is appropriate in the public school context. The organization wants the lawyer to sue UNC to block this (optional) reading of excerpts from the Koran by an adult student in a nonreligious context.*

The issue raised for the lawyer here centers around the lawyer holding a strong belief in a constitutional interpretation that is adverse to this specific position of the client, but also holding a strong belief in the general public policy position of the client. The client<sup>88</sup> believes its public policy position is served by taking this inconsistent position on constitutional meaning for this specific case. Adopting the client's interpretation poses several problems:

This position is directly adverse to the client and lawyer's usual position on interpretation with respect to using religious texts in public schools—a direct conflict with a core commitment to the meaning of the Constitution.

This position on the acceptability of religious texts is more difficult to maintain than the position against which the lawyer and client usually argue, because

This is teaching the text as a document rather than for the value content

These are college students (generally adults or nearly adults) rather than younger, more impressionable and more easily coerced public school children between five and seventeen years old

This is not very compulsory, due to the opt-out, an accommodation suited to the educational enterprise.

Additionally, should the court accept this interpretation and rule in favor of the client, the bulk of the client's other interests with respect to religion and religious texts in the public schools could be undermined (*i.e.*, the client's long-term interests would be undermined by the client's choice of how to achieve this short-term interest). Even if this client's long-term interests appear not to be sacrificed, might not the lawyer be sacrificing the interests of other likely present or future clients?

Three analyses of the lawyer's position may explain it. First, the lawyer who adopts the client's interpretation is taking an inconsistent position on constitutional meaning—one that may serve an underlying political agenda but that is likely to jeopardize the main legal and constitutional agenda of the client, if accepted. Second, the lawyer is using the constitutional interpretation advanced

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87. Some of the arguments raised against reading the Koran, at least in the popular press, alleged that readings from the Bible would not be acceptable. Rebuttals included clear demonstrations of the Supreme Court's precedent permitting the use of religious texts as historical and cultural documents, rather than to proselytize the religious beliefs contained within them, and it should be noted that public institutions include coursework that explores biblical texts. *E.g.* John Boddie, Letter to the Editor, *Koran Studies: Inquiry Isn't Indoctrination*, Wall St. J. A13 (Aug. 23, 2002) (available in 2002 WL-WSJ 3404328) (Boddie is the president of the American Civil Liberties Union of North Carolina).

88. The term "client" here does not differentiate between the particular named plaintiff and the public interest organization bringing the suit, as the latter is an impact litigation organization that selects its particular named plaintiff clients on the basis of their raising the issues that the organization wishes to raise.

merely as a strategy, a subterfuge, a way to undermine constitutional meaning in order to try to influence it in the future. That is, the lawyer is planning to bring the case, fail to argue it effectively, and lose, while obtaining useful language and precedent for advancing the client's main agenda in the future.

Both of these explanations of the lawyer's behavior are problematic as conscientious exercises of citizenship (especially as an oath-taking attorney) or at least of a thought-out commitment to the Constitution and its worthiness. The first position subverts the content of the Constitution, elevating a political agenda over constitutional worthiness. The second position subverts the process of negotiating constitutional meaning. Engaging in either casts doubt upon whether the attorney is acting within his or her proper role.

The third interpretation of the lawyer's decision to make the argument does not seem problematic. Perhaps this case situation resulted in a "teachable moment." The lawyer may find that the case confronted her with the reality of how a demand to expose one's self to a religious text, for whatever secular, good faith reason is offered, can cause a deep harm, even to adults with (less preferable) options for avoiding the exposure. This new understanding may change the lawyer's mind and heart, altering her good faith interpretation of constitutional meaning. If that is the case, the lawyer would also change her position on previous cases and on the main agenda of the client. She could probably not work for that client in the future, now that she understands the reasoning behind being able to make the client's argument in this case. One could not object to the lawyer changing heart when presented with facts that altered her interpretation. One might insist that the new interpretation be generally applied, however. This interpretation of the lawyer's conduct, if correct, actually well serves Professor Levinson's protestant constitutionalism, for the lawyer has become a part of the constitutional conversation, has seriously engaged in the negotiation of meaning, and has, with an open mind and fidelity to oath, changed position upon being presented with persuasive evidence and argument.

This third lawyer seems a paradigm for applying the theory of constitutionalism to the lawyering role. The lawyer has engaged in the process of questioning, dialogue, reflecting, reassessing, making an ethical judgment, and explaining the resulting interpretation in constitutional "law-talk." She has fleshed out the normative dimension to the lawyer's role that exhibits professional responsibility to client and Constitution.

#### *B. Insights from Protestant Constitutionalism into Defining the Lawyer's Role*

The lawyer's responsibility must, of course, be defined consistently with the lawyer's role. This accounts for much of the difficulty and complexity in confronting the issue. As noted by Jack Balkin elsewhere in this symposium,<sup>89</sup> Sandy's scholarship is remarkable for its consistency in both theme and voice.

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89. Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 *Tulsa L. Rev.* 553 (2003).

Having furnished plentiful examples of using protestant constitutionalism as a lens to examine any number of issues and actors, Professor Levinson's work offers helpful insights into how to approach the question and to define the important characteristics of a well-executed lawyerly role. From this examination, several themes emerge. First, role sensitivity drives one to analyze and propose a process, rather than specific content, for fulfilling one's constitutional responsibility. Second, appropriate processes can be sought (building upon Sandy's extended religious metaphor for a thematic vocabulary) by identifying the cardinal sins and cardinal virtues, then applying them to the context of lawyering. Third, the lens may play "an important role in legitimizing, indeed requiring, lawyers to view their function vis-à-vis clients as something other than merely predicting what a court would do if presented with their cases."<sup>90</sup>

Throughout Professor Levinson's work, he seems, sensibly, to recognize that one's interpretive responsibilities and authority differ in accord with the role one fulfills in the constitutional framework. A legislator has duties, and those duties differ from those of the judge or executive.<sup>91</sup> Part of this recognizes constitutional specification of perspective one must inhabit; part comes from the sensible recognition that one's perspective cannot be divorced from one's standpoint and role.<sup>92</sup> One's role may also define the boundaries of the input one can reasonably offer toward negotiating or constructing meaning. One's latitude, methods, and accountability are all role-driven to some extent, especially where the framework of the Constitution identifies the role and some of its aspects, and proscribes when it becomes an illegitimate (or delegitimizing) exercise of power to deviate from those boundaries.<sup>93</sup>

Thus, Professor Levinson is careful to separate the role of judge from that of lawyer,<sup>94</sup> of judge from law professor,<sup>95</sup> of inferior court judge from Supreme Court Justice,<sup>96</sup> even of lawyer from citizen.<sup>97</sup> Professor Levinson suggests that a public attorney limit his or her arguments on the client's behalf to arguments that

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90. Levinson, *Constitutional Faith*, *supra* n. 2, at 47 (analyzing a city attorney in a counseling function).

91. Levinson, *supra* n. 13, at 1050 (in which the respective roles are understood to be different); Levinson, *supra* n. 23 (discussing role-sensitivity for the federal judiciary); Levinson, *Constitutional Faith*, *supra* n. 2, at 47-49 (examining the city attorney, the mayor, and the council members as having different roles).

92. The marvelous literature on standpoint and perspectivity must be acknowledged here. *E.g.* Martha Minow, *Justice Engendered*, 101 Harv. L. Rev. 10 (1987); Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829 (1990).

93. Professor Levinson's beliefs about this might best be reflected in the articles he co-authored with Professor Balkin on *Bush v. Gore* and the claim of the illegitimacy of the Court's intervention and of its methods of reasoning. Balkin & Levinson, *supra* n. 23; Balkin & Levinson, *Legal Historicism*, *supra* n. 3. It seems that Professors Balkin and Levinson are also concerned that such an exercise of extra-constitutional power exerts a delegitimizing force on the Constitution and the governmental institutions it established, in addition to being an example of illegitimate exercise of power. Balkin & Levinson, *supra* n. 23, at 1049-50 ("flagrant judicial misconduct that undermined the foundations of constitutional government").

94. Levinson, *supra* n. 10, at 453-55; Levinson, *supra* n. 9, at 363-64.

95. Levinson, *Constitutional Faith*, *supra* n. 2, at 165-70; Levinson, *supra* n. 4.

96. Levinson, *supra* n. 23.

97. Levinson, *supra* n. 54.

the client actually considered. This illuminates that legislators and attorneys general have different roles, even when they act as client and lawyer.<sup>98</sup> But what is the role of any attorney representing any client who seeks to influence the meaning of the Constitution itself? This is the question that needs to be pursued more deeply in the context of all the rest of the lawyers who represent clients, including lawyers and clients who may be "mere" citizens.

Lawyers should not be divested of power or responsibility to exercise judgment about constitutional meaning independent of their clients and their clients' interests.<sup>99</sup> Insisting that the attorney argue only the constitutional meaning his or her client wants argued divests the attorney alone of an ability to make the Constitution worthy.<sup>100</sup> The lawyer is not merely the client (agent) with developed tools for using the Constitution to support its interests. Neither should the lawyer be solely responsible for "legal judgments," authorizing the lawyer to choose constitutional arguments without client input, even if those interpretations do not optimally advance the client's interests.

It is no answer to say the attorney can always have input as a citizen himself or herself, independent of his or her lawyering role. That ignores both that the attorney is instrumental—and more influential—in constitutional interpretation during the representative role than in the guise of mere citizen, and it ignores the fact that lawyering is itself a constitutional role.<sup>101</sup> Indeed, the Sixth Amendment<sup>102</sup> and the "case or controversy requirement"<sup>103</sup> imply that lawyers are necessary parts of the work of the entire judicial branch. Even if one casts the lawyer as mere "interpreter" of client needs and interests, that role is still distinct from that of client because, as Professor Levinson's law and literature<sup>104</sup> and law and music<sup>105</sup> scholarship shows, one cannot avoid differentiation between the interpreter, the interpretation, and that which is interpreted.

*Constitutional Faith* includes some extended discussion of the importance of each lawyer's conception of citizenship, because of the centrality of law and

98. Levinson, *supra* n. 13 (although it suggests that the attorney general refrain from creating his own arguments to support legislation).

99. Levinson, *Constitutional Faith*, *supra* n. 2, at 173-74 (criticizing "unbridled advocacy" as social practice, and noting there must be some discipline, process, or method that would aid the lawyer in doing the more worthy thing); cf. Levinson, *supra* n. 1 (discussing the lawyer's moral and professional responsibility and power to raise moral questions for discussion with clients).

100. Cf. Levinson, *Experience*, *supra* n. 24, at 756 (discussing the "sharp notion of the morality of role" that holds that participating in the adversary system is in itself worthy and moral, whatever one argues or accomplishes within it). Why require that only such a "sharp notion" give the lawyer a sense of personal morality, especially when that notion requires one to ignore crucial realities, such as the consequences of one's actions in role?

101. See Gordon, *supra* n. 58, at 48-50 (long tradition of lawyers assuming the public role of safeguarding the framework of institutions of democracy and capitalism is so ingrained as to have become constitutional; such civic responsibilities on lawyers are "inescapable").

102. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

103. U.S. Const. art. III, § 2 [1] ("The judicial power shall extend to all Cases, in Law and Equity, . . . to Controversies . . .").

104. E.g. *Hermeneutic Reader*, *supra* n. 2; Levinson, *Law as Literature*, *supra* n. 2.

105. E.g. Levinson & Balkin, *supra* n. 2.



lawyers in American public life (*i.e.*, lawyers will be leading citizens).<sup>106</sup> Yet it notes that a “good” lawyer (one who defers all judgment to the client) can indeed be a “dreadful” citizen (one who fails to contribute to the worth and goodness of constitutional meaning). If this is not admirable, as Professor Levinson says he finds it hard to be, then must not the lawyer have some ability, if not a duty, to make his or her contributions to the constitutional conversation ones that are consistent with his or her conscientiously reached and held vision of constitutional worthiness? Is not this the “conception of lawyering” that “matters”?

Thus, the attorney must negotiate meaning and define his or her role in ways sensitive to the multiple relationships at stake: the relationship between the attorney and the client, between the attorney and the tribunal (court or legislature), and between the attorney and the Constitution.

Drawing from Sandy’s work, I distill the following list of virtues that one must practice when engaging in interpretation: humility, empathy, fidelity, accountability, and candor:

*Humility.* Humility requires one to question; as Sherman Clark states it: ask the hard questions, and follow them where they lead.<sup>107</sup> One must exercise what Mark Tushnet calls self-aware historicism:<sup>108</sup> the acknowledgement that one might not be right, or good.<sup>109</sup> Humility leads to a kind, but skeptical, attitude of questioning both others and one’s self.<sup>110</sup> It also makes one attend to consequences, refusing refuge in the abstraction of process if the results are wrong or abominable.<sup>111</sup>

*Empathy.* Empathy requires that one engage in relationship, recognizing the importance of both one’s self and the other. As Rod Smith described it, empathy should result in truly listening, understanding others, and assessing consequences.<sup>112</sup> This robust openmindedness permits one’s own ideas and beliefs to develop during a true engagement in conversation.<sup>113</sup> Such empathy must accompany the lawyer into the lawyer-client relationship and persist during all

106. Levinson, *Constitutional Faith*, *supra* n. 2, at 165-68.

107. Sherman J. Clark, *Promise, Prayer, and Identity*, 38 *Tulsa L. Rev.* 579 (2003).

108. Tushnet, *supra* n. 32.

109. See Balkin & Levinson, *supra* n. 22, at 1017.

110. *E.g.* Levinson, *supra* n. 1; Levinson, *supra* n. 32, at 1980-81.

111. See Levinson, *Constitutional Faith*, *supra* n. 2, at 169 (teaching future lawyers to recognize that “respectable” legal thinking can defend “terrible outcomes” such as slavery); *Id.* at 170 (teaching lawyers to have an awareness that their one views are not necessarily “true” or even “best”); Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 182-83 (advocating that students be trained to understand how slavery lawyers participated in the system of slavery, and that we understand the past, in part, “to remind us to consider how our present interpretations of the Constitution might look to future generations”); Tushnet, *supra* n. 32 (discussing the “good” lawyers and judges who could use “good” law and reasoning to continue slavery); Aviam Soifer, Speech, *Secular Sectarianism and Perilous Neutrality* (Tulsa, Okla., Nov. 1, 2002) (discussing the perils of the neutrality principle applied with reference to its stated goals and blindness to its actual impact).

112. Rodney K. Smith, *Treating Others as Our Own: Professor Levinson, Friendship, Religion, and the Public Square*, 38 *Tulsa L. Rev.* 731 (2003).

113. *Cf.* Sanford Levinson, *Conversing about Justice*, 100 *Yale L.J.* 1855, 1877 (1991) (criticizing White for failing to engage others, and extolling Booth as an example of true engagement leading to a change in ideas).

representation, not merely during the "counseling" function. This empathy flows from an ethic of respect that is critical to the moral reflection needed for good interpretation.<sup>114</sup>

*Fidelity.* One must have both faith and courage—the commitment to follow through.<sup>115</sup> In essence, fidelity is the fulfillment of the oath, the "pouring in" of one's self so that one's identity becomes fashioned in response to the meaning one attributes to one's role and the Constitution.<sup>116</sup> One's identity then becomes a part of one's self respect, which assists in one's assessing whether or not one's actions are consistent with the most "worthy" vision of the Constitution.<sup>117</sup>

*Accountability (Role Recognition).* One's role as an interpreter requires one to accept responsibility to engage in the interpretive dialogue. This means recognizing that what one does with respect to advancing or enforcing an interpretation matters, that it affects the course of constitutional meaning, and, hence, the worthiness of the Constitution and the system built upon it.<sup>118</sup> One must hold both one's self and others to account—that is, to exercising one's interpretive responsibilities appropriately and in context.<sup>119</sup> For a lawyer, that means one must be able to give valid reasons and present them persuasively, at the very least.<sup>120</sup>

114. Levinson, *Constitutional Faith*, *supra* n. 2, at 86. This attitude is similar to the principle of "interpretive charity" that Professor Levinson urges in *Constitutional Faith*. *Id.* at 75-77.

115. *See id.* at ch. 6, 48 (one should act "based on conscientious analysis of what fidelity to the Constitution requires"). This is a characteristic that Jack Balkin's symposium piece noted as part of Sandy's constitutionalism. *See Balkin, supra* n. 89.

116. *See* Levinson, *Constitutional Faith*, *supra* n. 2, at 48 (discussing "the willingness of ordinary public officials to take seriously the responsibility placed upon them by their oaths"); Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 193 (expressing the need to act on an internal commitment to the enterprise of legal argument); Sanford Levinson, *Constituting Communities through Words That Bind: Reflections on Loyalty Oaths*, 84 Mich. L. Rev. 1440, 1459 (1986) [hereinafter Levinson, *Constituting Communities*] (oaths can transform one, taking one beyond the bounds of ego and isolated self-interest); Clark, *supra* n. 107; *cf.* Sanford Levinson, *Why Select a Favorite Case?*, 74 Tex. L. Rev. 1195, 1197-98 (1996) (admiring Justice Jackson's selected opinion as an example of "how a serious person wrestles with [a] difficult problem").

117. *See* Levinson, *Constitutional Faith*, *supra* n. 2, at 170 (stating that self-respect may lead one not to follow the law).

118. *Id.* at 168-70, 193.

119. *Id.* at 50 (stating that "it is crucial to the maintenance of a constitutional order that individuals believe themselves obligated to be conscientious adjudicators [of constitutional meaning]"). Failure to be accountable and failure to hold others accountable seems to be one of Levinson's and Balkin's core indictments of the Supreme Court (and the Bush lawyers) in *Bush v. Gore*. Balkin & Levinson, *supra* n. 23, at 1060 n. 79; Balkin & Levinson, *Legal Historicism*, *supra* n. 3. Also, in describing the role of a city attorney and a mayor in determining the constitutionality of a proposed action, Levinson demonstrates how the attorney and mayor can exercise the virtue of being accountable. Levinson, *Constitutional Faith*, *supra* n. 2, at 47-49.

120. *See* Balkin & Levinson, *supra* n. 23, at 1078 (discussing the need to use legal doctrine and received forms of argument, as well as to give reasons). This seems to be the bare minimum, as explicated in *Frivolous Cases*. Levinson, *supra* n. 9. Additional questions arise as to the importance of belief underlying the lawyer's choice of argument. The lawyer must at least believe (correctly) that the argument is grounded in law and fact and is being made with the appropriate tools of lawyering (*e.g.*, law-talk). I suggest that if the lawyer does not believe the argument to be good or persuasive, at the very least the lawyer should treat this as a red flag for engaging in deeper questioning (humility and fidelity) and discussion with the client (empathy). *See* Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 186 (a law professor should critique legal argument or court decisions for "how well or badly they use the available materials of legal argument"); *id.* at 193-95 (stating that arguments have bounds of

*Candor.* Good constitutionalism requires that the actors engaged in the conversation be above-board, and make their interpretive arguments in good faith, visibly, and without subterfuge. Reasons and argument should match the actor's real reasoning, agenda, or thought process. This requires both self-assessment and a commitment to saying what one actually sees, rather than couching everything to achieve an underlying goal alone.<sup>121</sup>

The sins of interpretation are: irresponsibility (either abdication or exceeding the bounds of role); arrogance (including a claim of sole or final power to determine meaning); self-regard (to the exclusion of considering or accepting other inputs) and close-mindedness (refusal to listen, question, or learn); and subterfuge and lack of respect.

*Irresponsibility.* An actor is irresponsible if he or she either exceeds the bounds of his or her role in the constitutional conversation, or abdicates responsibility to engage in serious constitutional conversation when acting with respect to constitutional meaning. This abdication of responsibility is one Sandy frequently decries in his work when noting how deferral to the courts has divested other important constitutional actors of their power and responsibility to engage in interpretation themselves.<sup>122</sup> The refusal of an attorney general to require other constitutional actors (legislators) to support their actions before defending them also points out the sin of irresponsibility, on the part of both the legislators and the attorney general. Similarly, Levinson excoriates courts for exceeding the bounds of their role, an act of irresponsibility that upsets the process of the constitutional negotiation of meaning.<sup>123</sup> If the lawyer is treated as a nonentity with respect to contributing to interpretation, the lawyer is permitted to abandon principle or deflect responsibility for his or her actions and the results of those actions.<sup>124</sup>

*Arrogance.* Exceeding the bounds of role also demonstrates the second cardinal sin, that of arrogating to one's self more interpretive power than is appropriate when considering all the authorized interpreters entitled to be engaged in the conversation. The extreme display of this sin is claiming sole and

reasonableness that can be violated, and "self-respecting lawyers . . . should be ashamed of themselves for offering" "‘really and truly’ . . . bad legal interpretation[s] of the Constitution”).

121. Again, this can be drawn in the negative from Balkin & Levinson, *supra* n. 23, at 1062, 1083, 1102, and Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 195 (excoriating the Court in *Bush v. Gore* for not being candid in its approach and stated reasoning). See Levinson, *supra* n. 13 (insisting that the legislature have and give the real reasons and that the attorney general not manufacture them ex post facto to support the challenged action). It is also demonstrated in the positive in Sandy's famous Second Amendment article, Levinson, *supra* n. 62, where the consequences of the engagement in a candid interpretive inquiry and process may not be the consequences one would choose one's self as a matter of good policy.

122. Levinson, *supra* n. 10, at 453 ("Interpretation is the task of everyone . . . [The] court-obsessed jurisprudential tradition . . . [leads to] bad jurisprudence and a debased legal and political system."); Levinson, *Meese*, *supra* n. 24, at 1077 (touting the value of reinserting citizens into interpretation and questioning the judicial role). See *supra* n. 24.

123. Balkin & Levinson, *supra* n. 23, at 1049, 1083, 1108; see Balkin & Levinson, *supra* n. 22, at 1003 (criticizing the "Supreme Court's purported role as the sole authoritative interpreter of the meaning of the Constitution" in constitutional law pedagogy).

124. This does not accurately describe lawyering (although it may reflect the standard conception of extreme client-centeredness), and is not a state of lawyering about which we should feel sanguine.

final power to interpret the Constitution, especially as a means of shutting off further dialogue on the issue.<sup>125</sup>

*Self-regard and close-mindedness.* This sin is the failure of humility and empathy. Actors who refuse to take account of the input of others into the constitutional conversation, those who ignore the impact of an interpretation on others, and those who refuse to listen, question, and learn commit this sin.<sup>126</sup>

*Subterfuge and lack of respect.* In essence, this is the sin of violating the terms of engagement and thus undermining the process of constructing constitutional meaning. Its practice grows out of actors failing to take either their own or others' roles seriously enough to participate in a process that is open, visible, and earnest in its effort to accord meaning. Actors who lack respect for their own role often choose to state their positions without articulating reasons or using the developed appropriate ways of discussing constitutional meaning—engaging in "law-talk." Actors who lack respect for others or for the process itself choose subterfuge and pursue hidden agendas in their effort to co-opt meaning, rather than to engage everyone in the negotiation of meaning in good faith.<sup>127</sup>

Applying these virtues and sins to examining the role of the lawyer leads to some productive ways of rethinking the lawyer's role in the process of constitutional negotiation of meaning. It permits us to see the lawyer as more than the mere Holmesian predictor of officially-enforced meaning<sup>128</sup> (a somewhat amoral and irresponsible role), and allows us to think of the lawyer as a responsible interpreter who must engage in earnest dialogue with self, client, and tribunal<sup>129</sup> as well as inhabiting a role similar to that of a monitor<sup>130</sup> of client input

125. The cardinal offender in this category is, unsurprisingly, the Supreme Court. Levinson, *supra* n. 19, at 1564 n. 15. Although Levinson evinces little or no problem with the Court declaiming its view and requiring that it be enforced, he finds very problematic the further claim that this view is the only one authorized to be declared, and that others should desist from expressing contrary views. *Id.* at n. 15 (his problem with some of the *Casey* rhetoric and the *Bourne* decision). Thus, for the Court to operate within its role, its view will of necessity have great power, and will be enforceable against contrary views. But that is no basis for claiming that conversation should now halt on the issue, or for attempting to disempower other constitutional actors from contributing to the meaning of the constitutional provision in question through their legitimate and authorized actions and expressed points of view. Interestingly, the Court's engagement in this sin often is complemented by other actors engaging in the first sin—that of abdication of their own responsibility to reach independent interpretations and to advance them consistently with their roles in the constitutional framework. See Levinson, *Meese*, *supra* n. 24, at 1077; *supra* n. 63.

126. Levinson, *supra* n. 113; *cf.* Levinson, *supra* n. 7; see Sanford Levinson & J.M. Balkin, *The "Bad Man," the Good, and the Self-Reliant*, 78 B.U. L. Rev. 885, 898 (1998) (discussing the Emersonian view of virtue as being forward-looking, willing to change one's mind).

127. *E.g.* Balkin & Levinson, *supra* n. 23, at 1049-50, 1102, 1108; Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 193-95.

128. Levinson *supra* n. 9, at 363 n. 43, 366-67; Levinson, *supra* n. 54, at 56; Levinson, *Constitutional Faith*, *supra* n. 2, at 169 (warning against "professional detachment" from actual social consequences).

129. Levinson, *Constitutional Faith*, *supra* n. 2, at 47-49, 165-70 (discussing the value of taking the legal system morally to task).

130. Levinson, *supra* n. 13. This role is one less about protecting the good exercise of constitutionalism by the client (a role that would cast into doubt the level of dignity the lawyer was according the client), and more one of fulfilling the lawyer's role to exercise his or her own constitutional responsibility seriously and well. In *The Lawyer as Moral Counselor: How Much Should the Client Be Expected to Pay?*, Levinson writes, "If moral conversations are part of the lawyer's role, as I think they must be, the justification must be, paradoxically or not, the role that such conversations

who uses a developed expertise in interpretation and argument. What the lawyer may do and remain a "good" lawyer (but dreadful citizen) is not used to answer the question of what the lawyer may do, even should do, to remain a good lawyer and remain true to constitutionalism. This view of the lawyer refuses to accept that the only "real" and professional lawyer is a rationalizer and apologist for client points of view, one who may actually believe strongly contrary to the positions being taken, indeed, one who may appear to be a tool of the client rather than having an independent responsibility.<sup>131</sup> This view is consistent with using the lens of constitutionalism rather than the professional responsibility law governing lawyers. It is truer to the view of fidelity and integrity that Levinson uses when analyzing other interpretive actors.

### C. *Models of the Lawyer's Role*

Continuing the extended religious metaphor, I propose there are three models one could create for the lawyer's role in constitutional interpretation: the priest, the minister, or the "knowing instrument."

The models of priest and knowing instrument, although the more common and simplified models that most people recognize and allude to,<sup>132</sup> share a common defect. They each posit a very different, but nonetheless hierarchical, flow of authority, a hierarchy in which the lawyer becomes a mere conduit (however important) rather than an actor with independent judgment. Both ignore the lawyer's "duty to engage the client in . . . [moral or constitutional] dialogue," relegating her to "legal" tasks that reflect an "abject poverty of . . . understanding of the lawyer's role."<sup>133</sup> More importantly, while recognizing the

play in assuring the lawyer that he or she is leading a moral life, rather than monitoring the client's morality." Levinson, *supra* n. 1, at 835.

131. This alternative vision of the lawyer's role has generated a rich literature. *E.g.* Paul R. Tremblay, *Practiced Moral Activism*, 8 St. Thomas L. Rev. 9 (1995) (noting the extensive literature and reviewing the most influential contributors, *e.g.* David Luban, William Simon, Richard Wasserstrom); *see* Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press 1992); *The Ethics of Lawyers* (David Luban ed., N.Y. U. Press 1994) (Professor Luban has multiple books and articles of his own on this issue, and this collected edition of many perspectives nicely covers a good deal of the territory; there is a helpful Introduction addressing these issues at xi-xxx); Simon, *supra* n. 34; Gordon, *supra* n. 58; *cf.* Levinson, *supra* n. 9 (in which Professor Levinson evinces dissatisfaction with the model as adequately descriptive or nuanced).

132. The knowing instrument is the standard conception. *See* Levinson, *supra* n. 10, at 454-57; Levinson, *supra* n. 9, at 368. The priest is the "regnant" lawyer. *See* Lopez, *supra* n. 131; Levinson, *supra* n. 9, at 367-68.

The standard conception has been much discussed, and goes by several other names, *e.g.* the dominant view, *see* Simon, *supra* n. 34, at 7-9, the libertarian-positivist position, *see* Gordon, *supra* n. 58, and the neutral partisanship position, *see* *The Ethics of Lawyers*, *supra* n. 131. It is also characterized by a belief in the lawyer's role as remaining morally neutral toward the client's means and objectives (and thus pursuing them rabidly) and being morally unaccountable for those means, objectives, and their consequences.

133. Levinson, *supra* n. 1, at 839. Thomas Shaffer has critiqued both visions as holding a "false assumption that the only choices available to lawyers are to do what the client wants (the hired gun approach) or what the client needs (the paternalistic or best interests approach)." Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501, 562 n. 286 (1990) (discussing Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 Notre Dame L. Rev. 231 (1979)).

lawyer's necessary relationship to both the client and the Court, each is bereft of the third critical relationship between the lawyer and the Constitution itself.

Thus, I will propose that we use a model that I call minister, one more complex and dynamic, but one nonetheless more true to the lawyer's oath to uphold the Constitution as both citizen and professional and more true to protestant constitutionalism as espoused by Professor Levinson and his many followers.

### 1. The Priest

The priest is a Catholic clergyman who believes that the only true interpretation of the sacred issues from the Pope. Although the priest is devoted to understanding interpretation and to conveying that interpretation to the laity, the priest serves as a conduit, one who passes on and helps enforce the authorized interpretations from above. Notably absent is any independent ability or authority to relate to the sacred texts and interpret them in accord with the priest's own "best lights."

In constitutional interpretation, this would make the lawyer the authorized spokesperson for the Supreme Court, the one to apply the authorized interpretations of the Court to the concern the client brings, but also the one bound to follow the Court's interpretation, leaving no room for neither the client nor the lawyer to offer a different authoritative view of constitutional meaning emanating either from other branches or from the lawyer's or client's own best interpretation, using appropriate sources and legitimate arguments.

Unsurprisingly, for the lawyer who professes true belief that the Supreme Court is the ultimate arbiter and hence is always right, the Supreme Court interpretation may often match the lawyer's own beliefs about what the Constitution both does and should mean. But the point is, it doesn't matter. If the lawyer disagrees, the lawyer still operates to enforce the constitutional meaning handed down from on high.

Thus, in the example of the selective conscientious objector that Professor Levinson raises in *Constitutional Faith*, the client and lawyer could act consistently with the Constitution only by recognizing the client could not be a conscientious objector, given the Court's definitive pronouncements.<sup>134</sup> This vision meets the Webster's definition of priest as "one authorized to perform the sacred rites of a religion esp. as a mediatory agent between man and God."<sup>135</sup> Here, "God" is the Constitution and the Court.

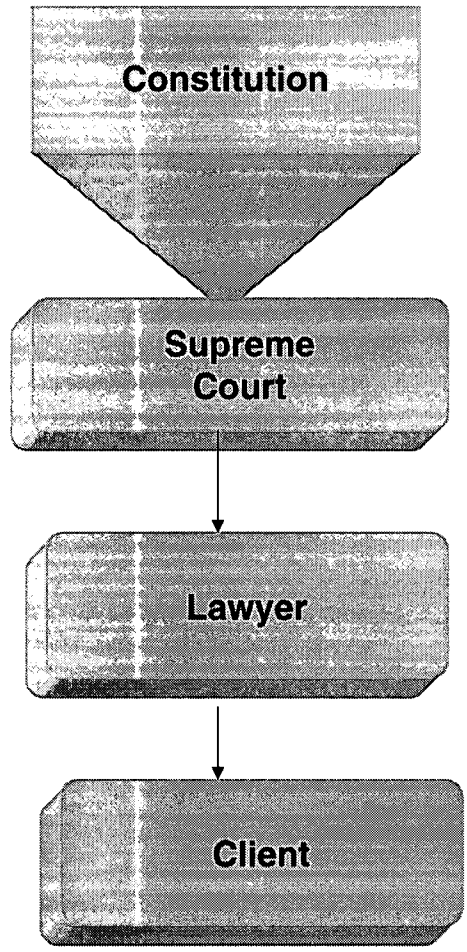
Even if the lawyer reached an interpretation drawn from the Court but not mandated by it, a priest lawyer would impose his or her own interpretation on the client, as the expert. And as Professor Levinson recognizes, if that were the outcome, it would be contrary to "a protestant constitutionalism that is true to

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134. Levinson, *Constitutional Faith*, *supra* n. 2, at 46 (asking "Is a lawyer's primary obligation to 'the law' or to judges who make claims to incarnate the law?" and stating that a priest lawyer would choose the latter answer).

135. *Webster's New Collegiate Dictionary* 933 (Merriam-Webster, Inc. 1991).

### THE PRIEST



itself," because it would recognize only Court interpretive authority, and "substitute a priesthood of lawyers for a pontifical Court."<sup>136</sup>

## 2. The "Knowing Instrument"<sup>137</sup>

Similarly, the knowing instrument adopts a role vis-à-vis the client and the Court that abdicates any independent responsibility to engage in constitutional interpretation. However, far from recognizing Supreme Court authority to govern constitutional interpretation and to affect the way the lawyer pursues the client's objectives, the lawyer cedes all power to the client to determine how to argue what the Constitution means, using the Constitution as well as the lawyer as a means in service of the client's objectives.<sup>138</sup>

The lawyer devolves into a mere tool for client interests and preferences, although he or she may frequently make arguments about constitutional meaning that are both consistent with Supreme Court precedent and match his or her own deeply and reflectively held beliefs about what is "good" constitutionalism. But again, the point is that both of those can diverge—widely—from each other, and the lawyer will still make the client's argument and pursue the client's goals despite its potential to pervert constitutional meaning as the lawyer sees it.

Thus, lawyers may be in the position of not only being an instrument—"a means; a person made use of by another person or being, for the accomplishment of a purpose (tool),"<sup>139</sup> but being a "knowing" one, aware that they are "violating what they swear to support!"<sup>140</sup> That is, the lawyer agrees to follow the dictates of the client in contravention to his or her own beliefs of constitutional meaning, which forces him or her to violate the very Constitution he or she has sworn to uphold.

In both priest and knowing instrument roles, the temptation is not to develop one's own interpretive view, but instead to wait to be told what view to

136. Levinson, *Constitutional Faith*, *supra* n. 2, at 47.

137. *Id.* at 92 (stating "[John Marshall] argued that the very existence of the Constitution presupposes that it 'is to be considered, in court, as a paramount law. . . . Why otherwise . . . does it direct the judges to take an oath to support it?' For judges to enforce unconstitutional laws would be to have them become 'knowing instruments, for violating what they swear to support!'" (citing *Marbury v. Madison*, 5 U.S. 137 (1803)).

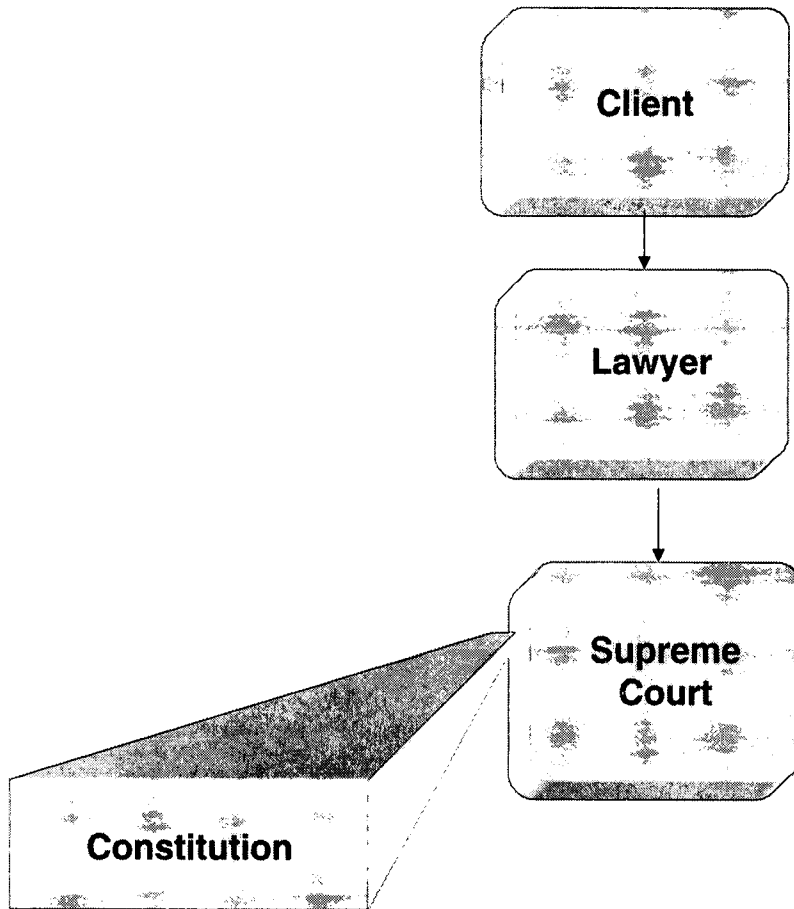
138. This is the model that Levinson addresses in Levinson, *supra* n. 10, at 455-57 (although "not wish[ing] to defend this client-centered model," Levinson notes it is "broadly descriptive" of the way American lawyers practice).

139. *The Oxford English Dictionary* vol. VII, at 1050 (2d ed., prepared by J.A. Simpson & S.C. Weiner, Clarendon Press 1989).

140. Levinson, *Constitutional Faith*, *supra* n. 2, at 92-93 (quoting *Marbury*, 5 U.S. at 180). Obviously, the judge, who has the power of positive law to enforce his or her interpretation of the Constitution, is able to have a much stronger effect upon constitutional law and interpretation than a lawyer, whose argument may be rejected by the Court, and thus not become positive law. However, the argument might be accepted, making the lawyer at least complicit in, and perhaps absolutely essential to, the positive law thus made. And even if rejected, the argument still aligns the lawyer in the conversation with an interpretation that is "incorrect" in the eyes of its advancer, and still corrupts the dialogue and negotiation process. Similarly, the client who has power of decision can use the lawyer in a way inconsistent with the lawyer's beliefs if the lawyer refrains from meaningful conversation on these issues. One should be wary of insisting that lawyers should play such a corrupting role in a process hopefully designed and practiced to lead to a respectable Constitution.



# THE KNOWING INSTRUMENT



hold by whoever is granted the ceded authority to direct the lawyer's role. The lawyer is thus led to be a "bad" citizen, one who does not accept the responsibility of citizenship to engage in independent thought and interpretation about "good" constitutional meaning.<sup>141</sup> And if the lawyer does wish to fulfill his or her citizenship role, he or she may find himself or herself in unpleasant situations/dilemmas where he or she is forced by his or her role definition of priest or knowing instrument to disregard his or her own ability to give input into meaning. That is, he or she will be the "good" lawyer by being the "bad" citizen, a result that Professor Levinson recognizes in *Constitutional Faith* as being difficult to find admirable.<sup>142</sup>

### 3. The Minister

The third alternative, that of "minister," is more difficult to conceptualize and implement. The dictionary definitions of minister reflect the strange ambiguity of the term, which can mean both servant and high-placed official.<sup>143</sup> The term arose in religious contexts to replace the term priest, which was deemed objectionable as implying an erroneous view of the nature of the office,<sup>144</sup> perhaps because of the absence of a papal authority to represent and the presence of a belief in the lay interpretive expertise. Yet, ministers do hold positions of some expertise, partially because they have devoted themselves to lives of study and thought about the sacred texts, and to serving others with their knowledge. Ministers also have an allegiance to a particular religious concept, develop an expertise within it, and are willing to act as a guide through it.<sup>145</sup> While recognizing that each congregant has his or her own ability to interpret, ministers also recognize the role of being a helpful guide and interpreter, of being one who calls for the best of moral worthiness from all actors.

Blending the meanings of minister may help define a role for lawyers and a way of fulfilling it that reflects the lawyer's equally important relationships to three entities: the client, the Court, and the Constitution. Rather than a hierarchy, in which the lawyer has no direct relationship with constitutional interpretation, this model presupposes a network of reciprocal relationships among all four of the identified entities. This model leads to a dynamic interplay of negotiating

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141. Levinson, *Constitutional Faith*, *supra* n. 2, at 167 (questioning the complacency of identifying such activities of lawyers as moral based on a commitment to role and the adversary system and noting that "one can be a 'good lawyer' but nonetheless a dreadful citizen, at least where citizenship implies commitment to achieving that polity most worthy of respect").

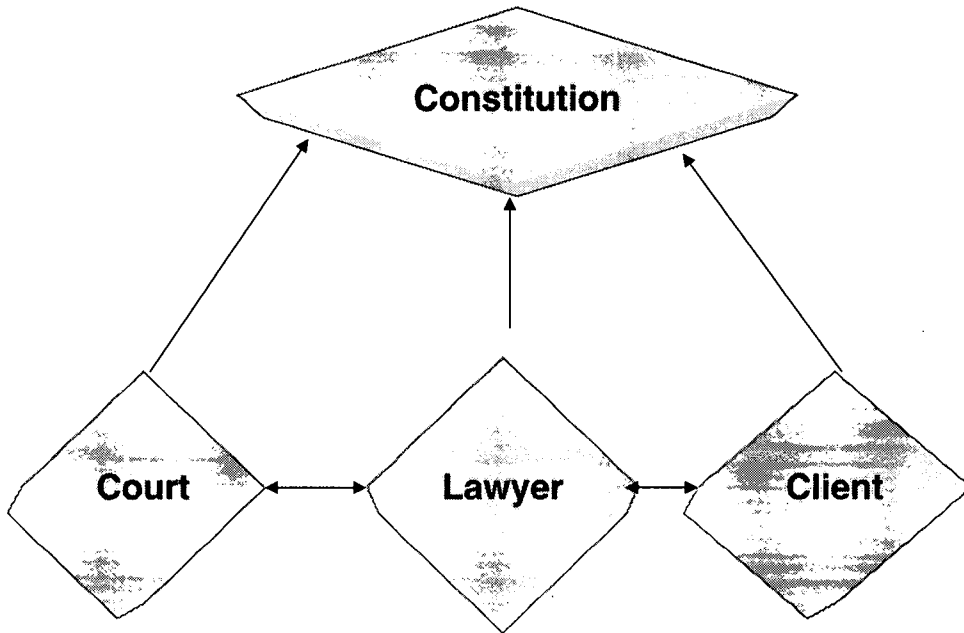
142. Levinson, *Constitutional Faith*, *supra* n. 2, at 168.

143. *Webster's Third New International Dictionary of the English Language Unabridged* (Philip Babcock et al. ed., Merriam-Webster, Inc. 2002) ("one [who] acts under the orders or authority of another") ("one that waits upon or serves") ("high officer of state entrusted . . . with management . . .").

144. *The Oxford English Dictionary* at 818 ("employed . . . by those at first who objected to the term[ ] priest . . . as implying [an] erroneous view[ ] of the nature of the sacred office").

145. Sol M. Linowitz with Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* 12 (C. Scribner's Sons 1994) (stating that the relationship of lawyer and client should be seen as clergyman and parishioner, "where it is understood that the clergyman is not subservient to the parishioner").

# THE MINISTER



processes as each actor attempts to fulfill both his or her identified role and his or her responsibility to confront the Constitution seriously, with a commitment to making it "good."<sup>146</sup>

*Constitutional Faith* discusses the "conscientious oath-taker" who has an independent duty to measure proposed actions "against his or her thought-out conception of the Constitution,"<sup>147</sup> and the idea of need for moral reflection.<sup>148</sup> Fulfilling a responsibility to reach "self-conscious decisions on meaning" does not provide "license [to] . . . do 'whatever [one] think[s] best' in any uncomplicated sense." Rather, one, including an attorney, could defer to recognized interpretations of primary decisionmakers, unless an extraordinary event led to the need to confront assumptions.<sup>149</sup> When interpreting, some deference to the Constitution itself must override pure individual choice: actors should "decide to resolve any of their own mental disputes in favor of the conception of the Constitution most worthy of respect."<sup>150</sup>

Part IV of this paper attempts to come to grips with how a minister lawyer would fulfill his or her role as constitutional interpreter, citizen, and client representative, and how he or she could become a positive part of the process of constitutional dialogue and negotiation of meaning.

### III. IMPEDIMENTS TO THE SEARCH FOR THE LAWYER'S ROLE IN CONSTRUCTING MEANING

#### A. Professional Responsibility Formalism

One of the great difficulties in assessing the role a lawyer has in defining the Constitution is that there is great tension between the "traditional" practice of deferring totally or substantially to the client<sup>151</sup> in choosing and pursuing constitutional claims and arguments and the protestant constitutional practice of exercising independent judgment about what is good for the development of the Constitution. This difficulty is exacerbated if one has trouble deciding how

146. This is a model of "engaged lawyering" that is reflective of Professor Levinson's general commitment to engaged citizenship. One refuses to be a "thoughtless cheerleader for the law," and is willing to forego one's own rights, even defy the law; a model he refers to as "light-years away from the Holmesian view of the lawyer as austere instrument of the client, which now prevails." Levinson, *supra* n. 54, at 68.

147. Levinson, *Constitutional Faith*, *supra* n. 2, at 123.

148. *Id.* at 86.

149. *Id.* at 84.

150. *Id.* at 78.

151. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, in *The Legal Profession: Responsibility and Regulation* 162, 163 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988) (describing this view as "where the attorney-client relationship exists, it is often appropriate and many times even obligatory for the attorney to do things that . . . an ordinary person . . . should not do . . . . [This] required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance [is expected because it is the lawyer's] duty to make [his or her] expertise fully available in the end sought by the client, [i.e., to be] an amoral technician"). This traditional almost total client deference is referred to variously as the standard conception, the dominant view, the libertarian-positivist position, and neutral partisanship. See *supra* n. 132.

indeterminate or positivist the actual role of the lawyer and the law of lawyering is (or should be recognized to be). The more indeterminate the role of lawyer and the law of lawyering, the more room there is for judgment, but the more difficult it is for lawyers to discern proper action.<sup>152</sup> This raises the specter of both greater opportunity for good choices and greater risk of poor choices.<sup>153</sup> Yet, if one substitutes simple formalism and positivism into the law of lawyering, there is less opportunity for independent, nonself-interested reflective decisions—including joint lawyer-client decisions—to be made.

Unfortunately, formalist positivism seems to be the dominant model for assessing professional responsibility,<sup>154</sup> although much recent scholarship focuses upon exposing that model as incomplete and empty.<sup>155</sup> Positivism in professional

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152. See Levinson, *supra* n. 4, at 2022 (critiquing broad injunctions to be a public-regarding lawyer because they are too vague for guidance, unfair to use for discipline, and lack “norms designed to guide lawyers in doing their work”); cf. Balkin & Levinson, *Legal Historicism*, *supra* n. 3, at 184 (noting “with . . . room to maneuver comes moral responsibility”).

153. See Tremblay, *supra* n. 131, at 11-12 (the sophisticated philosophical discussions of how lawyers should mesh their roles with moral activism “strands” lawyers by implying they need to exercise sophisticated philosophical judgment; there is a real risk in permitting judgment without giving a reliable method for exercising it). Tremblay further states, “the traditional approach offers predictability at the possible cost of moral corruption, the various activist approaches sacrifice some of that certainty for a gain in integrity.” *Id.* at 63; see Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 *Geo. Wash. L. Rev.* 169, 184 (1997) (vagueness in according discretionary latitude can result in arbitrariness and unequal client representation or self-interest trumping other considerations).

I might suggest that the tension that exists between client representation and independent judgment, between indeterminacy and positivism, is a tension that is good. Maybe it marks the nature of the negotiation of meaning that must occur. Removing that tension, or altering its balance, can lead to poorer results in decisionmaking. The need to interact with the client provides a conversational check on the lawyer’s isolated judgment, a check that is missing if the lawyer accepts the client’s isolated, self-interested judgment without such dialogue.

154. See Simon, *supra* n. 34, at 3-4, 17-18 (stating how the “revolt against formalism” and positivism in other areas of legal thought and theory undermine lawyers’ conceptions of their role, and should undermine the “dominant view” or standard conception of that role, but instead, legal ethics “through a remarkable act of intellectual segregation” has “enjoyed relative immunity from these critiques”), 7-13 (explicating the dominant view and alternative conceptions of lawyer ethics, and critiquing styles of legal ethics that adopt “categorical” rather than contextual approaches to resolving tensions and dilemmas among the lawyer’s responsibilities); Rhode, *Ethics in Practice*, *supra* n. 8, at 12-13 (describing how lawyers have adopted ethical standards that they are willing to see enforced, generally standards that avoid hard questions of judgment (or at least do not make the lawyer responsible for judgments made), and that minimize responsibilities to anyone other than direct clients).

155. David B. Wilkins, *Legal Realism for Lawyers*, 104 *Harv. L. Rev.* 468, 470, 476 (1990) (rule indeterminacy is a direct challenge to the professional responsibility assumption that lawyers can determine the bounds of the law, and thus will know how to mediate between client and public interests, threatening to “collapse the distinction between the lawyer’s public responsibility to obey the law and her private responsibility to represent her client effectively”); for general critiques of the conception and its purported bases and effects on the practice of law, see Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press 1993); Simon, *supra* n. 34; David Luban, *Lawyers and Justice: An Ethical Justice* (Princeton U. Press 1988); *Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation*, *supra* n. 8; Gordon, *supra* n. 58. For a critique that exposes the poverty of the conception for achieving other important client goals and social interests, see Carrie Menkel-Meadow, *The Limits of Adversarial Ethics*, in *Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation*, *supra* n. 8, at 123.

Another criticism of the standard conception is found in comparative law perspectives. Even the English system, an adversary system as our own, finds the standard conception of the suppression of the lawyer’s responsibility for the public and the system of law problematic (and unnecessary). More global perspectives make clear that the use of the tenets of this conception undermine some of the most important values of client representation, often giving way to raw power overriding the rule of law in the guise of attorney fidelity to client interests. An inability to imagine a system based

responsibility can go in two directions. One, using the "zealous representation"<sup>156</sup> banner, reduces the lawyer to a tool of the client, removing discretionary judgment in favor of making all judgments "must" unless a positive rule states "must not," *i.e.*, the vision of lawyer as knowing instrument.<sup>157</sup> The other uses the rule giving the lawyer control over legal strategy<sup>158</sup> to enforce a paternalistic vision of the lawyer imposing his or her own legal interpretations onto the client's cause.<sup>159</sup> This view is consistent with the lawyer as priest (if the lawyer adopts the Court's view of an issue) or the lawyer as instrument (if the lawyer adopts the legal argument he or she determines is best for the client). Neither offers a nuanced vision of the lawyer-client relationship. Each substitutes a definitive right or wrong answer about the lawyer's role for a less certain or ambiguous answer about how the lawyer best fulfills his or her multiple obligations to client, system, and justice.<sup>160</sup>

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differently is thus a failure of imagination, not an inevitability of respecting client autonomy and supporting democratic process. See Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 Vand. J. Transnatl. L. 931 (2001); Mark Zimmet, *Ethics in International Commercial Litigation and Arbitration*, in *Litigation and Administrative Practice Course Series Handbook No. 624*, at 361, 415 (P.L.I. 2000); Karen L.K. Miller, *Zip to Nil?: A Comparison of American and English Lawyers' Standards of Professional Conduct*, CA32 ALI-ABA 199, 208 (1995).

156. ABA Model Code of Prof. Resp. EC 7-1 (ABA 2002); ABA Model R. Prof. Conduct, Preamble (2002).

157. This is a view of advocacy tracing its roots back to Lord Brougham. See Gillers, *supra* n. 8, at 346-47; ABA Model Code of Prof. Resp. EC 7-7 (authority to make decisions is exclusively the client's, and if made within the framework of the law, those decisions are binding on the lawyer).

158. See ABA Model R. Prof. Conduct 1.2 (a): "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are pursued." This distinction between objectives and means is used to give the lawyer responsibility for legal decisions, including tactical decisions on strategies to use and technical issues of law. See Ronald D. Rotunda, *Professional Responsibility: A Student's Guide* 66-67 (West Group 2002-03); ABA Model Code of Prof. Resp. EC 7-7 (a lawyer's own decision should not affect the merits of the cause or substantially prejudice the rights of the client).

Ann Southworth's empirical work shows that some "cause" lawyers, especially those in legal aid or class action settings, routinely use their own judgments rather than trying to ascertain client wishes in what may be difficult or impossible settings within which to do so, although there is also a great deal of deference to client goals and input, especially in community-based organizing lawyering. Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 Fordham L. Rev. 2449, 2468 (1999) [hereinafter Southworth, *Collective Representation*]; Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers' Norms*, 9 Geo. J. Legal Ethics 1101, 1105, 1138 (1996) [hereinafter Southworth, *Lawyer-Client Decisionmaking*].

159. Cf. Monroe H. Freedman, *Personal Responsibility in a Professional System*, in *The Ethics of Lawyers* 81, 82-84 (David Luban ed., N.Y. U. Press 1994) (detailing some statements of prominent lawyers and judges in support of this vision of lawyering); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, in *The Legal Profession: Responsibility and Regulation* 162 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988) (noting in 1975 that the two major critiques of the profession were: the amorality of the lawyer's role toward others in the lawyer-client relationship and the lawyer paternalistic domination in the lawyer-client relationship).

160. Gordon, *supra* n. 58, at 43 ("'Ethics' has come to mean either: (1) the detailed technical rules in the professional-ethical codes; or, alternatively, (2) a strictly personal morality . . ."); Rob Atkinson, *Lawyering in Law's Republic*, 85 Va. L. Rev. 1505, 1509 (1999) (reviewing Simon, *supra* n. 34: "Simon finds a parallel fault in the standard decisionmaking strategy of the Dominant View. That strategy, he points out, is 'categorical,' by which he means that 'a rigid rule dictates a particular response in the presence of a small number of factors'"); see *id.* at 1517 (Simon eschews replacing the current system of mandatory rules and sanctions with another; he proposes a way of lawyering, not a set of rules).

The current practice of viewing the lawyer role vis-à-vis the client as subject to positive law contained in the Rules of Professional Conduct owes much to history. Indeed, the history of written professional responsibility codes is one that seems to be moving inexorably away from aspirational and general principles of good conduct toward a Code that includes both aspiration, principles and rules on the issues thought to be susceptible to definitive answer, and then to a set of Rules, ever more certain and prescriptive of behavior.<sup>161</sup> Coupled with the desire to avoid hard questions, this system of positive rules is artlessly interpreted by more and more practitioners as a mere series of mandates and prohibitions.<sup>162</sup> It devolves into a set of commands about what one must or must not do. The gray areas, in which discretion can be exercised, become instead another set of positive commands: if there is no prohibition, then one must do it for the client as part of the zealous representation imperative. This positivist conception of professional responsibility, implicit in the label “law of lawyering,” removes the components of ethics and judgment,<sup>163</sup> leaving the lawyer with little power to give input into what

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161. Rhode, *Ethics in Practice*, *supra* n. 8, at 3, 12-16; Gillers, *supra* n. 8, at 4-6. The history of the American Bar Association and other large organized bars is fraught with problems related to the lawyers who organized the bars conceiving them as more or less exclusive clubs for those lawyers who were, like them, privileged, high-prestige practitioners with access to relatively greater wealth and power. The ABA became a “professional protective organization” which fought to maintain control. Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America*, in *The Legal Profession: Responsibility and Regulation* 82, 84 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988); James W. Hurst, *The Growth of American Law*, in *The Legal Profession: Responsibility and Regulation* 79, 81-82 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988). See C.F. Taeusch, *Professional Ethics*, in *The Legal Profession: Responsibility and Regulation* 90, 90-92 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988) (noting in 1934 that American professional ethics standards were more extensively codified than elsewhere in the world, and that ethical rules and regulations of the profession “suffer from overformalization and often they lack a sense of relative values”). Hazard and Rhode point out that the first attempts to publish ethical norms occurred in the twentieth century, and that they ignored previous nineteenth century writings that had more emphasis on the notion of complex normative obligations of lawyers. While Murray Schwartz charges that the history of codification “reflects diminishing interest in ethical aspirations and a greater reliance on minimum prohibitions,” Hazard defends the Model Rules as enforceable requirements—a code of legal standards rather than of ethics. Rhode challenges the norms implicit in that devolution as potentially socializing “to the lowest common denominator of conduct that a highly self-interested constituency will publicly brand as deviant,” and notes the problem that it may thus “fortify the illusion that the profession’s moral responsibilities have been adequately identified.” *Legal Profession: Responsibility and Regulation*, *supra* n. 8, at 93-94 (citations omitted).

162. Levinson, *Constitutional Faith*, *supra* n. 2, at 87 (stating that artless positivism denies the necessary link that morality be infused into law by its practitioners). See Rhode, *Ethical Perspectives*, *supra* n. 8, at 170, 177 (the refuge in the standard conception of being required to make all arguments on behalf of the client, without exercising moral reflection or discretion, leads “lawyers’ sensitivities [to] atrophy, or narrow to fit the constricted universe dictated by role”).

163. Simon, *supra* n. 34, at 195 (noting that “Discussions of legal ethics have a tendency to collapse into discussions of lawyer regulation . . . when people assume that an ethical criticism of lawyering could be plausible only if it were susceptible to formulation and enforcement as a disciplinary rule.”); Anthony T. Kronman, *The Law as a Profession*, in *Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation*, *supra* n. 8, at 29 (stating that legal ethics is an increasingly rule-bound discipline). This tendency is one Professor Levinson seems to adopt in both *Frivolous Cases*, Levinson, *supra* n. 9, and “*Impractical*” *Scholars*, Levinson, *supra* n. 4. This result is not necessarily surprising, as the attempt to codify ethics undermines the very essence of ethics, paving the way for the substitution of a legalized view of conduct for ethical judgment. John Ladd, *The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion*, in *The Legal Profession: Responsibility and Regulation* 105, 105

might be deemed "good" constitutionalism (as distinguished from mere instrumentalism).<sup>164</sup> Thus, positivism in the conception of professional responsibility impedes addressing the lawyer's role in contributing meaning within the indeterminate enterprise of constitutional interpretation.

The conjunction of formalism in professional responsibility thought and indeterminacy in law has led to the extreme version of the standard conception as the clearest port in the storm. It lets lawyers cope with the uncertainties of law by pretending that ethics during representation is certain, quick, and easy—one need not exercise independent judgment, but merely follow the client's dictates. Thus, indeterminacy in law has become a rationalization for fashioning and following formalist dictates to make unbelievable and unworthy arguments. Lawyers' training in coping with indeterminacy in law should instead be a guide in how to cope with the equally challenging indeterminacies of morality and politics that affect the largely discretionary ethical responsibilities during client representation.<sup>165</sup>

### B. Nihilism

Another impediment to addressing this question is a view that the ability and responsibility to contribute to the ongoing conversation about the meaning of the Constitution means that any individual view is as good as any other, that any actor can be his or her own interpreter of law, a law unto one's self, that each of us should form our own view of the Constitution and refuse to abide by anyone else's view, including that of the legislature embodied in statutory law or of the judiciary embodied in court-made law.<sup>166</sup> This nihilistic, simplistic, anarchistic vision is one that appears, with somewhat varying degrees of complexity, in the American Patriot Movement<sup>167</sup> or in Ed Meese's now-infamous remark.<sup>168</sup> It belies the

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(Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988); Gillers, *supra* n. 8, at 9-10 (asking whether "real ethics" are part of the ethics of lawyers).

Note that this tendency toward mandate or prohibition seems to underlie Professor Levinson's criticism of professional norms that provide little explicit guidance for behavior, and his fear that an aspiration not met might result in discipline, despite its vagueness. Levinson, *supra* n. 4, at 2022. Interestingly, if we use Professor Levinson's "impractical" theory to examine lawyering, we find a legitimizing basis for arguing that the client should not control the lawyer's argument out of sheer self-interest, but that the lawyer's independent duty of constitutionalism permits him or her to be public-regarding in representing that client (a model closer to the one Judge Edward's supports). *Id.* at 2019-20.

164. Such positivist instrumentalism seems to account for much of why slavery did so well in our system. See Levinson, *Constitutional Faith*, *supra* n. 2, at 169; Balkin & Levinson, *supra* n. 22, at 1017. By teaching law students the role that "good" lawyers played in preserving slavery, Levinson hopes they will question the values their future arguments will serve. *Id.* Why equip them to ask these questions if they are not also professionally entitled and empowered to answer them in their actions during representation (*i.e.*, to refuse to make arguments they firmly believe are morally unworthy or evil?).

165. E.g. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 Notre Dame L. Rev. 1 (1999).

166. Professor Levinson argues against this extreme vision in *Constitutional Faith*. Levinson, *Constitutional Faith*, *supra* n. 2, at 84.

167. Wilson Huhn, *Political Alienation in America and the Legal Premises of the Patriot Movement*, 34 Gonz. L. Rev. 417, 432 (1998-99).

168. Meese stated that the Supreme Court's decisions are binding only on the parties appearing before the Court, and are not binding on other citizens: "[S]uch a decision does not establish a supreme



subtlety of both indeterminacy theory and of Professor Levinson's theory of protestant constitutionalism.<sup>169</sup> For lawyers, it can become a "false belief that law's boundaries either do not exist at all or do not apply to them."<sup>170</sup>

One must be cognizant not only of the views of other interpreters, but also of the important distinction between interpretation and the force of positive law—a force that institutional government actors have, whether or not we agree with their interpretation of the Constitution. One must also be sensitive to appropriate role constraints when advancing constitutional meaning, *i.e.*, to the proper processes of constitutionalism. Thus, the lawyer's role cannot be to advance any individual interpretation the lawyer wishes, without reference to client interests, institutional context, or extant law and interpretation on the issue.<sup>171</sup> But neither is it sufficient to argue that lawyers cannot know the right or better answer, and that therefore they should eschew making any judgments.<sup>172</sup>

C. *Complexity of Describing Alternative Conceptions of the Lawyer's Role as Both "Citizen" and Representative*

Defining the lawyer's role necessitates respecting the role the lawyer plays in the process of decisionmaking, as well as respecting the lawyer's substantive interpretive input as an added voice in the constitutional conversation. But it also requires respecting the role other actors (especially clients and judges) play in those processes. Each actor should participate in the conversation with an appropriate boundary set by role and the overall process of constitutional interpretation and application.<sup>173</sup>

law of the land that is binding on all persons and parts of government henceforth and forevermore." See Levinson, *Constitutional Faith*, *supra* n. 2, at 40, 39-41; Levinson, *Meese*, *supra* n. 24.

169. Levinson, *Constitutional Faith*, *supra* n. 2, at 79, 84-85; *supra* n. 34. Note the reverberations with cognitive theory: dualism, multiplicity, perspectivity, with the contextual constraints, the knowledge of good sources and modes of argument and analysis, the ability to exercise judgment among competing alternatives in light of disciplinary conventions. K. Patricia Cross & Mimi Harris Steadman, *Classroom Research: Implementing the Scholarship of Teaching* 184-90 (Jossey-Bass 1996) (explaining the developmental stages of modes of thinking and reasoning, from an absolutist or categorical approach through a transitional approach focused on uncertainty and unable to exercise judgment about quality of knowing, through independent knowing and finally to contextual knowing, which "values thinking through problems and integrating and applying knowledge in context in light of evidence").

170. Koniak & Cohen, *supra* n. 46, at 180.

171. In a slightly different context, that of lawyer exercising independent moral judgment during client representation, William Simon suggests that the boundaries of appropriate independence to reach a moral judgment that will affect how the lawyer represents the client should be drawn from the existing constraints and legal principles that surround the legal order and the lawyer-client relationship. Simon, *supra* n. 34, at ch. 6; William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083 (1988); Gordon, *supra* n. 58 (seeking boundaries in the shared political and legal ideals of the society).

172. Rhode, *Ethical Perspectives*, *supra* n. 8, at 170, 176-77 (noting this argument and its disingenuousness from lawyers who constantly make just such sorts of judgments about all other aspects of law and who can judge without being coercive).

173. Lawyers may have a good deal of latitude in advancing interpretations, consistent with their representative role. Yet, boundaries are relatively clear in requiring that the input be made through the channels of representation, be it in a lobbying, consulting, or litigating role. In addition, the lawyer needs to know and respect positive law. If challenging the law, the lawyer must identify the law opposed, should make clear it is an argument to change law, and should make the client aware that violations of that law subject one to the consequences. ABA Model R. Prof. Conduct 3.3; ABA Model R. Prof. Conduct 2.1 ("render candid advice"); ABA Model Code of Prof. Resp. EC 7-5. It is not

Determining the relative roles and responsibilities of clients and lawyers during representation is a difficult problem that has earned attention and the considerable energies and talents of some redoubtable legal minds. The standard, or dominant, conception has the great advantage of being easy to state and easy to adhere to as a practicing lawyer—one defers to the client and makes all arguments plausibly legal in dogged pursuit of the client's perceived interests. Primary justifications rest upon serving client autonomy and the felt necessities (and strengths) of the adversary system.<sup>174</sup> This conception has the virtue of appearing intellectually rigorous and tight, hence most defensible. It is a relatively straightforward injunction that guides and predicts lawyer behavior, if followed, leaving little open to question (assuming that lawyers know the bounds of the law including the strictures of professional ethics). It achieves that rigor falsely, however. The tightness comes from deflecting philosophical and moral criticisms onto the two component premises: the value of client autonomy (and the lawyer as

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contributing to the constitutional conversation to engage in subterfuge or hidden behavior that undermines an authoritative interpretation currently embodied in the positive law.

In seeking that boundary for lawyers, looking at the role of legislator vis-à-vis constitutional interpretation may help illuminate how interpretation interacts with the process and role of a representative. Certainly there is some tension in the role of legislator (do what loudest portion of constituency wants vs. what moneyed interests want vs. what is in best interests of whole constituency vs. what serves the broader public interest vs. what the Constitution demands as limits). However, it is a more attenuated relationship, and does not approach the quality of agency and representation that is the core of the lawyer-client relationship (if only because there is presumably a relatively singular interest embodied by the client that can never be captured by the constituency of a legislator or executive). No one would argue that the legislator should not exercise independent judgment on issues of constitutional import, but instead should do simply what his or her constituency wants or would be benefited by. Legislators who exercise judgment come readily to mind. The respect in which Senator John McCain is held emanates partly from his willingness to act against campaign contributions that he sees as corrupting the process of government, despite arguments that limits on campaign contributions and spending are prohibited by authoritative interpretations of the First Amendment. And when Senator Paul Wellstone died in October 2002, the regard in which he was held for voting his conscience on an increasingly minority liberal position was evident in the news stories. His vote against granting the President power to attack Iraq was held up as a reason to hold him in esteem, whatever one thought of the policy or constitutional meaning of the vote. Indeed, as my colleague Will Huhn notes, in the recent past legislators have been released from voting a party line when votes of great constitutional moment are held, as in the Nixon and Clinton impeachment votes and the Iraq Resolution votes.

A challenge should be visible, made through recognized processes. A fine example of this is a former client of mine, Mark Schmucker. *U.S. v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983) (*Schmucker I*), rehearing denied, 729 F.2d 1040 (6th Cir. 1984), cert. granted and judgment vacated, 471 U.S. 1860 (1985), remanded, 766 F.2d 1582 (6th Cir. 1985), on reappeal, 815 F.2d 413 (6th Cir. 1987) (*Schmucker II*); Elizabeth Reilly, "Secure the Blessings of Liberty": A Free Exercise Analysis Inspired by Selective Service Nonregistrants, 16 N. Ky. L. Rev. 79 (1988). Mr. Schmucker, a conscientious objector to the draft registration law, refused to register. But unlike the thousands of hidden nonregistrants, Mr. Schmucker wrote a letter to the Selective Service Administration detailing his reasoning for refusing to register. *Id.* at 80. That letter earned him prosecution, but it also engaged him in the constitutional conversation. *Id.* at 87. When his challenge to the prosecution (as being based impermissibly upon his exercise of the First Amendment rights to speak, petition the government, and exercise his religion freely) failed, Mr. Schmucker served two years as an aide in a home for the profoundly mentally disabled for his sentence.

174. Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613 (autonomy); Monroe H. Freedman, *Understanding Lawyers' Ethics* (M. Bender 1990) [hereinafter Freedman, *Understanding*]; Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill 1975) [hereinafter Freedman, *Lawyers' Ethics*] (grounding many ethical duties in the necessities of the system, which is defended); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976).

agent and voice of that client rather than as an independent entity) and the virtues of the adversary system as the method for attaining truth or justice (*i.e.*, the inputs need not be concerned about their closeness to truth or justice, because the system itself will find them in the clash of opposing stalwarts). Since neither premise is without its difficulties and conundrums,<sup>175</sup> the standard conception “rises” above conundrum by ignoring them.<sup>176</sup>

But this advantage comes with a price. First, the conception does not accurately reflect the actual practices of lawyers, who report that they exercise ethical discretion more often than the strong version of the standard conception would explain<sup>177</sup> and that they make a number of decisions that the standard conception would leave to clients.<sup>178</sup> This means that the prevalence of the conception authorizes both reflective and unreflective (hired-gun or paternalistic) representation, rationalizing amoral or immoral behavior.<sup>179</sup> It also means that those lawyers who choose to use the discretionary room are on their own in determining how to exercise that discretion consistently with their lawyerly role as opposed to consistently with their personal moral or political beliefs.<sup>180</sup> The conception thus does not prevent lawyerly discretion, but leaves it unguided, resulting in more paternalistic impositions of personal<sup>181</sup> (and likely socially

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175. Simon, *supra* n. 34 (detailing but critiquing the premises); Rhode, *Ethics in Practice*, *supra* n. 8, at 9-12 (asserting and critiquing the premises); Thomas L. Shaffer *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963 (1987) (arguing that client autonomy as a value is an inappropriate emphasis).

176. Rhode, *Ethical Perspectives*, *supra* n. 8, at 170, 178 (“retreat into role fails even to confront, let alone resolve, the moral difficulties it raises”).

177. Southworth, *Lawyer-Client Decisionmaking*, *supra* n. 158, at 1138 (discussing lawyers departing from endorsement of the principle of no independent lawyer judgment “where they could not stomach the client’s objectives or where they doubted their clients’ abilities to make sound decisions. . . . Thus, even lawyers who expected their clients to exercise substantial autonomy sometimes were unwilling to yield to client commands that interfered with their core professional commitments regarding purpose and craft.”); Susan Daicoff, (*Oxymoron?*) *Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 Fla. L. Rev. 197 (1996) (noting that lawyers report engaging in more discretionary and ethical decisionmaking than might be predicted, that they exercised apparently different levels of ethical reasoning in different types of situations, that they used non-codified reasons for their choices, and that they used case-by-case analysis in making moral decisions).

178. *E.g.* Koniak & Cohen, *supra* n. 46 (detailing decisions made by attorneys in large class action litigation that supplant client input and interests); Southworth, *Lawyer-Client Decisionmaking*, *supra* n. 158, at 1105-06, 1110-41 (noting the differences in levels of lawyer deference to client desires as related to sorts of civil liberties practices, funding sources, and general political vision of the attorney).

179. *E.g.* Gordon, *supra* n. 58, at 53 (stating that the legal culture, by dint of the prevalence of standard conception rhetoric, has fallen out of the habit of thinking about public obligation during representation); Rhode, *Ethics in Practice*, *supra* n. 8, at 12 (stating that the long run effect of practicing under the standard conception and its belief system about the adversary system imposes high costs, corrupted judgment, and the ability to rationalize serious ethical lapses in the resulting climate that prevails).

180. *E.g.* Daicoff, *supra* n. 177, at 245, 247 (lawyers use contextual analysis in ethical decisionmaking that is unpredictable in the rationales and variables used; the study seems to suggest that “codes of ethics are insufficient and inadequate in assisting lawyers to identify ideal or optimal ethical behavior”).

181. *See* Freedman, *supra* n. 159, at 82-83 (citing some famous lawyers and jurists giving strong paternalistic visions of overriding client choice), 90-91 (arguing that lawyers commonly preempt client moral judgment by assuming that all arguments they are willing to make are those the client would want, thus substituting their judgment in cases where the client’s morals might urge a more moderate position).

dominant)<sup>182</sup> views on clients (undercutting both autonomy and value adversariness). Second, for those lawyers who attempt to adhere to the conception (or who face those who use it vigorously to rationalize virtually indefensible actions and arguments), the conception leaves a moral vacuum that has been attributed with the growing sense of alienation and dissatisfaction that infects lawyers—the sense that it is indeed difficult to be both a good lawyer and a good person.<sup>183</sup>

Alternative conceptions that attempt to reintroduce the conundrums of exercising moral and political judgment directly into client representation are criticized on at least two grounds. First, critics claim that they provide no intellectually rigorous way of regulating behavior by explaining and offering specific guidance to practitioners.<sup>184</sup> Hence, lawyers are purportedly left to make decisions based upon personal preference and paternalistic practices. Second, the substitution of personal values for client interests is decried as betraying a fundamental aspect of the lawyerly relation, overriding client autonomy and interest.<sup>185</sup>

Attempts to cabin the discretion by appealing to the substance of the legal system and its accepted values<sup>186</sup> are dismissed as intellectually muddy and too indeterminate to provide real assistance<sup>187</sup> (although lawyers do this work everyday for every other legal question that confronts them).<sup>188</sup> Of course, this is no different from the real state of affairs that empiricists have documented.<sup>189</sup> In fact, it appears to be better in at least two regards. One, the lawyers are self-

182. This is a frequently stated criticism of Anthony Kronman's position about lawyer-statesmen and William Simon's position, which seems to assume powerful clients. *E.g.* Dinerstein, *supra* n. 133, at 558-59; Anthony V. Alfieri, *Denaturalizing the Lawyer-Statesman*, 93 Mich. L. Rev. 1204, 1206, 1216 (1995) (criticizing the elite and corporate nature of the lawyers Kronman credits with good judgment, and the lawyer-centered nature of deliberation that Kronman then endorses).

183. *E.g.* Simon, *supra* n. 34, at 1-4; Rhode, *Ethics in Practice*, *supra* n. 8, at 3 (questioning how one can live a life of integrity, given the tension in these competing demands); Freedman, *supra* n. 159, at 82 (noting the increasing attention to the question in the literature).

184. *E.g.* *The Ethics of Lawyers*, *supra* n. 131, at xviii-xxi (citing and describing such critiques, which are then represented by essays contained in this edited book); Geoffrey C. Hazard, Jr., *Law Practice and the Limits of Moral Philosophy*, in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation*, *supra* n. 8, at 75, 89-90; Rhode, *Ethics in Practice*, *supra* n. 8, at 18; Rhode, *Ethical Perspectives*, *supra* n. 8, at 176.

185. *E.g.* *The Ethics of Lawyers*, *supra* n. 131, at xviii-xxi (citing and describing such critiques, which are then represented by essays contained in this edited book).

186. Such attempts have been made by William Simon, *see* Simon, *supra* n. 34 (locating boundaries in the substance of justice and the legal system); Gordon, *supra* n. 58, at 43-44 (stating that lawyers are agents of both clients and the common framework of our institutions, norms and customs), and Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. Rev. 1 (1988) (urging a public-grounded boundary deriving from the civic republican tradition); Wendel, *supra* n. 165, at 28 (describing David Luban's system); *id.* at 37, 112 (urging a casuistic model of reasoning that accounts for social and community and legal norms).

187. For a more nuanced criticism, *see* Atkinson, *supra* n. 160, at 1517, 1519, 1529. Atkinson critiqued earlier Luban and Simon proposals for failing to provide a satisfactory meta-ethics to replace neutral partisanship and its ethical grounds, and later proposals as being unduly optimistic about the ability of moral or justice consensus to exist or to "get it right." *See The Ethics of Lawyers*, *supra* n. 131, at xviii.

188. *See* Rhode, *Ethical Perspectives*, *supra* n. 8, at 176-78.

189. *See supra* n. 177.

consciously struggling to prevent mere personal preference from overriding client values and interests. They know that they must justify any decision to differ from the client by reference to ideals that transcend personal preference.<sup>190</sup> Two, the models all reflect a strong requirement for extensive lawyer-client communication and input, utilizing a client-centered approach as a basis and moving toward collaborative discussions and decisionmaking as the outcome of lawyer moral input and judgment.<sup>191</sup>

Thus, a major advantage of this approach is to remove the false deflection of the difficult questions that obscure the seriousness of the lawyering enterprise and the need for it to be self-consciously and conscientiously engaged in. By privileging the need to reflect and discuss, this model supports common lawyer behavior and belief, gives more guidance than is otherwise available, and continues the conversation and search for grounding that promises even better guidance might be available in the future.

Neither model can remove the dangers of arbitrariness or paternalism, but the first model supports some affirmatively bad results, while the second model eschews those methods and results. The first model leaves lawyers unguided in conforming their moral and political instincts to their role. The second model suggests both methods and content for the reflective and conversational processes within the lawyer-client relationship that will facilitate more productive negotiation of constitutional meaning.<sup>192</sup>

Neither model can dispense with the reality of moral pluralism and human inability to define truth and justice or the reality of conflicting sets of values and desirable goals. Both should be judged on how well they assist lawyers and clients in coping with those realities, not on how effectively they ignore those realities to fashion bright-line regulations that make the task look easy or the conflicts appear resolved.

It is difficult to imagine a lawyer contributing to constitutional interpretation without client involvement and without some concrete instance within which the

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190. A framework that insists "on an ethical predicate, on an attempt systematically to justify the consequences of professional action[,] . . . [does not] imply that systematic reflection will yield determinate resolutions, or . . . overlook the [limitations of moral methodology]. . . . There may be no uncontrovertible answers, *but there are better and worse ways of thinking about the questions.*" Rhode, *Ethical Perspectives*, *supra* n. 8, at 179 (emphasis added).

191. *Id.* (urging that we create more channels for "serious normative dialogue"); e.g. Alfieri, *supra* n. 182, at 1217 (citing David Wilkins as having a more client-centered approach than does Kronman to the deliberative enterprise between lawyer and client), 1227 n. 108 (citing Amy Gutmann's proposal for practical judgment that involves deliberation with lawyers and clients); Anthony V. Alfieri, *Practicing Community*, 107 Harv. L. Rev. 1747, 1757 (1994) (citing Lopez's rebellious lawyering model that relies on collaboration of lawyer and client, and openness to being educated in both directions); Dinerstein, *supra* n. 133, at 505 (touting the "important dialogic opportunities" in a fully realized lawyer-client relationship), 534 (approving approaching clients "openly" and having "tentative deliberation about the decision"); Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 Mich. J. Race & L. 201, 223 (1999) (stating that critical lawyers focus on collaboration).

192. Rhode, *Ethics in Practice*, *supra* n. 8, at 16 ("it [is] easier to lament lost ideals than to invite the cost and conflict involved in institutionalizing them"), 18 (lawyers can accept their moral responsibility for consequences, and justify their conduct under "consistent, disinterested, and generalizable ethical principles" that recognize the lawyer's role).

interpretation is to operate. The legislative analogy<sup>193</sup> may tell us that both the concrete short-term and the more public long-term must be considered in the lawyer-client setting. The role of the lawyer may be to seek and to present these latter inputs, not simply the former, while that of the client is to present well the former inputs.<sup>194</sup> Then, the duo can look at both perspectives together in coming to some terms with what is not only a client-helpful but also public- and future-regarding interpretation of the Constitution. In other words, the good comes not out of someone (client or lawyer) deciding what the Constitution means or should mean; it comes out of the constant negotiation of meaning between the two of them,<sup>195</sup> the forum in which the client's cause is placed, and the current arguments and interpretations on that and similar issues. The difficulty and tension, even the apparent conflicts, in requiring both lawyer and client to participate in the constitutional conversation make it more likely that better proposals for meaning will ultimately be contributed. Both dimensions of the tensions then remain operative and even visible, helping in the overall assessment of what action today will serve worthy constitutional ends.

Lawyers should not leave to others the responsibility for contributing to meaning and for finding the varied factors that will assist in getting to a good meaning. By viewing lawyer and client separately, we can create lawyers who do not abdicate their responsibility to contribute to the meaning of the Constitution.<sup>196</sup>

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193. See *supra* n. 173.

194. See Balkin & Levinson, *supra* n. 23, at 1077 (distinguishing high politics from low politics and noting that most citizens treat their own short-term "low" political agendas as high politics because they fail to distinguish between constitutional and ordinary politics); Rhode, *supra* n. 83, at 327 (stating that Clinton needed lawyers who could balance and focus on "long-term values as well as short-term preferences"), 316 (locating that failure in the "professional culture of technicality" that has "lost sight of broader values"); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 *Hastings L.J.* 947, 949-50 (1992) (rebellious lawyering, the preferred model, is willing to allocate resources away from client short-term needs to community long-term needs, whereas regnant lawyering is a tendency to favor the present and identifiable interests of clients).

195. Cf. Levinson, *supra* n. 1; Levinson, *Constitutional Faith*, *supra* n. 2, at 84-85 (noting it is hard to say that someone else is committed to manifest injustice without quite a bit of evidence).

196. Gordon, *supra* n. 58, at 45 (lawyers have special responsibility, part shared with all in a system, and part due to their own "unique position to safeguard framework arrangements"), 50-51 (lawyers representing clients pushing for major political change have heavier responsibilities to the public, as much more is at stake than client interest; lawyer independence is much more important then, and needs to be exercised by not risking "sabotage" of public-regarding norms in pursuit of client goals); Rhode, *Ethics in Practice*, *supra* n. 8 (lawyers should have personal moral accountability, as do all other actors); Pearce, *supra* n. 81, at 21 (envisioning a utopian time when lawyers stop relying on professionalism excuses to justify nonaccountable behavior, and instead accept that they are also morally accountable for their actions, even during client service, and noting it need not lead to abandoning loyalty to clients, but to dialogue with the public about the morality in lawyers' work); Dinerstein, *supra* n. 133, at 529 (citing Leubsdorf's model that requires lawyers to justify their behavior morally and socially without claiming their lawyerly role alters their moral responsibilities); cf. Levinson, *supra* n. 1, at 834-35 (discussing Thomas Shaffer's work on lawyers and clients engaging in moral conversation, and suggesting that not only is the lawyer not the definitive "voice" of morality, but that a real dialogue would begin on the premise that both can contribute to the conversation and each may change the other's mind; Levinson emphasizes that doing this with the client is a part of the lawyer's own responsibility to be moral, rather than a responsibility to "make" the client moral).

If one takes Professor Levinson's theory seriously, lawyers should not abdicate their own role in constitutional interpretation. First, the oath they take negates this easy opt-out of independent analysis of what makes the Constitution "best" or at least "better." Second, the lawyer should not be reduced to less than a citizen<sup>197</sup> nor should we lose the capacity of the lawyer to facilitate the client acting as a good citizen (*i.e.*, neither as passive toward constitutional meaning nor purely self-regarding and instrumental when proposing constitutional meaning).<sup>198</sup> The role as mere "hawker" of self-interested client interpretation, *i.e.*, interpretation designed to be instrumental for a specific, private goal, even if it undermines a fundamental and more public-regarding goal and interpretation,<sup>199</sup> reduces the lawyer and his or her role to less than that of the citizen. Surely one does not divest oneself of the privileges and responsibilities of citizenship by undertaking the role of lawyer.<sup>200</sup> And surely an individual cannot fairly be foreclosed from exercising that power and role when he or she may have chosen that role because of its instrumental place in affecting constitutional development toward goals the individual sincerely believes to be the "good."<sup>201</sup> We should not

197. See Levinson, *Constitutional Faith*, *supra* n. 2, at 167 (questioning whether citizen should trump lawyer "as a source of desirable identity").

198. *E.g.* Levinson, *Constitutional Faith*, *supra* n. 2, at 61 (explicating John Adams' view of the citizen (noting its distinctly non-modern bent) as one who occasionally subordinates self and self-interest for the public good); Levinson, *Experience*, *supra* n. 24, at 754 (discussing the Kronman theory of public-spiritedness).

199. Gordon, *supra* n. 58, at 47 (the dominant libertarian-positivist view holds that lawyers owe only the "most minimal duties to the legal framework" of not violating unambiguous legal commands, not telling plain lies to tribunals and not straining argument so much as to be outright misrepresenting, and "no duties to the social framework").

200. Is the citizen who brings (or defends) a case with constitutional dimensions cast into a responsible role? Can we (as Professor Levinson argues we can for public attorneys and officials) expect that the citizen would then be more engaged with constitutional meaning? Or can we at least say that such a citizen should expect to be asked to reflect upon worthy constitutional meaning? Such a citizen might fairly be expected to consider both the constitutional implications of his, her or its position and constitutional values, as they are affected by that position.

Even more so, is it unfair to say that such a citizen has no basis for insisting that the lawyer chosen to help him or her will do so in spite of strongly held contrary beliefs about what is necessary for constitutional worthiness? In other words, should not a citizen (choosing to implicate constitutional values) expect that the lawyer he or she is privileged (or in criminal cases has the right) to use to advance his or her cause will be engaged and conscientious with respect to constitutional meaning, and seek to make a positive contribution to it? *Cf.* Gordon, *supra* n. 58, at 50-51; Wendel, *supra* n. 165, at 72-73 (citing Simon). If so, having the lawyer act consistently with protestant constitutionalism would be a part of the expectations that are the premise of the lawyer-client relationship, rather than some contradictory add-on that the client has some right to perceive as a species of personal harm. *Cf.* Zacharias, *supra* n. 153, at 175-76 (stating that the limited empirical evidence available shows that clients are willing to "accept limits on their lawyer's advocacy if they know of the limits in advance" and ascribing this to the realization that people place moral limits on their conduct).

201. See Simon, *supra* n. 34, at ch. 1 (siting a major source of lawyer dissatisfaction and moral anxiety in the paltry, formalist, and positivist view of lawyer ethics known as the dominant view); Wasserstrom, *supra* n. 159, at 170 (noting that one's professional identity is a dominant role and people can become the moral person that they are in the professional setting, a heavy price for lawyers utilizing the standard conception role-differentiated morality to pay in their personal lives); *cf.* Levinson, *supra* n. 4, at 2018 (declaring that there is good in "choosing one's own work because it satisfies one's internal needs for self-development . . . rather than responding to the external demands of dominant others"—a statement that also points out the normative shortfall of the priest and knowing instrument models, by implication).

pretend lawyers do not have that role; for all practical purposes, their engagement in client representation will indeed influence constitutional meaning.

One way in which the representative role of lawyers affects interpretation, or could affect it, is by having the attorney affirm the importance of the client's power and sworn responsibility to participate in the constitutional conversation by construing the Constitution, rather than simply assessing one's self-interest in a cause. Reality impels us to recognize that much of what the Constitution means and is occurs in the daily lives and beliefs of citizens, outside the halls of government.<sup>202</sup> A second way is by reaffirming the meaning of the lawyer's oath of fidelity as an investment in the "goodness" of constitutional meaning and interpretation even during representation.<sup>203</sup>

If the attorney cannot logically be sentenced to abdication, are there nonetheless role constraints so restrictive that the question of attorney role is small and uninteresting? Does the role require the lawyer to reach his or her own interpretation, but to act and present interpretive possibilities only in the client's interest per the client's own definition of that interest? The oath seems to negate this distinction between belief and conduct, requiring one to conduct one's self consistently with fidelity to constitutional principle,<sup>204</sup> rather than simply to make a "thought commitment" to the ideal of a good Constitution and leave the work of making it good to everyone else (perhaps obstructed by the lawyer's own representation of a client).<sup>205</sup> Then, would an adequate (and constitutionally required) role restraint limit the lawyer to presenting the alternative view of meaning to the client, aided perhaps by the ability to attempt persuasion?<sup>206</sup> But

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202. See Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Duke U. Press 2000) (extended exegesis of the people having tremendous impact on the meaning and survival of the free speech right, by their own understanding of what it means, exercise of rights consistent with that understanding, and refusal to "give" the right to any court or legislature to define or limit); Rhode, *Ethics in Practice*, *supra* n. 8, at 19; Gordon, *supra* n. 58, at 47. Professor Levinson also recognizes the importance and power of dailiness—and what happens outside the walls of the courtroom. Levinson & Balkin, *supra* n. 2, at 1657 (to understand law, one must focus on what actual people do); Balkin & Levinson, *supra* n. 22, at 1021-22 (discussing the importance of social movements to constructing and changing constitutional meaning); Levinson, *supra* n. 9, at 366 (lawyers' advice to clients has "far more to do with structuring our legal system" than specific court rulings); *cf.* Levinson, *Constituting Communities*, *supra* n. 116, at 1469 (the dailiness of everyday practices is the source of stability in a constitutive community).

203. *Cf.* Levinson, *supra* n. 54, at 54, 56 (noting also skepticism about the value of extreme nationalism and substitution of an externally defined good).

204. Levinson, *Constitutional Faith*, *supra* n. 2, at 122-23 (discussing legislative duty and behavior); Levinson, *Constituting Communities*, *supra* n. 116.

205. *Cf.* Rhode, *Ethics in Practice*, *supra* n. 8, at 9-12 (finding something similar to this abdication objectionable in the moral context).

206. Levinson, *Constitutional Faith*, *supra* n. 2, at 47 (stating that a city attorney can argue to client during counseling function, but silent as to how the attorney should act if the client insists on violating the attorney's views of constitutional meaning and wants the attorney to advocate that position).

Often, any power to raise such questions (much less to pursue the lawyer's judgment) is recognized to exist only during the counseling function, consistent with Model Rule 2.1: "In representing a client, the lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The Model Code contained this understanding of the lawyer's role as including rendering advice from nonlegal perspectives in Ethical Consideration 7-8.



then, if the client insisted otherwise, could the lawyer act with fidelity when his or her purported constitutional role would require him or her to act in opposition to his or her own serious and conscientious view of constitutional meaning? Is there a third possible choice: The lawyer's role is merely one of "reviewer" rather than primary interpreter, amounting to a procedural responsibility alone? That might meet one aspect of Professor Levinson's prescription for the attorney general in the *Smith* case—the attorney's role is to hold other constitutional actors to fulfilling their constitutional duty at least in form,<sup>207</sup> *i.e.*, they must demonstrate something akin to reflection and support a judgment reached in terms that mimic constitutional analysis (*i.e.*, they must ask and say beforehand that a rule without exception is necessary to the achievement of what they consider to be a compelling interest). Under this conception, the lawyer's role is limited to, and fulfilled by, being a monitor of others' formal fidelity to engaging in constitutional interpretation. Within the lawyer-client relationship, this would appear to be met by asking for reflection, then taking at face value and arguing what the client says in response, even if the lawyer believes it is disingenuous and a distortion of good constitutional meaning.

All of these answers are unsatisfactory to me, as they conceive of the lawyer's role as so paltry that it is hard to say it can be performed with fidelity and conscientiousness. It even thrusts as necessary upon the lawyer the role of being a "dreadful citizen"<sup>208</sup> if she is so unfortunate as to have a client who either in good or bad faith possesses a vision of the Constitution that is fundamentally or significantly at odds with the lawyer's vision of goodness and worthiness.

If one agrees with my assessment of the unsatisfactory nature of these answers, perhaps another set of arguments might be interposed as reasons to eschew looking deeply at the lawyer's role. First, one might urge that the lawyer is highly unlikely to be in a position that implicates distinguishing between her client's view and her own, because lawyers and clients choose each other based in no small measure on their concordance on issues of political and moral value judgments. This is a version of the lawyer being free to decline representation<sup>209</sup>

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Dinerstein critiques the use of this persuasion model in the poverty law context as being unduly paternalistic and likely to overlook alternative valid moral conceptions held by poor and powerless clients. Dinerstein, *supra* n. 133. Simon argues persuasion is inescapable in the nature of the lawyer-client relation. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation*, *supra* n. 8, at 165; Wendel suggests that casuistry as a mode of reasoning provides a good model of tentative reaching of moral ground to facilitate appropriate lawyer-client discussion. Wendel, *supra* n. 165, at 112-13.

207. Levinson, *supra* n. 13. It is not altogether clear that Professor Levinson views this prescription as one of form alone, given his spirited exchange with Attorney Frohnmayer (and his deputy Jerome Lidz) on the issue of the interpretation of the attorney general role. See *supra* nn. 74, 79-81; Balkin & Levinson, *supra* n. 23, at 1099 (ascribing such a role to the Court vis-à-vis Congress when the latter acts under the power of the Fourteenth Amendment's Citizenship Clause).

208. Levinson, *Constitutional Faith*, *supra* n. 2, at 167.

209. *E.g.* Freedman, *Understanding*, *supra* n. 174, at 71; Freedman, *Lawyers' Ethics*, *supra* n. 174, at 89 (recounting the position that lawyers have an autonomy interest of their own that should be exercised at the stage of determining representation and that therefore lawyers are accountable for their choices to represent, *i.e.*, that the lawyer should use moral judgment to screen out clients. This might then permit the lawyer to make the client's preferred arguments with a minimum of discordance

(assuming an unpopular client with no alternative has not presented itself), an important, but hardly sufficient, safeguard. We might note the high degree of value concordance that studies demonstrate between attorneys and their clients,<sup>210</sup> even note the growth of true-believer attorneys who work for organizations devoted to causes that look for ideal clients.<sup>211</sup> Or, second, we might posit that the lawyer retains so much control over the daily decisions about how to argue a legal point that this purported dilemma is vastly overstated. However, Professor Levinson seems to belie this complacency in his article in Osgoode Hall, which describes lawyers capitulating to clients to make arguments that are marginal at

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between lawyer and client views, because the lawyer has sufficient value concordance with the chosen clients.); Dinerstein, *supra* n. 133, at 554 (noting the options of declining representation and withdrawing as protecting lawyers' independent judgment); *but see* Johnson, *supra* n. 191, at 205, 225 (one can decline representation, but the "constraints increase considerably after the attorney agrees to represent the client"); Tremblay, *supra* n. 131, at 43-44 (citing the likely limited usefulness of withdrawal as an option); Wendel, *supra* n. 165, at 58 (noting that declining representation is not a remedy for an attorney who has agreed to represent the client, so it is an inadequate remedy for many lawyers).

210. Professor Ann Southworth's work is particularly notable here, *see* Southworth, *Collective Representation*, *supra* n. 158, at 2469-70, and Southworth, *Lawyer-Client Decisionmaking*, *supra* n. 158, at 1131, as are some other pieces of recent scholarship doing empirical analysis of how lawyers represent clients in public interest, civil rights, and other quasi-public sorts of causes. *See* John H. Heinz & Edward O. Lauman, *Chicago Lawyers: The Social Structure of the Bar*, in *The Legal Profession: Responsibility and Regulation* 60, 61 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988) ("[lawyers'] principle may . . . be influenced by their areas of practice"); *see id.* at 63 (strong relationship between lawyer social background, including religion, and their types of work, areas of practice, types of clients) (lawyer perceived prestige within the profession derives from the "reflected glory" of the power and status of the lawyer's clients). This work demonstrates that the originating social class (and to the extent one can associate certain sorts of values with such social class and religious backgrounds) were predictive of the sorts of clients and practices the lawyers would engage in, with those from privileged and dominant classes tending to serve clients from the same classes to protect their business and wealth, etc.

211. Interesting sets of questions about representational ethics arise in the context of public interest and impact litigation practice, as a rich and growing literature makes clear. The nature of the "cause" lawyer, who defines the goals, looks for the issues, and then finds the "best" client, highlights the unsuitability of the standard conception as a model for ethical relations between attorney and client. Similarly, the nature of a client-centered conception of practice alters when the client is less powerful and sophisticated, a short-term representative of a long-term need, and a more diffuse grouping of people with some identities of interest and need. Rather than practicing as hired-guns, and thus being subject to the critiques of the worst outcomes of the standard conception, these lawyers are more frequently criticized for failing to obtain or adhere to client decisions about goals and means, being paternalistic and condescending, and undermining the dignity and autonomy of individuals for some perceived collective goal. This is a new critique of the standard conception—essentially, it is useless and unsuited to assisting such lawyers in understanding their roles and practicing them. *E.g.* Ann Southworth, *The Rights Revolution and Support Structures for Rights Advocacy*, 34 L. & Socy. Rev. 1203 (2000); Southworth, *Lawyer-Client Decisionmaking*, *supra* n. 158, at 1110, 1114, 1131-32, 1144-45 (lawyers choosing causes and clients, including making front-end compromises by recruiting clients whose interests coincided with those of the lawyers); Johnson, *supra* n. 191, at 220-21 (discussing lawyers who decide first on the issue and impact desired, and then select a client); Rhode, *Ethical Perspectives*, *supra* n. 8, at 170, 173 (noting the lawyers who are actively engaged in practices like poverty, civil rights, civil liberties, and similar practices, a small percentage); Heinz & Lauman, *supra* n. 110, at 77-78 (noting the growth during the 1970s and 1980s of public interest associations who represented "interests" on matters of public policy and have "considerable social impact"); Pearce, *supra* n. 81, at 20 (discussing the rise of freestanding public interest law practice).

Robert Dinerstein critiques this approach from a client-centered approach, although he recognizes the importance of permitting other goals and values to enter into the client-centered approach. Dinerstein, *supra* n. 133.

best, unsound more likely.<sup>212</sup> Or third, one might insist that the likely discordant interpretations of client and lawyer are about marginal aspects of constitutional meaning, and therefore the resolution of whose view to present is unlikely to have any real effect upon the legislative, administrative, or judicial outcome in ways that can dangerously distort constitutional meaning<sup>213</sup> (but keep in mind we live in a country that found it possible to harmonize slavery with the “best” meaning of equality).

All of these answers basically urge a de minimis effect as adequate reason to relieve the lawyer of responsibility for engaging in constitutional interpretation in some fashion that is independent of serving client self-interest at the expense of the public good. Not much of an answer. And perhaps one not empirically accurate either.<sup>214</sup>

212. Levinson, *supra* n. 9, at 366-69. Note, however, that actual practice, even with the true believer attorney, results in conflicts between lawyer beliefs and judgment and client desires. See Southworth, *Lawyer-Client Decisionmaking*, *supra* n. 158 (detailing these conflicts in different sorts of civil liberties and cause practices, and identifying the lawyer responses to them, which usually are to defer to client judgment when it can be ascertained).

213. Note that much lawyering never gets the issues resolved by an impartial decisionmaker, either because the lawyer-client relationship exists outside the bounds of tribunal advocacy, see Michelle Grant, *Legislative Lawyers and the Model Rules*, 14 Geo. J. Legal Ethics 823, 828 (2001), or because the causes in tribunals rarely come before the tribunal for ultimate resolution. See Rhode, *Ethical Perspectives*, *supra* n. 8, at 170, 170-71. Note also Robert Gordon's concern that lawyering for public policy changes should have heightened public responsibilities. See Gordon, *supra* n. 58, at 50-53.

214. Lawyers do appear to exercise independent judgment with more frequency than the standard conception would predict. E.g. Daicoff, *supra* n. 177, at 201, 240 (stating that attorneys approached ethical issues on a case-by-case basis and exercised discretion that reflected upon personal values in determining how to approach the issues presented in the study); Southworth, *Lawyer-Client Decisionmaking*, *supra* n. 158, at 1138-41 (documenting that lawyers exercise independent judgment when confronted with morally repugnant options, especially those that interfered with their core commitments, but that lawyers grapple with these issues). Southworth notes that despite substantial evidence of lawyer influence, such influence does not necessarily result in lawyer domination or control of clients. *Id.* at 1135.

In addition, the fairly recent explosion of a rich scholarship concerning the proper role of the attorney with respect to poor clients, underrepresented clients, clients raising claims on behalf of communities of interest, public interest law lawyers and clients, civil rights clients, and the like attest to the strength of both the numbers of clients and lawyers engaged in such causes and the issues of professional responsibility, particularly concerning the proper nature of the attorney-client relationship. Southworth, *Collective Representation*, *supra* n. 158, at 2451-52 (discussing the problems of client vs. constituency representation in law reform litigation); Dean Hill Rivkin, *Reflections on Lawyering for Reform: Is the Highway Alive Tonight?*, 64 Tenn. L. Rev. 1065, 1066-67 (1997) (discussing the tension between law reform agendas and client interests, individual clients and the communities they represent, and the lawyer's role as client voice); Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. Miami L. Rev. 999, 1043 (1994) (discussing the newer visions of client and lawyer as collaborators and allies, considering and respecting each other's judgment, and the service vision of lawyer seeking to empower client and client's community). A view of the more problematic effects of class action lawyering is presented by Susan Koniak & George Cohen in *In Hell There Will Be Lawyers without Clients or Law*. See Koniak & Cohen, *supra* n. 46.

Likewise, an extensive literature has developed in professional responsibility that engages the question of how the lawyer can be a moral being, true to his or her own moral values, while representing a client who may desire or need legal arguments to be made by the lawyer against the lawyer's preferred moral views. See citations to Wasserstrom, *supra* n. 151, Simon, *supra* n. 34, Luban, *supra* n. 155, and Rhode, *supra* n. 8, earlier; but see Hazard, *supra* n. 215; Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259 (1995); Fried, *supra* n. 174; Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

The lawyer's role, bound in client representation, must have some impact on the way the lawyer engages in constructing and presenting meaning. So the real—and hard—question, is how—how does the lawyer remain true to role and true to the Constitution?

D. *The Admirable Lawyer—Constructing the Lawyer's Role*

During this symposium, Sandy raised the question: If we were to honor a lawyer as we were honoring him, what would the lawyer look like, *i.e.*, what are the characteristics of an honorable, admirable lawyer? In the spirited discussion that ensued, several points emerged. First, we would look to the lawyer's legal positions and arguments to assess their worthiness. That assessment would look not to mere technical competence in role, but for consistency in the arguments made (if only due to the need for credibility before a tribunal). Consistency—as reflective of a thought-out commitment to a worthy conception of the Constitution—is also itself a value. Consistency would matter not in peripheral sorts of issues, but with respect to the core of the lawyer's constitutional positions and their consequences. Thus, Thurgood Marshall was discussed as a model: the arguments made consistently advanced the core value of equality as a consequence.<sup>215</sup> Second, this commitment to a core ideal over time<sup>216</sup> would lead to admiration for both the ends sought (whether one agreed with those ends or not, they are ends that can be considered worthy ends) and the means used.<sup>217</sup> The admirable lawyer is one whose lawyerly work demonstrates that the meaning of the Constitution, and one's commitment to it, matter.

Applying these insights, as well as those of the virtues and sins of protestant constitutionalism raised earlier, to examine the three models of lawyering above, leads to some basic ideas about how a lawyer can fulfill his or her responsibilities

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Suffice it to say great disagreement exists on the nature and boundaries of the lawyer-client relationship and the lawyer's ability to follow his or her own moral, or even legal and policy, lights while in that relationship. It is far from an easy question, and perhaps even farther from a question upon which some consensus has emerged. It is, therefore, worth both engaging with the question and extending it to the analogous field of constitutional theory and interpretation.

215. Although note the ambiguity of the lawyer's role in the NAACP litigation discussed by Derrick Bell. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 472 (1976) ("it is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the attorney's ideals").

Conversely, Floyd Abrams was mentioned as having potentially violated that criterion when he accepted representation in a case to make an argument that on its surface appeared inconsistent with the core First Amendment values he had heretofore consistently advanced. Second Annual Legal Scholarship Symposium: The Scholarship of Sanford Levinson, Discussion of Sanford Levinson, Jack M. Balkin, and Mark Tushnet (Oct. 31, 2002, Tulsa, Okla.).

216. But note that the lawyer in the problem posed earlier could change positions admirably, if he or she was convinced that the same core value was being served, but had a new understanding of how to achieve that core value based upon facts, *i.e.*, if he or she believed that religious freedom was better served by not making religious texts required reading in public schools.

217. See Balkin & Levinson, *supra* n. 23 (recognizing that there is value and meaning in engaging in high political constitutional debate about the meaning and fundamental premises of a good polity within our constitutional framework, and agreeing to engage in conversation on that basis, but leveling scathing criticism on means and ends that are not sought through legitimate processes of constitutional negotiation and consistency of proffered interpretations).

when the lawyer confronts a conflict between the lawyer's own preferred interpretation of the Constitution and what might be routinely seen as the client's preference in pursuing his, her, or its own interests. A lawyer adopting the role of knowing instrument will predictably make an easy decision to make the argument the client wants, without question or hesitation—or deliberation. The priestly role would also provide relatively clear guidance for the lawyer on each dilemma. The priest would discern the Court's position on interpretation, and follow it. Neither of these models of deliberation and action is a satisfactory way of engaging either client or lawyer in the interpretive process that each should ideally be engaged in. The better role, the one of minister, is both less defined and more difficult to navigate, requiring "an extraordinary display of ethical sensitivity and self-restraint."<sup>218</sup> What follows is an attempt to define and navigate in this terrain, and a suggested method for practicing the role of minister.

Returning<sup>219</sup> to the problem of the oft-ignored continuum between *must* and *must not* may provide some guidance. A focus on prohibition versus mandate ignores the importance of the *may* questions and thus the importance of having some way of navigating through the *may* questions when they do arise. Just as it is absurdly reductionist to say that unless the lawyer *must not* do something, he or she *must* do it if his or her client requests or if it would help the client somehow in the fight to get on top and win, it is probably unhelpful to view the lawyer's role in such simplistic terms when evaluating his or her engagement in the interpretive enterprise.

As Professor Levinson points out, the rules that govern lawyers, *i.e.*, the rules that can be used to discipline a lawyer and to evaluate his or her conduct as having exceeded the bounds of role, leave a lot of room to make arguments that the lawyer either does not believe in or that the lawyer believes to be worse interpretations than those the lawyer would propose—but he or she can make the argument to assist the client without risking discipline.<sup>220</sup> But why? Why is there this latitude? Is it to give license to the lawyer to make such arguments? Worse, is it to *mandate* that the lawyer make such arguments if the client wants them or if the lawyer believes they serve the client's private interest? Or, is it to make certain that lawyers who have very offbeat interpretations—ones that far exceed the current boundaries of legal thinking, but who believe that those interpretations are indeed the best and that all the other alternatives are weaker or affirmatively bad (*e.g.*, arguing about whether or not slavery is protected, or blacks are citizens post-*Dred Scott*)—are able to make such interpretations on behalf of both their clients and the public good, without risking discipline because people don't like their positions?<sup>221</sup> Is it a way to democratize, bring indeed, First

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218. Cf. Bell, *supra* n. 216, at 505.

219. See *supra* pt. III.A.

220. See Levinson, *supra* n. 9.

221. Levinson, *supra* n. 9, at 372 (quoting D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 57 (1976)), 374 (searching for a standard of frivolousness that doesn't threaten the "genuinely innovative lawyer").

Amendment principles including the chilling effect idea, to bear within the role of lawyering, so that the arguments made and the interpretations urged have the opportunity to contribute to the development of the law and justice?

Thus, even if a lawyer has room to make arguments solely in a client's private interest despite a (strong) belief the arguments do not advance (or actually retard) law and justice, surely the lawyer is neither required nor encouraged to use his or her latitude in this way. Hence, we have also the duty to the system and public.<sup>222</sup> These multiple duties may better be viewed not so much as presenting a conflict, but as suggesting when the lawyer should exercise the discretionary power to stretch the boundaries on behalf of a client, to go "all-out"—*i.e.*, when serving the client's interests *also* serves the public, the system, and the lawyer's own belief (in faith and integrity) that what he or she argues is the best way to look at this problem and to interpret this law.<sup>223</sup>

An analogy may be helpful here. Defamation law, as constitutionalized, permits publication of harmful false statements without legal redress.<sup>224</sup> Of course, the First Amendment is not better served by false statements than by those that are fair and accurate.<sup>225</sup> And the ability to escape liability for falsehoods is hardly an encouragement or requirement that journalists publish falsehoods with regularity, nor is it designed to remove the need for integrity and accountability from journalism. Instead, it places the responsibility for accuracy within the integrity of the journalist, and hopes that the journalist rises, rather than sinks, to the occasion. Journalists that sink subvert First Amendment values

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222. ABA Model R. Prof. Conduct, Preamble, para. 1 (lawyers have "special responsibility for the quality of justice"; "Law . . . makes justice possible. . ."); Simon, *supra* n. 34, at 8 (noting that even proponents of the dominant view tend to modify its basic precept with some norms intended to protect third-party and public interests).

223. Professor Levinson's previous writings lead me to expect that one of his critiques of this position would be that it collapses the role of lawyer with that of judge, a collapsing that he objects to in several pieces. *E.g.* Levinson, *supra* n. 9, at 363-64; Levinson, *supra* n. 10, at 454-55. Professor Levinson is understandably chary of such a collapse, as it bespeaks participation in the "bane" of Anglo-American jurisprudence, *i.e.*, focusing on judges too much. However, because that emphasis has distorted the practice of a good protestant constitutionalism, Professor Levinson may be too quick to conflate the evils of emphasizing the judicial role with a refusal to recognize the realities of lawyers' professional lives. Instead, asking lawyers to engage in assessment of constitutional meaning that allows them to think and act with the integrity and fidelity that Professor Levinson claims for judges and law professors does not end or limit their role to engaging in such conduct. It simply incorporates that conduct into their role as a piece of doing both well and good. William Simon has a similar response in Simon, *supra* n. 34, at 11 (stating that it is a "style of judgment," rather than a role, that he advocates for lawyers).

224. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court stated, "erroneous statement is inevitable in free debate, and . . . it must be protected," *id.* at 271-72, and that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct . . ." *Id.* at 273.

225. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation . . ."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues.").

even while they are fully protected by them.<sup>226</sup> But journalists that rise earn credibility and admiration, and probably some influence, without endangering any First Amendment values along the way. And if they say something we really don't like and that we believe to be false, they are protected. But self-righteous invocation of the First Amendment as an excuse for doing wrong tends not to receive our plaudits.<sup>227</sup>

Let us return to lawyer latitude to make arguments on behalf of a client even when the lawyer does not find those arguments to be persuasive or does not even believe the argument is a valid interpretation of the law or good law or policy. We know our system of law and the law of lawyering and professional responsibility give advocates permission to (or refuse to discipline advocates who) make weak, non-believed, but "non-frivolous" arguments. But to interpret this permission as an encouragement or requirement to make such arguments is a huge leap. Just because one *can* doesn't mean one *should*, much less *must*, do something. Therefore, something other than the naked permission must be operative to help lawyers know how to exercise their discretion to make and propose interpretations of law—the Constitution—within those broad boundaries of nonsanctionable<sup>228</sup> behaviors. Clients alone should not control this aspect of lawyerly judgment or integrity. Lawyers must have their own input. To argue otherwise is to violate the premises of both major ethical systems: (1) we've permitted the client to treat the lawyer as means, rather than an end in himself or herself<sup>229</sup> and (2) we've insisted upon making judgments that pursue the lesser over the greater good.<sup>230</sup> That in itself should tell us that probably the interpretation that one should or must engage in this activity is deeply flawed.

With Deborah Rhode, who writes in a slightly different context, this proposed role for the lawyer insists that lawyers abjure "a reflexive retreat to role, which denies reflection at the very point when reflection becomes most essential."<sup>231</sup> Rather, my approach insists on a constitutional predicate, "on an attempt systematically to justify the consequences" of legal representation.

226. *Cf. Saenz v. Playboy Enter., Inc.*, 841 F.2d 1309, 1314, 1317 (7th Cir. 1988). The court noted that "crafty and mischievous authors" expose public officials to "baseless accusations and public mistrust while promoting an undisciplined brand of journalism unproductive to society." *Id.* at 1314, 1317. The court held that "clearly discernable, though not explicit," falsehoods uttered with actual malice were also unprotected by the Constitution. *Id.* at 1317.

227. *Id.* One hardly thinks the Court approves of Larry Flint's parody of Jerry Falwell, even as it protects it. *See Hustler*, 485 U.S. at 50 (the case involves an ad parody "doubtless gross and repugnant in the eyes of most").

228. (In both senses of the word?)

229. This violates the categorical imperative of Kant, the deontological philosophy of good. *Cf.* William K. Frankena, *Ethics*, in *The Legal Profession: Responsibility and Regulation* 119-26 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988) (detailing the forms of deontological and teleological ethical theories). *Cf.* Levinson, *Constitutional Faith*, *supra* n. 2, at 170 (stating that a lawyer should be able to counsel that violating the positive law on the books is the right thing because self-respect should ultimately trump law).

230. This is an anti-consequentialist or anti-teleological position, violating the ethical norms of utilitarianism. *Cf.* Frankena, *supra* n. 229, at 119-26 (detailing the forms of deontological and teleological ethical theories). *Cf.* Levinson, *Constitutional Faith*, *supra* n. 2, at 177 (stating that constitutional actors should be aware of the consequences of their social visions).

231. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589, 643 (1985).

Although there will not be determinate resolutions, "there are better and worse ways of thinking about the questions."<sup>232</sup>

A lawyer should never be encouraged or required, on the basis of some flawed rationale about role constraints, to make an argument that he or she believes misreads the Constitution as the best and most worthy document it can be; and it is not a contradiction to role to suggest that the lawyer not only may but should use his or her discretion to make arguments he or she can believe in as worthy and consistent with the Constitution to which he or she has pledged fidelity. In doing this, the professional responsibility latitude and the role of lawyer restrain the lawyer from insisting on an interpretation as if he or she were the ultimate judge, or fully independent of the client and the client's interest. The lawyer is, after all, simply one of many negotiators, as well as an agent for and voice of a client, and thus the lawyer should be engaging in negotiation and dialogue, not simply forming his or her own opinion and substituting it for those of anyone else, client, court, legislature.<sup>233</sup> This means that one should be quite cautious before adopting the view that one's own (idiosyncratic or not) interpretation is the one true faith, and insisting upon imposing that on one's clients during either transactional or dispute-resolution representation.<sup>234</sup> But one should be equally wary of assuming that it is proper to make any argument at all, as long as one can clothe it in garments of argumentation that make it sufficiently plausible to avoid invoking disciplinary wrath. The lawyer needs to strive for the middle ground,<sup>235</sup> of which there appears to be quite a lot.

#### *E. A Proposed Rubric for Lawyer Dual Responsibility*

Some tentative ideas about how one would negotiate this middle ground, being steered by fidelity to the Constitution and service to client, follow. In applying these thoughts, several institutional aspects of the lawyer's role must be both recognized and understood to exercise some constraints upon how the lawyer acts.

First, the lawyer is a gatekeeper to the courts, exercising independent judgment about the worthiness of a proposed client's cause and his or her

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232. Rhode, *Ethical Perspectives*, *supra* n. 8, at 178-79.

233. Levinson, *Constitutional Faith*, *supra* n. 2, at 84-85 (stating that rarely has one sufficient evidence to interpret another as being committed to manifest injustice); *cf.* Levinson, *supra* n. 1, at 835-36 (initiating a "genuine encounter" with a client requires an invitation to serious conversation on an issue, not a mere acceptance of the client's direction nor a statement of the lawyer's preferred judgment).

234. Levinson, *Constitutional Faith*, *supra* n. 2, at 170 (stating that one should be aware that one's own views are not "true" or even necessarily "best" with respect to moral or constitutional meaning). In the burgeoning professional responsibility literature, there is an insistence upon recognizing the multiplicity of values at stake during representation. *See* text accompanying *supra* nn. 175-93.

235. William Simon also advocates using such contextual and discretionary judgment more routinely in professional representation. Simon, *supra* n. 34, at 16 (noting that both the Model Code and the Model Rules make "substantial concessions to the lawyer's personal moral autonomy," despite the tendency in the dominant view to see all as categorical and mandatory. One problem is that both the Code and the Rules "make no effort to specify how decisions" in the discretionary aspects might be made).



willingness to pursue that cause. Some of this is driven by attorney preference and commitment: attorneys who believe in business interests and the benefits of free enterprise and economic choice are more likely to practice law in areas that provide clients with those interests. Some of this is driven by attorney self-interest: consistency in the position one takes leads to attorney credibility before tribunals and with other lawyers, and benefits clients; client knowledge of attorney effectiveness in representing certain types of interests and claims leads to more client work and referrals. The attorney's reputation before a tribunal already cabins the acceptable tenor of arguments (Professor Bobbitt's modalities and Professors Balkin and Levinson's law-talk) as well as the plausibility of the arguments advanced. In the role of counselor and as one with knowledge and expertise about the law and predictable outcomes, lawyers often fulfill the role of talking clients out of bad ideas, whether those ideas are "bad" because they are unlikely to receive a sympathetic ear from the law, or are "bad" because they are morally questionable or likely to result in unintended consequences in derogation of the client's primary interests.

The aspect of the lawyer's role that makes lawyers representatives of and agents for client interests also means that the lawyer's role is less independent and individualistic, and more interdependent and affected by the client's interests. Of necessity, a lawyer probably needs to be more pluralistic about how he or she reflects upon, explains, engages in dialogue, and then re-reflects upon interpretation in light of a client's desires and goals.<sup>236</sup> A lawyer is not free to assume any superior insight into constitutional meaning or to impose his or her view without client input and even perhaps some acquiescence (and of course the client always remains free to reject the lawyer's services if the lawyer chooses to advance an interpretation with which the client disagrees). But the lawyer must also steer clear of abdicating all responsibility for meaningful reflection and interpretation of constitutional meaning as it arises in the client's cause.

The more plastic the lawyer and more likely to eschew the need for reflection, the more danger that serious constitutional dialogue will not occur, and that both lawyer and client will fail to live up to the heavy responsibilities of citizens in a constitutional system; the lawyer will be a mere instrument. But the more the lawyer perceives herself as authorized to reach and impose his or her personal interpretation, the more "rebellious" (regnant in Lopez's terminology) the lawyer is against the lawyer's role as agent, the more danger that the client's interests will be sacrificed, and that the lawyer will act as priest, disempowering the client and the cause.

Current rules of professional responsibility make it clear that the lawyer cannot go forward with the client's interpretation unless the client's objective is

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236. Cf. Levinson, *Constitutional Faith*, *supra* n. 2, at 61-65 (noting modernism and moral pluralism make finding a common source of "truth" or "goodness"—much less locating that source in law—an impossible enterprise).

within the bounds of the law,<sup>237</sup> or the argument is nonfrivolous under the facts and or law<sup>238</sup>—the “*must not*.”<sup>239</sup> The “*must*” is similarly narrow. The lawyer must maintain client confidences<sup>240</sup> and reveal contrary legal authority, disclose material facts when necessary to avoid assisting criminal or fraudulent client conduct, and inform the court if a fraud has been perpetrated upon it.<sup>241</sup> Current rules make the lawyer responsible for advocating the client’s cause, but do not define what must be done to fulfill that duty. That leaves a tremendous amount of ground within which lawyer discretion, exercised with an eye to client and public interest, is presumably in control.<sup>242</sup> Recognizing this reemphasizes the role of *may* and *should*. The *may* and *should* ought to be subjected to inquiry by all of us and to reflection by the individual lawyer, something that is woefully lacking in much of the practice of law. Ah, the wages of positivism and formalism being used to define and apply the law of lawyering, while indeterminacy reigns in the law of substantive law.<sup>243</sup>

That leaves remaining the question of how the lawyer decides which arguments to make and which objectives to pursue when disagreement exists

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237. ABA Model R. Prof. Conduct 1.2 (d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . .”); ABA Model R. Prof. Conduct 3.3 (“A lawyer shall not knowingly (a) make a false statement of material fact or law to a tribunal.”).

238. ABA Model R. Prof. Conduct 3.1 (“A lawyer shall not bring or defend a proceeding, or assert a claim or controvert an issue therein, unless there is a good faith basis for doing so that is not frivolous, which includes good faith arguments for an extension, modification or reversal of existing law.”). Interestingly, as stated, the rule does not require the nonfrivolous argument; it simply permits it, while prohibiting the frivolous argument. *But see* ABA Model R. Prof. Conduct cmt. 1 (stating the “duty to use legal procedure for the fullest benefit of the client’s cause”).

239. One other “*must not*,” couched with many exceptions, involves conflicts of interest. *See* ABA Model R. Prof. Conduct 1.7 to 1.11.

240. ABA Model R. Prof. Conduct 1.6 (but note how many exceptions are incorporated into the rule as written).

241. ABA Model R. Prof. Conduct 3.3. *See* Rhode’s critique of this rule as adopted in Rhode, *Ethics in Practice*, *supra* n. 8, at 10-12.

242. *See* Simon, *supra* n. 34, at 16.

243. Professor Levinson interestingly points out that a good deal of nihilism seems to rest squarely upon the shoulders of the practicing bar and its attitude that any plausible argument must be made on behalf of a client if the client wants it, and that any objective that is legal must be pursued on behalf of the client, all in the name of “zealous advocacy.” Levinson, *supra* n. 4; Levinson, *supra* n. 10. However, laying responsibility solely on the practice of the profession does not necessarily fairly come to grips with the impact that legal realism and its latter-day progeny recognizing indeterminacy has had on the training of all those practitioners. There may be no inescapable or inevitable linkage between (a) the recognition that law in itself is devoid of values and thus that any values served by the law are external, sought, and infused by its practitioners, and (b) the development of the nihilistic pure instrumentalism of client service that seems to pervade the practice today. (Indeed, given the timing of the development of the codes of professional responsibility and the alteration of the codes over time to support greater deference to client objectives and methods of achieving those objectives, the interrelationship among the social consciousness, the practitioners of law, and the legal philosophers—all influenced by currents of thought endemic to their times—is somewhat inescapable.) But it also seems hard to believe that being introduced to indeterminacy as a law student, without being challenged to develop a personal and professional ethical construct for determining which values, and why and how, one will seek to infuse into the law, leads to the easy out of “there are no bad arguments except ones that are positively illegal (is there such a thing?) and so noncredible and incapable of being expressed in law-talk that it will affirmatively hurt my client’s cause to make them, rather than being worth the chance they might work.” *See* Simon, *supra* n. 34, at 2-4, 7-9.

between the lawyer and client, and none of the objectives and arguments are foreclosed by in-place boundaries upon proper representation.<sup>244</sup>

A simple rubric might look like this:

Expect both the lawyer and the client to engage in real and serious constitutional reflection, holding in mind that self-interest alone is insufficient support for advancing the worth of a proposed interpretation.

Require the lawyer and client to engage in dialogue about the issue and their proposed best interpretations, and discuss how the best interpretations might assist in achieving valuable client goals as well, *i.e.*, to engage in serious constitutional conversation.

If after such reflection and dialogue and assessment in concrete reality there is disagreement, then the lawyer must make a choice about how to proceed.

If the lawyer is *firmly convinced that his or her interpretation is necessary for a good Constitution* (other alternatives will create unworthy meanings harmful to the fabric of constitutional commitments to basic principles: equality, liberty, self-government, justice), he or she is entitled to—in fact perhaps should—either advance that interpretation or refuse to present a different interpretation. The lawyer must inform the client of the decision, and the reason for it.

If the lawyer is *firmly convinced that the client's proposed interpretation is unworthy* (it creates unworthy meanings harmful to the fabric of constitutional commitments to basic principles: equality, liberty, self-government, justice), the lawyer is entitled to (perhaps should) refuse to advance it. The lawyer must inform the client of the decision, and the reason for it.

If the lawyer, after reflection and dialogue, believes there is no clear worthy or unworthy interpretation being advanced, and the attorney is satisfied that the client's vision is sufficiently coherent and congruent with either the attorney's own vision or a vision that the attorney cannot find to be noticeably inferior to the attorney's own vision, then the attorney may advance the client's version, and, indeed, probably should do so, given (a) the client's independent right to have his, her, or its version presented in a forum where it might have influence and (b) the nature of the attorney's role in the enterprise (which is to give access and voice to others, not simply one's self).

But in that vast territory of "*may*," even utilizing a presumption that close calls should be in favor of the client's choice, a lot of attorney (and client) soul-searching and oath-reflection should be going on. One could not call the lawyer's choice to deviate from the client's orders either an illegitimate exercise of the professional role or a flaw in the performance of the lawyer's oath to the client and the Constitution.

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244. Suggested alternative visions have some strongly shared characteristics: first, a focus on context and determining what is right and best within that context; second, an insistence on mutual dialogue and discussion between lawyer and client as prerequisites to determining courses of action; and third, an insistence upon recognizing the multiplicity of values at stake during representation, including the autonomy of not simply the client, but also of the attorney (and sometimes of third-party others as well). See text accompanying *supra* notes 175-93.

The good faith/frivolous requirement, defining the *must not*, is objective. Belief alone cannot protect the lawyer from a finding that the lawyer acted outside the bounds if there is no objective support for the argument made.<sup>245</sup> But to determine if one's professional responsibility to the Constitution has been upheld, the lawyer himself or herself needs to utilize a subjective test for the exercise of choice in the *may* zone. Lack of belief (on the part of the lawyer or client) in a proposed argument about constitutional meaning is a sure warning sign that the argument is or may be inconsistent with fidelity to protect and defend the Constitution and to serve the public good as well as the client's interests.

Applying this rubric to the example above would lead the minister lawyer to approach the task of client representation and choice of constitutional arguments differently. He or she would insist both on assessing the constitutional meaning independently, and on having the client grapple with the issue about the meaning of the First Amendment rather than considering the service of a short-term policy goal alone. The minister-lawyer would discuss<sup>246</sup> the pitfalls of inconsistent arguments and the potential unintended consequences of success with the client, including the potential of undermining a key position on the constitutional meaning of the First Amendment in which the lawyer believes. Unless the client can articulate a viable argument for consistency of position and meaning of the Constitution, the lawyer may, and probably should, refuse to make this argument. The key for the lawyer is exercising sufficient independence of inquiry and judgment on constitutional meaning, engaging in serious constitutional conversation with the client, separating public policy beliefs and commitments from constitutional beliefs and commitment, and being cognizant of long-term as well as short-term goals and consequences.

Critics will certainly interpose that this proposed role for the lawyer is a mere idealized academic view that cannot, and will not, be concretized in actual practice.<sup>247</sup> To those critics, I give two responses. First, many lawyers seem to be seeking an integrated, coherent theory of legal practice that enables them to serve their clients well without disserving their own deeply held convictions about the right and the good.<sup>248</sup> Second, this proposal is no more fanciful than that of

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245. Levinson, *supra* n. 9, at 373-74; Rotunda, *supra* n. 79, at 455 (noting that the Model Rules drafters insist upon an objective test of frivolousness, whereas the Model Code utilized a subjective test).

246. Much of the recent work advocating a morally activist vision of lawyering, and even those advocating less active lawyering roles, rely heavily upon the use of a collaborative and deliberative discussion model for the lawyer and client in the decisionmaking relationship. *E.g.* Alfieri, *supra* n. 182, at 1217, 1227 n. 108; Alfieri, *supra* n. 191, at 1757; Dinerstein, *supra* n. 133, at 505, 534; Johnson, *supra* n. 191, at 223; *see supra* n. 191.

247. Simon recognizes that many lawyers might find such a contextual approach, or the abandonment of the categorical dominant view, to be "almost inconceivably utopian," despite the fact that lawyers regulated by the tort system are subject to such norms, and that lawyers routinely apply such thinking to all other sorts of issues. Simon, *supra* n. 34, at 11. As he points out, though, all views of legal ethics include an aspirational tradition, one accepted by most lawyers, who "care about the rightness of their conduct and . . . are motivated at least to a limited extent to behave ethically." *Id.*

248. *Cf.* Tremblay, *supra* n. 131, at 47 ("It ought to be easier to be morally activist in 1995 than in 1974, thanks to Luban, Simon, Wasserstrom, etc.").

Professor Levinson with respect to the serious and conscientious practice of protestant constitutionalism by all public officials and citizens. Our system, of constitutional law and of the practice of law by lawyers, will be improved by any person who takes seriously those responsibilities, whether or not everyone does so.<sup>249</sup>

#### IV. CONCLUSION

The indeterminacy of constitutional law and the strong pull of the standard conception of lawyering make it difficult to explore the role of the lawyer, but it is intellectually rewarding and of practical importance. If lawyers have a sense of role, and practice it, Sandy's theory of the Constitution comes closer to being prescriptive of good constitutionalism and descriptive of how it will actually be practiced. Then, the Constitution's peculiar blend of purposes—guiding light for future, warning buoy for present, and anchor to past—can be meaningfully practiced by those who often come to be lawyers because they believe in the Constitution and the system it is designing.

There is no basis for allowing an unnuanced view of professional responsibility to obstruct our view of constitutional fidelity or to distort the process of good constitutional interpretation. Therefore, there is no need to require a lawyer's integrity and fidelity to be discarded simply because we are willing, as a matter of professional responsibility law, to protect lawyerly choices that might otherwise lead to discipline by benighted institutional behavior and censorship. We can't know if the lawyer has acted in an admirable or despicable way unless we know the process of reflection and dialogue that accompanied the choice to make an interpretive argument; both loyalty and creativity are admirable up to a point. Professional responsibility theory creates no need to reward crass rationalizations; constitutional theory creates no need to decry conscientious and humble interpretive attempts. And thus we come back to the hallmark of ethics and protestant constitutionalism: one acts with integrity, not with soulless adherence to the letter of the rules.<sup>250</sup>

We need to seek an underpinning to (and understanding about) the latitude given to lawyers that is less one of license to distort and more one of support to do good. We can incorporate that insight, and the insights of protestant constitutionalism, into the way we understand the lawyer's professional responsibility to client and Constitution.

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249. One is reminded of the story of the old man throwing starfish back into the sea, one by one, on a beach filled with millions of them. He is confronted by a young man, who asks why he is doing so, as it could not possibly matter; there are too many to save. The old man quietly responds, "It matters to this one."

250. Cf. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, in *The Legal Profession: Responsibility and Regulation* 181, 188-89 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 2d ed., Found. Press 1988) (stating that lawyers can conceive of their role in ways that integrate its functions in the legal system with the lawyer's personal morality; using a model of role that is not a fixed role (*i.e.*, there is only one stated way to perform the role, whatever the context) but rather a recourse role (*i.e.*, the definition of the role's duties and responsibilities alter with the context and are responsive to the institutional objectives of the role, necessitating reflection and judgment when performing the role)).

Professor Levinson asks whether the only relevant interest the lawyer can take account of is the client's.<sup>251</sup> I propose this question is readily answered.

The fact that a lawyer is *allowed* to make any argument within the bounds of the law does *not insist* that lawyers pursue client interests so rabidly that nothing else matters. It simply recognizes that the "best" law may be yet unmade, and unfetters the lawyer from having to eschew an argument firmly believed to advance the cause of making the Constitution worthy and "good."

That is, the lawyer is free to be a constitutional prophet, but has no license (much less a mandate) to be a Pharisee and shill.

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251. Levinson, *supra* n. 9, at 365 n. 50 (counterposing the issue against the acceptability of making an argument the lawyer believes in but that is unlikely to be found acceptable to a judge).

