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Afterword

Sanford Levinson

AFTERWORD

Sanford Levinson*

I noted during the Halloween weekend during which we gathered in Tulsa that there is, inevitably, a mixed message generated by an event dedicated to a retrospective assessment of the lifework of a "senior" scholar, in this case, of course, myself. To acknowledge one's "seniority," under these circumstances, is to recognize that the bulk of one's accomplishments are in the past, even as attendant intimations of mortality play an ever greater role in one's consciousness. I am not the kind of "senior" I was in high school or college, gamely looking forward to a long lifetime of new worlds to conquer.

Paul Finkelman brought to Tulsa a wonderful group of old friends, as well as at least one new one. Our two days together last October in Tulsa were magical moments, at least for me, of human fellowship. That in itself meant a great deal to me, but what was certainly as important was the quality of discussion about a variety of issues that have been important to me throughout my scholarly life (and which are reflected in the articles in this symposium). I was elated. Authors always feel that their work, in David Hume's phrase, will "fall stillborn from the press," the equivalent of a bird that sings a song that no one hears. That one's work is not only read (and even cited), but, more to the point, also taken seriously and discussed is a real gift. I will forever be grateful to the authors and to the University of Tulsa and the editors of the Tulsa Law Review for performing what Jewish tradition calls a *mitzvah.*

But reading the final versions has transported me to an even higher level of pleasure. In reading them, I could not help thinking of Thomas Jefferson's desire that his gravestone label him only as the founder of the University of Virginia. I am not Thomas Jefferson, but I do know that I will follow him to the grave, and I am not above thinking of how I hope to be remembered. There are private answers, having to do with my wife, family, and friends. But insofar as I also have a desire to be remembered as well for my more "public" career as a legal academic, I could hardly do better than simply having it "written in stone" that my work helped to generate these remarkably rich articles by people I like and admire.

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One reason that I wanted to write this afterword is simply to express my gratitude to everyone. But I also want to take a few pages not so much to respond in full to the particular papers—a task that would, in fact, require an article at least as long as the symposium issue itself—but, rather, to offer some brief reflections[1] about some of the points raised in the essays. I could, of course, devote several pages to taking issue with the extremely flattering comments made by the essayists. One does not expect eulogies, especially if the subject is still alive and well, to include warts-and-all portraiture. But part of maturity is realizing that the warts are indeed there, even if full recognition of that reality is perhaps best left for other occasions. I do want to address some of the analyses of my work that struck home in a variety of ways and, indeed, suggest possible directions for future work.

I. LEGAL REALISM AND THE ASSESSMENT OF LEGAL CRAFT

From my self-interested perspective, perhaps the most striking single sentence in this symposium is Mark Graber's comment that "Levinson's refusal to teach *Marbury* on craft grounds is more Langdellian than Levinsonian."[2] He is making reference to the fact not only that I (generally) do not teach *Marbury* to my first-year law students,[3] but also that one of the reasons I give for my decision "is that I got angry, every single year, when reading Marshall's mangling of section 13 of the Judiciary Act[4] and then Article III of the Constitution."[5] As Graber notes, though, this scarcely seems to fit with my purported embrace of legal realism and "indeterminacy" in some of my work; it seems more congruent with the oft (and justifiably) derided views of Christopher Columbus Langdell, the Dean of Harvard Law School who "invented" the case method as a means of engaging in the legal "science" that he embraced. Such a "science" would enable the student to distinguish between "correct" and "incorrect" legal reasoning based on notions entirely internal to the notion of legal analysis itself, that is, without reference to the merits or demerits of the result of the particular case.

Like most American legal academics, I have little patience with Langdellianism. Step Feldman notes, altogether correctly, that I once wrote that "there is no point in searching for a code that will produce 'truthful' or 'correct' interpretations; instead, the interpreter, in Rorty's words, 'simply beats the text into a shape which will serve his own purposes.'"[6] And if that is not bad enough, I

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1. As Jack Balkin noted, I like the "reflection" trope, in part because it allows one to sketch out some thoughts without, however, having to do the really hard work of presenting sufficient evidence and confronting in full possible contrary positions. Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 Tulsa L. Rev. 553 (2003).

2. Mark A. Graber, *Establishing Judicial Review:* Marbury *and the Judicial Act of 1789*, 38 Tulsa L. Rev. 609, 613 (2003).

3. *See* Sanford Levinson, *Why I Don't Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*, 38 Wake Forest L. Rev. __ (forthcoming 2003).

4. Judiciary Act of 1789, § 13, 1 Stat. 73 (1789).

5. *See* Levinson, *supra* n. 3.

6. Stephen M. Feldman, *History and Interpretation*, 38 Tulsa L. Rev. 595 (2003) (quoting Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373, 385 (1982) (quoting Richard Rorty, *Nineteenth-*

went on to describe John Marshall as "perhaps[ ] the great Nietzschean judge of our tradition,"[7] and this was not meant as a criticism. So why do I describe myself as feeling "anger" when reading Marshall's opinion, rather than admiration at his rhetorical skills in "beating texts" to serve his own instrumental purposes, which is, after all, what judges (and all other lawyers) do for a living? To change the analogy, one might describe Marshall as the Michael Jordan of judges, making almost literally incredible feints and fakes before driving in for the basket and leading his team to a championship. If one applauds Jordan, why shouldn't a self-described Realist sit back and simply admire the show that Marshall puts on and, if one likes the idea of a strong federal judiciary, commend Marshall for being an unusually able captain of the team? If one does not like that idea, then one could criticize Marshall, but this is, obviously, a normative-political critique, not an assessment of his skills as a lawyer.

What Mark has done is to identify a genuine tension in my own thought—and emotions—that I have scarcely resolved in a fully satisfactory manner.[8] To quote from my screed on why I don't teach *Marbury*:

> So let me make an embarrassing confession: For all of my own attractions—indeed, intellectual commitment—to Legal Realism, I nonetheless believe that there *are* opinions of the Supreme Court (or of other constitutional interpreters to whom I also grant authority) that are genuinely inspiring and may even, at least a bit, vindicate our spending time in teaching students how to be constitutional lawyers (and, some of them, judges). It is only such a view, of course, that licenses Realists actually to express other than simple political outrage concerning decisions they despise.[9]

I trust that what Graber means by "Langdellianism" is just the continuing belief, however attenuated, in an ability to distinguish a "well-crafted"—or at least intellectually honest—opinion from one that is "badly argued" or, in Rorty's terms, merely the "beating" of legal materials into a form that allows the author to achieve his or her political goals. This is no small point. Indeed, it is sufficiently large that all I can do here is to acknowledge the fairness of Graber's comment. Perhaps I am like the purported revolutionary who, nonetheless, betrays remnants of a bourgeois consciousness! The question then becomes whether I need to discipline myself further to eliminate the last vestiges of that backward consciousness or, instead, whether the proper response is to concede that the bourgeoisie were on to something important. So, perhaps, was Langdell and

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Century Idealism and Twentieth-Century Textualism, in *Consequences of Pragmatism* (*Essays* 1972-1980) 151 (U. Minn. Press 1983)).

7. Levinson, *supra* n. 6, at 389.

8. The other Mark—Tushnet—has identified a similar tension with regard to the recognition of the role played by sheer historical contingency in structuring one's (or, more to the point, *my*) own thought and the willingness, at any given moment, to assert that thought as correct, worthy of emulation by others, or, indeed, as the basis for coercing others, through the mechanism of law, should they not voluntarily acquiesce. Mark Tushnet, *Self-Historicism*, 38 Tulsa L. Rev. 771 (2003).

9. Levinson, *supra* n. 3. For discussion of this point, *see* 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, 193-96 (2001).

everyone else who tries to offer some separation, however attenuated, between law and politics and, therefore, to leave at least some space in which one might assess an opinion in terms of its fidelity to law or adherence to internal standards of legal craft.

Moreover, Graber's article suggests important implications not only with regard to the merits of teaching *Marbury* (or, as he convincingly argues, the Judiciary Act of 1789 and the run-up to *Marbury*, which both he and I believe is, all things considered, a relatively trivial case save for understanding the politics of the aftermath of the 1800 election[10]), but also for the larger issue of what I am doing when I limn the outlines of "constitutional faith." Am I simply describing the structures of belief maintained by *others*, who possess a faith that I in fact do not hold, in precisely the way that I might describe the structures of belief of, say, members of the Church of Jesus Christ of Latter-day Saints ("LDS") like Rod Smith, without, in the least, committing myself to the truth value of that faith? Or, in contrast, am I offering as well a more "internalist" account of my own struggles with such a faith?

All I can say with confidence is that there are some days when I take the same stance toward the United States Constitution that I do, say, toward the Canadian or Saudi one, that is, as an interesting object to be studied and analyzed from an emotional distance; on other days, this seems simply silly (if not worse). As both Frank Michelman and Sherman Clark suggest, in their distinctive ways,[11] I certainly feel "constituted" at least in part by my relationship with the claims, aspirations, and deficiencies of the Constitution in a way that is simply untrue with regard to *any* foreign analogue or, for that matter, any state constitution. I have lived in at least six states, and never once did I seriously study the local constitution and reflect on its implications for my identity. This is true notwithstanding that my primary success as a practicing lawyer was winning a civil liberties case, based on the New Jersey Constitution, against Princeton University.[12] For whatever reason, the United States Constitution is different, as I suspect it is for most Americans.

II. ASSESSING THE CONSTITUTION

But is the United States Constitution worthy of our support, let alone our "faith"? Frank Michelman devotes his fine article to reviewing my rather self-dramatizing internal dialogue in the last chapter of *Constitutional Faith*, as I described my uncertainties when deciding in 1987 whether to "sign" the Constitution that was on display in Philadelphia as part of the commemoration of the Constitution's having been drafted in that city 200 years before. As he notes, I finally decided to sign, and then he goes on to offer some important reflections

10. Graber, *supra* n. 2, at 610.

11. Frank I. Michelman, *Faith and Obligation, or What Makes Sandy Sweat?*, 38 Tulsa L. Rev. 651 (2003); Sherman J. Clark, *Promise, Prayer, and Identity*, 38 Tulsa L. Rev. 579 (2003).

12. *See St. v. Schmid*, 423 A.2d 615 (1980), *appeal dismissed sub nom. Princeton U. v. Schmid*, 455 U.S. 100 (1982).

about what exactly I thought I was signing on to, with what kind of commitments. He offers what to me is a convincing critique of the notion that it is a genuine "contract" in any very plausible sense. Nonetheless, I presumably thought, and I take it that Frank would agree, that I was signing on to something that potentially had *some* meaning—and therefore potential "bite"—independent of my own favorite political views. Why else would I bother thinking even a moment about adding my signature if I were truly confident that I could, without fail, always achieve "happy endings" when charged with the task of answering what the Constitution required in a given instance? As Frederick Schauer has convincingly demonstrated, it is a characteristic of any practice of rule-following that it will lead one on occasion to distinctly sub-optimal, perhaps even "tragic," results.[13] It is, then, no small matter to commit oneself to "play by the rules."

As I listened to Frank's talk and then read his essay, I found myself asking once more if I would sign the Constitution today, that is, in 2003. And I find myself coming to a quite different answer than was the case sixteen years ago in Philadelphia. The reason, briefly, is that like most constitutional law professors of the time, I tended to focus on issues of constitutional rights (and wrongs). Several of the essays note the role that slavery plays in some of my writing (and in the casebook that I co-edit). Not at all coincidentally, the decision whether or not to "sign" the 1987 scroll included a meditation on Frederick Douglass's own willingness to support the Constitution, which he argued, plausibly or not, was "anti-slavery," even before the transformative addition of the so-called Reconstruction Amendments following the war.[14] If the Constitution was good enough for Douglass, then, I decided, it was good enough for me.

I remain interested in rights—and, even more so, in the importance of integrating the saga of chattel slavery into the standard curriculum (and casebooks)—but it is also true that I am now far more interested in structural issues than I was when writing *Constitutional Faith.* And I have become increasingly convinced, as I have put it elsewhere, that the Constitution is an "iron cage" that traps us within a dysfunctional political order.[15] I believe, more than ever, that our "veneration" for the Constitution is not only idolatrous, but also stupid.[16] We the People of the United States almost desperately need to have a long-overdue national conversation about the adequacy of many of its provisions that are never litigated (including, but certainly not limited to, equal voting

13. *See* Frederick F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decisionmaking in Law and in Life* (Oxford U. Press 1991); *Constitutional Stupidities, Constitutional Tragedies* (William N. Eskridge, Jr., & Sanford Levinson eds., N.Y. U. Press 1998).

14. *See* Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, in Paul Brest et al., *Processes of Constitutional Decisionmaking* 207 (4th ed. 2000). Jack Balkin and I discuss the merits of installing Douglass' speech into the "canon" of constitutional law materials in J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 1021-24 (1998).

15. *See e.g.* Sanford Levinson, Bush v. Gore *and the French Revolution: A Tentative List of Some Early Lessons*, 65 L. & Contemp. Probs. 7, 38 (2002).

16. *See e.g.* Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 Tex. Tech L. Rev. 2443 (1990); *Constitutional Stupidities, Constitutional Tragedies, supra* n. 13; Sanford Levinson, *Why It's Smart to Think about Constitutional Stupidities*, 17 Ga. St. U. L. Rev. 359 (2000).

membership in the Senate, fixed term presidencies, and life tenure for federal judges) and, therefore, are almost never thought about (and just as rarely taught) by legal academics.

I am no longer particularly concerned by the Constitution's adequacy or inadequacy as the protector of certain rights; apropos my earlier comments, I remain confident that judges and other constitutional interpreters indeed have all of the intellectual resources they need to make the constitutional text as protective (or unprotective) of any given rights as they wish. I am now far more anxious about a far more hard-wired—that is, functionally unamendable—political process that, on the one hand, seems to assure an almost permanent political gridlock that makes it next to impossible to resolve (or even seriously to confront) basic political problems,[17] and, on the other, seems to countenance an ever increasing tendency toward presidential Caesarism.[18]

I continue to believe that the enterprise of "constitutionalism" is extremely important, for all of its difficulties, but I have far less confidence than I did in 1987 that our particular Constitution is adequate to our present needs. My inclination today would be to refuse my signature, especially if I thought that someone actually cared whether or not I signed and would take a resounding "no" as an invitation to a serious conversation about what I have elsewhere called the "imperfections" of our constitutional order.[19] I continue to believe that the best forum for such a conversation would be a new constitutional convention,[20] even as I recognize that this remains a highly idiosyncratic view, especially among "respectable" people.

III. THE PROBLEM OF CONSTITUTIONAL AUTHORITY

If my relationship with my wife is certainly my most important "private" relationship, then, most certainly, my relationship with Jack Balkin has been, for the past decade, my most important collegial relationship, reflected, among other ways, in the now almost dozen jointly-authored articles and co-edited books. I simply cannot imagine engaging in the scholarly (and schmoozing) enterprise without Jack. If he is kind enough to grant me some role in his own fecund scholarship, then the extent to which it is a fully reciprocal influence must be emphasized. His emphasis on the importance of social movements in the drama of constitutional development has been extremely illuminating for me, and I think that the way he weaves my conceptualization of "protestant" and "catholic" constitutionalism into his own master narrative of social movements is masterful. I wasn't thinking those thoughts when I initially formulated those notions, but I happily do so now.

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17. *See* Mark V. Tushnet, *The New Constitutional Order* (Princeton U. Press 2003).

18. The Caesarism may be less hard-wired inasmuch as it presumably could be contained through a resolute Congress willing to countenance impeachment, but, to put it mildly, I am not optimistic.

19. *See Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Sanford Levinson ed., Princeton U. Press 1995).

20. *See* Sanford Levinson, *Why Not Take Another Look at the Constitution?*, 234 Nation 656, 656-57 (May 29, 1982).

Jack's master motif, borrowed from his early interest in deconstructionist approaches to literary and social analysis, is to emphasize the joint presence of *both* constitutional "protestantism" and "catholicism" in American political life. That is, social movements are "protestant" insofar as they often arise in opposition to Supreme Court decisions—think only of the anti-abortion movement sparked in substantial measure by *Roe v. Wade*.[21] But what they wish to do, ultimately, is to capture sufficient control of the White House and Senate so as to make possible the takeover of the Supreme Court and thus gain the undoubted value that Supreme Court pronouncements have in our culture. A "true" Protestant has no desire to capture the Vatican; a dissenter within the Church, however "protestant" he or she may be with respect to adherence to the commands of the Pope, nonetheless strongly believes that it truly matters who occupies the Papacy and is willing to put enormous energies into working for the future success of one or another faction within the Church.

I believe this is substantially correct and an important corrective to my perhaps overly schematic initial presentation. I do wonder, however, if there nonetheless remains an element of disagreement or, at least, a difference of emphasis between Jack and myself that is worth discussing. Jack emphasizes the inevitable *fluidity* of authority in interpretation. He might echo Jefferson in saying, "we are all protestants, we are all catholics," at least with regard to our operative constitutional faiths. I want to offer a "yes, but" caveat. At any given moment, we may be faced with a decision of obedience or disobedience to a judicial command, and at that moment we must indeed decide (and declare) whether we recognize its authority over us.

As Frank Michelman points out, this is not necessarily the same thing as asking if we will *obey* the Court.[22] We might, after all, say (something like), "I recognize that you have the authority to say what you have said, but it calls on me to violate some moral or religious precept, and that I simply cannot do. (Think of Rod Smith and his moving story about his application for conscientious objector status.[23]) I will, therefore, go to jail rather than obey your command, but I am *not* challenging the legal validity of that command. It is indeed true that in our political system, the Court has become the 'ultimate interpreter,' the 'last word' on what the Constitution means at any given instant in any given case." But imagine someone else who instead says:

> To describe something as the "opinion" of the Court gets it just right! Judicial pronouncements are in no way "authoritative constructions," and each of us is entitled to our own opinion. The most authentic reading of the American constitutional tradition is that it is ultimately up to the individual to decide on the validity—that is, persuasive authority—of a Supreme Court opinion. Because I believe that the decision is completely unpersuasive, it is therefore invalid, and I will

21. 93 S. Ct. 705 (1973).

22. Michelman, *supra* n. 11, at 655.

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

> *not* engage in supine submission, as by going to prison without complaint as the penalty for defiance. Rather, I will go underground and help my fellow dissidents try to restore the 'true' Constitution.

For all of Jack's justified insistence that the project of "restoration" might well include (re)capturing the Court in the name of the "true" Constitution, at the particular moment I am describing, our latter figure has rather dramatically rejected "catholicism" for "protestantism." Similarly, the person who peacefully acquiesces in—and accepts the basic legitimacy of—his own imprisonment precisely because he doesn't wish to challenge the supremacy of the Supreme Court has cast his lot with "catholicism." To be sure, the actual phenomenological experience might be even more complicated. One must always factor "prudence" into the equation, and it is not clear how prudential analysis fits either model. One might accept a jail sentence simply because the alternatives, such as living an underground life or fleeing to a foreign country, seem even worse.

Still, at the moment of decision (and justification) one must make the either/or choice. Or, to switch metaphors, one will at that moment see in the well-known optical illusion *only* the rabbit *or* the duck, even as the sophisticate knows that either might be perceived within the ambiguous figure before one. Over time, one will in fact see in alternation both the rabbit and the duck, but it is literally impossible to see both at the same instant. Similarly, over time, one will indeed see the Supreme Court both as "ultimate interpreter" and as simply one player among many in constructing constitutional meaning, but one cannot, at any given moment when decision is necessary, perceive both as true.

IV. THE CONSTITUTIONAL FIDELITY DEMANDED OF THE LAWYER

A brand-new friend, whom I met for the first time in Tulsa, Professor Elizabeth Reilly, has written a powerful article on "the lawyer's role in constructing constitutional meaning."[24] Again, there is far more that could be said than I have time for—or the reader has patience for—in this ever-longer afterword. But let me respond, at least (and at most) briefly, to one set of questions that she raises, especially because she notes, all too accurately, that some of my prior attempts to consider the question are somewhat "simplistic."[25] She writes as follows: "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. Did he then have a professional responsibility to make all plausible arguments for his client even if they undermined his view of the Constitution?"[26]

A number of different issues are presented. First, would I, or should a properly motivated constitutional lawyer, take a case if its success would encroach on "core values of the Constitution." I would hope that the answer, at least for me

24. Elizabeth Reilly, *Priest, Minister, or "Knowing Instrument": The Lawyer's Role in Constructing Constitutional Meaning*, 38 Tulsa L. Rev. 669 (2003).

25. *Id.* at 671 n. 10.

26. *Id.* at 681 n. 58 (internal citations omitted).

personally, would be no. But, of course, a full answer would require a far more extended discussion of what those values are and how one recognizes them. The very use of the term "core" values suggests that there might be other, "peripheral" ones that do not demand any particular loyalty. And, as I have suggested above, there might be features of the Constitution—such as the "equal value" assigned to each and every state in the Senate or if voting the House of Representatives to break deadlocks in the Electoral College—that I believe are stupid or worse.[27] One might even regard these as "core values," but, frankly, I would take pleasure in undermining them.

But, of course, I do believe that the Constitution instantiates some extremely important values that are at the heart, or the "core," of what is most admirable in the American constitutional enterprise. I have, for example, represented the Ku Klux Klan and the United States Labor Party in two cases involving freedom of speech—the first under the First Amendment of the United States Constitution, the second involving the protections accorded by the New Jersey Constitution—and in both I had no difficulty in believing that I was indeed fighting the good fight in behalf of extremely important civil liberties. Indeed, both cases were in fact conducted under the aegis of the American Civil Liberties Union.

Even here, though, I find it necessary to note that there are many competent constitutionalists, including good friends, who believe that "hate speech" of the kind often spewed forth by the Klan especially is *not* protected by the best reading of the First Amendment, that the true "core value" of the Fourteenth Amendment is overcoming a history a racial hierarchy and subordination that racialist hate speech is designed to maintain. I still tend to disagree with this latter analysis, but I would not describe one of its proponents as traducing the "true" meaning of the First and Fourteenth Amendments; I would be inclined to say only that we have an entirely good faith difference of opinion about what is the best reading of our constitutional tradition. I suspect that Professor Reilly would agree insofar as she includes the important words "as he saw them," which operates to recognize the potential for good faith disagreement about the actual instantiation of core values.

But complications remain. Professor Reilly appears to think of the Constitution as a set of "values" and outcomes. If that is the case, then it makes a great deal of sense to engage one's clients in intense conversations about the possibly deleterious consequences for our polity of any given outcome that the client may desire insofar as it trenches on these values. But one can look at the Constitution instead (or at least in addition) in terms of the particular methods by which we approach it. My colleague Philip Bobbitt has notably outlined the "modalities" of constitutional interpretation,[28] one of which is "historical" or, as is more commonly described, "originalist," the notion that the Constitution today should be interpreted to accord with the understandings of its original audience

27. *See* Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, in *Constitutional Stupidities, Constitutional Tragedies*, *supra* n. 13, at 61.

28. *See* Philip Bobbitt, *Constitutional Interpretation* (Blackwell 1991).

some 200 (or, in the case of the Fourteenth Amendment, some 135) years ago.[29] As a matter of fact, I do not in fact find originalism either very plausible as a theoretical possibility or, just as importantly, as a normative account. That we should be ruled by the dead hand of the past is not, I think, a very attractive suggestion. This also, I should note, makes me less than a strong adherent of the importance of following another modality, precedent, which requires, if *stare decisis* is to be at all interesting in its implications, that one adhere to what one believes to have been wrongly decided past decisions. Would these views, however, affect how I would engage in the lawyering enterprise? The answer, I am afraid, is no. Indeed, I doubt that I would feel a duty to remonstrate with the client about the problems of using originalist appeals or relying on a dubious past case.

As I have written elsewhere,[30] a practicing lawyer has a duty to use all available modes of argument that serve the interest of his client. I would have no hesitation to proffer originalist arguments or to rely on what I deemed wrongly-decided cases any more than I would expect a devoted Borkian to refrain from referring to "fundamental values" if such an argument were thought to be in the interest of *his or her* client. Lawyers *must* craft their arguments by reference to their audience. If I choose to appear in front of a court dominated by contemporary Republicans, I would try to make arguments that would appeal to *them*, whether or not I personally thought they were the best arguments that were available. Indeed, and what is probably even more to the point, I try to teach my students how to use all of the modalities insofar as I am preparing them for careers as practicing lawyers. It would, I believe, be grossly irresponsible if, for example, I failed to teach the mechanics of constructing an originalist argument simply because I tend to find them completely unpersuasive.

If one finds these arguments jarring and believes, instead, that lawyers should never make use of modalities that they in fact find highly problematic, even objectionable, then, at the very least, I would argue very strongly that any such lawyers have a *Miranda*-like duty to warn clients from the outset that they will potentially receive far less robust representation than they might get from someone less fastidious with regard to using all available modalities of legal argument. I would also expect, as a matter of fact, any such lawyers to retain very few clients after engaging in the required disclosure. Similarly, I think that an overly fastidious law professor, who refused to teach modes of argument in which he or she disbelieved, should, at the very least, be allowed to teach only courses

29. Another strand of originalism would look more for original "intents" of the constitutional drafters, as against looking to the interpretations placed on the language by the initial audience. There are, I believe, even greater problems with the latter form of originalism than the former. For purposes of this discussion, though, it is sufficient to note that I ultimately find both untenable as modes of constitutional analysis.

30. *See* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 Harv. J.L. & Pub. Policy 495 (1996) (reprinted in revised form as *The Operational Irrelevance of Originalism*, in *Liberty under Law: American Constitutionalism, Yesterday, Today and Tomorrow* 105, 105-17 (Kenneth L. Grasso & Cecilia Rodriguez Castillo eds., U. Press Am. 1997)).

with voluntary registration, and students should be informed in advance of the truncated scope of the course.

V. How Much of a Friend Am I to Religious Sensibilities?

My final comment is sparked by Rod Smith's description of me as a "friend" of the religious, even if I am not a religious believer myself. That means a great deal to me because of my regard for Rod. The problem, however, is that I am not sure it is really true.

It is true that I am an "accommodationist," at least with regard to the kinds of issues raised by such cases as *Employment Division, Department of Human Resources of Oregon v. Smith*[31] and statutes like the Religious Freedom Restoration Act.[32] It is also true, as Rod notes, that I affirm with gratitude that some of my best friends, both during my childhood years in Hendersonville, North Carolina, and now, are religious. Finally, for what it is worth, I note that I basically disagree with Avi Soifer's critique of the Supreme Court's recent stance in school funding cases. Although I agree with him that the language of "neutrality" is inevitably slippery and, at the end of the day, remarkably unhelpful, I have come to believe that controversies about using public funds in religious schools are best settled through the ordinary political process. Part of the reason is that I believe that there is much merit to the view that parents of modest means should be able to enjoy the same options that those of us with greater means have with regard to choosing religious education for our children. But another is that I no longer believe that the Establishment Clause speaks clearly enough or, just as importantly, that federal judges have sufficient knowledge or wisdom to justify the continued constitutionalization of the issue, save for formal limitations that prevent, for example, programs from being limited to religious schools. I am not sure how I would vote as a legislator with regard to various funding or "voucher" programs,[33] but I have become quite sure that courts have little useful to say.

So why am I concerned that Rod may overemphasize my "friendliness" to religion and to the religious? One reason, perhaps, is that "friendship" is best conceived as a relationship between and among concrete people. One may tolerate, even respect, strangers and their possibly strange ideas and observances, but that is not the same thing as the personal encounter that is friendship. It is also the case that friendship, though surely an important value, is not necessarily a supreme one. Many years ago, I wrote an essay on "the preferences of friendship,"[34] which discussed at length the tensions between personal loyalties, captured in such notions as testimonial privileges, and overriding loyalties to the state and, more to the point, the society of strangers instantiated in the state. Our

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31. 494 U.S. 872 (1990).

32. 42 U.S.C. 2000bb (2000).

33. *See* Meira Levinson & Sanford Levinson, "'*Getting Religion*'": *Religion, Diversity, and Community in Public and Private Schools,* in *School Choice: The Moral Debate* (Alan Wolfe ed., Princeton U. Press 2003).

34. Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 Duke L.J. 631.

legal system does not privilege friendship (or even family relations) above the duties of citizenship, and I do not necessarily believe this is a bad thing. I have written elsewhere that "there is something almost lunatic in the unadorned version of E.M. Forster's (in)famous remark, 'If I had to choose between betraying my country and betraying my friend I hope I should have the guts to betray my country.'"[35] It all depends on what the friend is accused of doing (or, indeed, *has* done) and the degree of legitimacy that one accords the state that presumes to represent the interests of the country. Thus, for example, I admire rather than disdain the willingness of the "Unabomber's" brother to go the F.B.I. rather than protect him against discovery.

What this means, then, in the context of my "friendship," either actual or metaphorical, with those who are religious, is that I may not always be willing to give them the support that they might believe, rightly or wrongly, should be forthcoming from a true friend. Other loyalties might take priority, though from a religious perspective it may indeed be difficult to countenance the possibility that the religious duties should be subordinated to the demands of a secular state.

I have been thinking about this most recently with regard to the following statement of Abraham Lincoln, made in reply to a group of Chicago Emancipationists in September 1862 (just before, as a matter of fact, he announced his intention to issue the Emancipation Proclamation on January 1 if the South remained defiant in rebellion). They pressed upon him their own perceptions of what God required by way of response to the reality of slavery in American life. "I hope," responded Lincoln,

> it will not be irreverent for me to say that if it is probable that God would reveal his will to others, on a point so connected with my duty, it might be supposed he would reveal it directly to me; for, unless I am more deceived in myself than I often am, it is my earnest desire to know the will of Providence in this matter. *And if I can learn what it is I will do it!*[36]

Readers of *Constitutional Faith* will know that I have long been fascinated by Lincoln and his uncertain status as a model of constitutional fidelity.[37] Yet I had never really stopped to consider this statement, which I most recently read while participating in a reading seminar on Lincoln that Frank Michelman was offering at the Harvard Law School in the Spring of 2003.

One reason, no doubt, that it leapt out more this time than before is that our contemporary political culture, led by George W. Bush, has become suffused in religious talk. We seem increasingly to be governed by people who have not only faith in God, but, far more importantly, to be altogether confident that they do

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35. Sanford Levinson, *Structuring Intimacy: Some Reflections on the Fact That the Law Generally Does Not Protect Us against Unwanted Gazes*, 89 Geo. L.J. 2073, 2078 (2001) (quoting E.M. Forster, *Two Cheers for Democracy* 66 (Oliver Stallybrass ed., Edward Arnold 1972)).

36. *Reply to Chicago Emancipation Memorial, Washington, D.C.*, in Abraham Lincoln, *Speeches and Writings 1859-1865*, at 361 (Don Fehrenbacher ed., Lib. of Am. 1989) (emphasis in original).

37. Lincoln pervades *Constitutional Faith*; I have most recently written of Lincoln in *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. Ill. L. Rev. 1135.

indeed have ways of discerning exactly what God requires of them. And what they believe is required may be better described as active intervention into the ordinary affairs of the world rather than, as with Rod's conscientious objection, a (limited) withdrawal. I find it far easier to be friendly to those who wish to "opt out" of certain general practices or legal obligations than to religious adherents who feel called upon to reorder the social order, including its legal dimensions, to accord with what they discern as God's will.

Consider in this context the comment by Franklin Graham, the son of noted evangelist Billy Graham who heads a Christian relief agency, Samaritan's Purse. He is also a good friend of George W. Bush; indeed, he delivered a prayer during Mr. Bush's 2002 inauguration. In a *New Republic* article written in the immediate aftermath of the conquest of Iraq, Michelle Cottle notes that Graham is poised to send members of his agency to Iraq.[38] One purpose is to provide relief to the needy, a commendable task at which it apparently excels; another purpose, though, is to convert heathen Moslems to Christianity. Graham has notoriously referred to Islam as "'a very evil and wicked religion,'"[39] and he concedes that the distribution of aid is going be accompanied by information as to the "good news" about the possibility of eternal salvation through Jesus. Indeed, Graham no doubt believes, as did some of my high school friends mentioned by Rod and, apparently, as does George W. Bush,[40] that acceptance of Jesus as the Messiah is a *necessary,* and not only a sufficient, condition for salvation, so that *no* non-Christians (including, of course, Jews) can look forward to Heaven.

Graham was specifically criticized by General Norman Schwarzkopf during the first Iraqi war in 1991 because he had shipped to Saudi Arabia thousands of copies of the New Testament, translated into Arabic, to be distributed to local Saudis. Schwarzkopf pointed out that this not only violated Saudi law, which is rigorously exclusionist of any alternatives to Islam, but also assurances that had

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38. Michelle Cottle, *Bible Brigade: Franklin Graham v. Iraq*, New Republic 16 (Apr. 21 & 28, 2003).

39. *Id.*

40. *See* Sam Howe Verhovek, *Is There Room on a Republican Ticket for Another Bush?*, N.Y. Times Mag. 52 (Sept. 13, 1998):

> Bush, sitting one day recently on a sofa in the Governor's office at the Texas State Capitol, says he is "cautious about wearing my religion on my sleeve in the political process." And he offers this particular story to explain why.
>
> "Mother and I were arguing—not arguing, having a discussion—and discussing who goes to Heaven," recalls the Governor, who at the time had religion very much on his mind. Having dealt with a gathering drinking problem by abruptly swearing off alcohol, he had vowed a renewed commitment to his family and his faith. Bush pointed to the Bible: only Christians had a place in heaven. "I said, Mom, look, all I can tell you is what the New Testament says. And she said, well, surely, God will accept others. And I said, Mom, here's what the New Testament says. And she said, O.K., and she picks up the phone and calls Billy Graham. She says to the White House operator, Get me Billy Graham.
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> "I said, Mother, what are you doing?" Bush continues, chuckling at the memory. "Seriously. And about two minutes later, the phone rings, and it's Billy Graham, and Mother and I are on the phone with Billy. And Mother explains the circumstances, and Billy says, From a personal perspective, I agree with what George is saying, the New Testament has been my guide. But I want to caution you both. Don't play God. Who are you two to be God?"

apparently been given by the United States, as a condition of gaining entry to Saudi Arabia by its largely Christian armed forces, that there would be no proselytizing. "As Graham later recalled to *Newsday*," Cottle writes, "Schwarzkopf had a chaplain from his office phone the reverend to complain about the diplomatic difficulties he was causing. Graham's response: 'Sir, I understand that, and I appreciate that, but I'm also under orders, and that's from the King of Kings and Lord of Lords.'"[41]

One reason to pass over Lincoln's statement to the Chicago emancipationists is precisely that he was in fact, if not an ontological skeptic about the very existence of God, at least an epistemological one with regard to being able to discern God's commands. For him, there was no conflict between his secular and religious duties because he disaffirmed an ability to know exactly what those duties might entail. So his line about potential submission to "the will of Providence" is something of a throwaway. But that is, obviously, not at all the case with Graham and, one suspects, many others enjoying high national office (including, say, Attorney General John Ashcroft, who proudly told his audience at Bob Jones University that he has "no King except Jesus"[42]).

As already suggested, I feel considerably less friendly to such proclamations (and to the strangers who proclaim them) than I do to Rod Smith's claim for conscientious objection. Part of the reason, no doubt, is that I do not share the political aims of George W. Bush or Attorney General Ashcroft or the conversionary desires of Franklin Graham. The issue undoubtedly gets more complicated for me with regard to figures like Martin Luther King with regard to civil rights or Pope John Paul II when he calls for peace or emphasizes some of the deficiencies of a cowboy capitalism that seems altogether indifferent to the fate of the poor or other "losers" in the morally indifferent free market. Still, I remain uncomfortable about anyone who confidently asserts knowledge as to what God requires of him, her, or us and who is willing to act on that knowledge in a way that coerces those of us who do not share the belief.[43] Although it is true, as Rod

41. Cottle, *supra* n. 38, at 17.

42. *See* John Ashcroft, U.S. Atty. Gen.-designate, Commencement Address, *'We Have No Kings': Transcript of Ashcroft Speech at Bob Jones University* (Greenville, S.C., May 8, 1999) (available at http://abcnews.go.com/sections/politics/DailyNews/ashcroft_bjutranscript010112.html) (accessed Apr. 21, 2003):

> A slogan of the American Revolution which was so distressing to the emissaries of the king that it was found in correspondence sent back to England was the line, "We have no king but Jesus." Tax collectors came, asking for that which belonged to the king, and colonists frequently said, "We have no king but Jesus." It found its way into the fundamental documents of this great country. You could quote the Declaration with me. "We hold these truths to be self-evident that all men are created equal, and are endowed by their Creator with certain inalienable rights." Unique among the nations, America recognized the source of our character as being godly and eternal, not being civic and temporal. And because we have understood that our source is eternal, America has been different. We have no king but Jesus.

43. Conscientious objection is, I believe, non-coercive, even with regard to the person who is called to occupy the slot that the excused person was being drafted for. As Rod notes, his alternative was not acquiescence to the demand of the state to serve in the armed forces, but, rather, to go to jail. Someone else would have been called up regardless.

notes, that I am unwilling to "demand" "epistemic abstinence" of those who are religious when they participate in public debate, I would be lying if I did not admit that I feel considerably more comfortable with a debate conducted entirely in secular language.

There is one other issue raised in Rod's article that deserves comment inasmuch as it relates to the same issue of epistemological latitude that I am willing to, or indeed, am intellectually able, to offer my friends who are religious. He presents a valuable account of the process by which polygamy was excised from LDS doctrine. In his rendition, it was the process of a "revelation" from God to the leader of the Church. What should a non-believer, like myself, say about it? I have in my teaching used this important episode in LDS history as an example of how political pressure can change religious doctrine, but my account is thoroughly naturalist and, indeed, "realist," inasmuch as it suggests that it was church leaders, and not, in effect, God who bowed to the pressure of the United States. I can no more credit the LDS story of divine intervention than I can the Jewish story with regard to the Exodus from Egypt (an event, as it happens, that I have recently celebrated in the annual seder).

There is no way that I can genuinely think myself into accepting Providentialist accounts as plausible, though, paradoxically or not, I do not disdain them or find them to be signs of mental illness in the way that I would if someone offered an account of visitors from outer space commanding them to engage in certain acts. It is one thing, that is, to argue that one should tolerate, even respect and cherish, certain people whose views are based on an epistemological system that I do not share. It is another thing to believe, or to teach, that it—*i.e.,* the system—is worthy of the same respect as the people. All of us, I suspect, have genuinely close friends who possess one or another view that we sometimes find ourselves in effect apologizing for to others, as in, "Yes, it's true that Joe tells racist or sexist jokes, or believes in astrology, or believes that, as a non-Christian, I am damned to eternal punishment, but you have to know that he's really splendid in the ways that most deeply constitute a friendship. He was there for me when I needed help, and I know that I could always count on him in the future to stand by me through thick and thin. Nobody's perfect, after all."

Now, as a matter of fact, I'm not willing to dismiss religious claims with the same abandon as I do, say, astrological ones, even if I am not willing to give them the same credit that I do ones based on naturalistic science, but this still doesn't add up to my being able to tell the same story as Rod does with regard to explaining the change of view regarding polygamy in 1890. In teaching *Reynolds v. United States*[44] in the future, I will undoubtedly draw on Rod's account to illustrate the LDS perspective as to what explains the change, but I will not, in my own voice, "endorse" it, for the simple reason that I do not believe that the revelation occurred (though I am willing to grant that the Prophet believed that it did). If friendship requires anything more than this, then I may not pass the test.

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44. 98 U.S. 145 (1878).

VI. CONCLUSION

Since this "afterword" is not meant to be a single coherent argument, there is no way to bring it to a suitable conclusion. Perhaps it is appropriate, then, simply to reiterate that one of the greatest pleasures in my life is the opportunity to engage with other people, especially friends, in intense conversation about what Justice Cardozo once called (and has become a running tag line between Jack Balkin and myself) "[l]ife in all its fullness."[45] The University of Tulsa College of Law made just such a conversation possible, as illustrated by the interesting, challenging essays that were written by those brought down to Tulsa. I hope that this "afterword" not only conveys my endless gratitude, but also, and more importantly, serves as a "foreword" to future conversations.

45. *Welch v. Helvering*, 290 U.S. 111, 115 (1933).