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PLEDGING FAITH IN THE CIVIL RELIGION;  
OR, WOULD YOU SIGN THE CONSTITUTION?

SANFORD LEVINSON\*

I. INTRODUCTION

A. *"Miracle at Philadelphia"*

The principal exhibit commemorating the bicentennial of the Constitution is located in Philadelphia, in the Second Bank of the United States. Called "Miracle at Philadelphia," it is designed not only to inform, but also, inevitably, to establish a mood suitable to contact with the miraculous. One suspects, for example, that the letters from George Washington and the original notebook of James Madison function for most viewers as sacred relics rather than as sources of information.<sup>1</sup>

As the exhibit reaches the culminating event of September 17, viewers are presented with an invitation to become a latter-day

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As always, I am grateful to a number of friends and colleagues who were willing to respond to various drafts of this talk prior to its delivery on March 28, 1987. They include Douglas Laycock and Lucas Powe of the University of Texas Law School, Gene Nichol of William and Mary Law School, and Richard Rabinowitz, the designer of "Miracle at Philadelphia." I also received valuable encouragement from Clifford Geertz and Joan Scott of the Institute for Advanced Study, within whose environment I was privileged to be able to think about and draft this article. What is printed here was submitted to the participants at the Fourth Annual Bill of Rights Symposium in late February and left unchanged thereafter. A revised and substantially shorter version will appear as the concluding chapter of my book *Constitutional Faith*, which will be published by the Princeton University Press in the spring of 1988. The discussion of the *Schneiderman* case in Part III below, moreover, will appear in greatly expanded form as Chapter Four of that book.

1. Indeed, Madison's notebook can hardly be anything else than a relic, since the display has no standard "informational" content, as contrasted to the Washington letters, which allow the reader to become truly engaged in the question of Washington's willingness to accept the entreaties of Henry Knox and others to lend his unique prestige to the Philadelphia Convention by agreeing to attend it.

signatory of the Constitution.<sup>2</sup> The exhibit in fact takes ample note of the controversy surrounding both the signing and the subsequent ratification. Yet it is hard to believe that most viewers will not interpret the invitation as a suggested transformation of the visit from a mere remembrance of times past to a renewed dedication to the Constitution—a continuing ordination of it, as it were—as an ever-living presence that is vital to the establishment of a more perfect Union committed above all to the realization of justice and the blessings of liberty. Every participant in the exhibit is thus asked to make a choice—to sign or not to sign, to ratify or to reject, the Constitution of the United States.

I have now visited the exhibit twice, and I commend it to all who have not yet seen it. I have not yet accepted the invitation to sign, however, and I want to devote my remarks not only to explaining my own indecision about signing—for that is probably a better term, at least so far, than “decision not to sign”—but also to indicating why I believe that the question is of some general import and worth our collective attention.

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2. In particular, visitors are confronted with two endless scrolls, each with the same two questions: “Will you sign the Constitution? If you had been in Independence Hall on September 17, 1787, would you have endorsed the Constitution?”

Other celebrants have issued similar invitations. After completing the above remarks, I received a flyer distributed by the National Conference of Christians and Jews. At the top of the flyer is a statement by Mark H. Curtis, President of the Association of American Colleges in 1984: “If it were possible, it would be more than symbolic to have all persons sign a document of ratification to signify that they understand the principles of the Constitution and accept the rights and responsibilities it bestows upon them.” Immediately underneath the statement is a depiction of the 1787 Constitution, including the names of the signers. Below this is a large printed statement: “This is my Constitution; I’m putting my name on the line,” followed in turn by blank lines that can be inscribed by those willing to do so. A note at the bottom indicates that the project is “officially recognized by the commission on the bicentennial of the United States Constitution.”

I also attended a bicentennial symposium at Hofstra University, one of whose “special events” was an exhibit, sponsored by Nassau County (New York) and the Bar Association of Nassau County, entitled “The Living Constitution.” According to the program description:

Three hundred people (100 each day) will have the opportunity to sign a word to parchment sheets cut to the same dimensions as the original Constitution, thereby creating a “Living” United States Constitution. Each signer will receive a memorial certificate. The completed “Living Constitution” will become a permanent part of a memorial of the Bicentennial—Constitution wall in the main lobby of the Supreme Court Building in Mineola, Long Island.

One wonders what feelings were supposed to run through the minds of those who got to copy the words of article IV, section 2, clause 3—the Fugitive Slave Clause.

### B. *Constitutional Faith*

I have been writing now for some years about constitutionalism—and constitutional faith—as a central aspect of American civil religion. Clearly the event of which this symposium forms a part—the bicentennial of the Constitution—is linked to the plea of Washington in his Farewell Address that “the Constitution be sacredly maintained.”<sup>3</sup> Washington, of course, was building on the wish expressed by Madison in *The Federalist No. 49* that “veneration” rather than critique become the dominant motif of the citizen’s relation to the Constitution, for only veneration would generate the stability requisite to maintaining even the “wisest and freest governments.”<sup>4</sup>

There is, of course, also a rich tradition of dissent from such Constitution worship. Thus Jefferson could write acerbically in 1816 that “[s]ome men look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched.”<sup>5</sup> Not for him a veneration that implied the suspension of disbelief about potential imperfections. After all, “institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain as under the regimen of their barbarous ancestors.”<sup>6</sup> An ever-changing and presumably progressing society should with some frequency check its wardrobe and cast out that which no longer fits.

Still, the presence of conflicting traditions does not begin to resolve the question directed at us: How do we stand vis-à-vis the Constitution? What is our demeanor as we come together in remembrance of its origins? Do we celebrate, affirm, renew the vows of loyalty? One can imagine, for example, two kinds of golden wedding anniversaries. One would feature a couple whose marriage is

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3. Farewell Address by George Washington (Sept. 17, 1796), reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 214 (J. Richardson ed. 1896), quoted in M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 70-71 (1986).

4. THE FEDERALIST No. 49, at 314 (J. Madison) (C. Rossiter ed. 1961).

5. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in 10 THE WRITINGS OF THOMAS JEFFERSON 42 (P. Ford ed. 1899), cited in Schneiderman v. United States, 320 U.S. 118, 137 n.15 (1943).

6. *Id.*

universally recognized as truly fine and who might choose to ratify that recognition, so to speak, by symbolically re-engaging in their marriage ceremony of long ago to affirm the glory of their union. The onlooking celebrants could indeed share in the sense of human triumph over what Lincoln might call the "lesser angels" of our nature,<sup>7</sup> and tears of joy would be altogether appropriate as a response. Imagine, however, a second event, suffused with a kind of bitter nostalgia, in which the motif is remembrance of the fond hopes of fifty years ago coupled with a recognition that the marriage—though never formally dissolved by divorce—nonetheless in no way lived up to those hopes or, even worse, its potential. Here, renewal of the wedding vows would be rank sentimentality, the known historical reality contradicting the claims of the words. The only appropriate response of the participants in this sad spectacle would be embarrassment. Bicentennials, like anniversaries, are noncontingent events, dictated by the relentless turn of the calendar, but our responses to them are richly contingent and worth examination.

One sometimes hears that the dominant theme of the bicentennial should be "cerebration" rather than "celebration." If this means that we should engage in serious reflection rather than mindless cheerleading, it is impossible to disagree. But this would be equally true of wedding anniversaries. Indeed, the opposition between analysis and celebration is a false dichotomy, unless, that is, one believes that all analysis is so filled with what Holmes called "cynical acid" as to corrode the foundation necessary to genuine celebration.

Is not the central question whether, after reflection, we can genuinely, with an open heart, do ourselves what we require of those who would join the American polity from abroad by becoming naturalized citizens—that is, declare and celebrate our status as Americans "attached to the principles of the Constitution"?<sup>8</sup> If we answer no, is it because some other conception of Americanness offers us a better mode of political self-understanding, or is it that

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7. A. LINCOLN, *First Inaugural Address*, in *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN* (R. Current ed. 1967). "The mystic chords of memory will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature." *Id.* at 179.

8. 8 U.S.C. § 1451(c) (1982). See *infra* note 65 and accompanying text.

we view ourselves in the mode suggested some years ago by Michael Walzer, as "alienated residents"<sup>9</sup> who have become the functional equivalent of resident aliens, enjoying certain political benefits of residence but without the strong feelings of felt membership in, and loyalty to, a specifically political order linked in a meaningful way to the Constitution?

Raising these questions in an audience of law professors presents a special paradox. One reaction I sometimes receive to my analysis of the Constitution and civil religion is that only law professors, and maybe a few lawyers, take the Constitution all that seriously anyway. Critics suggest that ordinary citizens are not involved with the Constitution at any significant level, least of all as an item of worship. Indeed, on the very morning that I wrote these remarks, I heard a sociologist suggest on National Public Radio that the genuine civil religion of the American public is sports, particularly events like the Superbowl.

Obviously we who are here today are far more interested in the Constitution than the general populace. But that would obviously be equally true in regard to the topic of any academic conference. Do we in fact regard what we are teaching as of genuine import to defining and maintaining a particular kind of presumably commendable American polity, or is our attitude a kind of clinical detachment? Is it even possible that our familiarity with the Constitution has served to breed not celebration but contempt? One thinks of the oft-quoted comment that one should never observe too closely a butcher shop or a legislature if one wants to continue eating sausage or respecting statutes. Is the same true ultimately of constitutional law? Has our observation of the process of creation, ranging from the runaway Convention in Philadelphia some two hundred years ago to a long and bloody civil war, not to mention the latest burst of incoherence from the Supreme Court, made us incapable of celebrating the existence of the Constitution, and therefore of engaging in the symbolic addition of our signature to the document?

Perhaps you doubt the legitimacy of the analogy to the wedding anniversary or to the overall framing question—ought we sign the Constitution. After all, we rarely ask scholars whether they either

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9. M. WALZER, *Political Alienation and Military Service*, in *OBLIGATIONS* 99, 114 (1970).

endorse or repudiate that which they study. One looks forward to the tricentennial of the Glorious Revolution of 1688 or the bicentennial of the French Revolution without expecting overt testaments of belief on the part of the participants. Why should our bicentennial be different?

One answer surely lies in the peculiarly ideological nature of the very notion of American identity. "For most peoples," writes Samuel P. Huntington, "national identity is the product of a long process of historical evolution involving common ancestors, common experiences, common ethnic background, common language, common culture, and usually common religion."<sup>10</sup> It is the fate of the United States, however, to be different from "most peoples." Here one's political identity is based not on shared Proustian remembrances, but rather on willed affirmation of what Huntington refers to as the "American creed," a set of overt political commitments including, *inter alia*, an emphasis on individual rights, majority rule, and a constitutional order limiting governmental power.<sup>11</sup> American independence did not follow from any genuine ethnic, linguistic, cultural, or religious difference from the British center, but rather from the adoption of explicit political principles set out in the Declaration of Independence. Americans were defined substantially as those who adhere to the truths enunciated in the Declaration and later allegedly vindicated by the Constitution adopted in Philadelphia. "What, then, does it mean to be an American?"<sup>12</sup> asks Whittle Johnson, echoing Hector St. John Crèvecoeur's more famous inquiry of two centuries ago, "What is the American, this new man?"<sup>13</sup> For Johnson, who offered a strikingly similar analysis to the one later put forth by Huntington, the answer is easy: "To be an American means to be a member of the 'covenanting community' in which the commitment to freedom under law, having transcended the 'natural' bonds of race, religion, and class, itself takes on transcendent importance."<sup>14</sup>

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10. S. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 23 (1981).

11. *Id.* at 13-30.

12. Johnson, *Little America—Big America*, 58 *YALE REV.* 1, 11 (1968).

13. B. KETCHAM, *FROM COLONY TO COUNTY: THE REVOLUTION IN AMERICAN THOUGHT 1750-1820*, at 173 (1974) (quoting J. CREVECOEUR, *LETTERS TO AN AMERICAN FARMER* (1782)).

14. Johnson, *supra* note 12, at 11.

Thus Huntington is able to speak of "a body of political ideas that constitutes 'Americanism' in a sense in which one can never speak of 'Britishism,' 'Frenchism,' 'Germanism,' or 'Japanesism.'" Americanism in this sense is comparable to other ideologies or religions."<sup>15</sup> It is this emphasis on creedal orthodoxy that, ironically enough, has made possible the historically remarkable ethnic diversity of the United States and makes unremarkable the fact that the child of an immigrant from Poland is speaking to you this morning about the meaning of our national constitutional faith. As Anne Norton has written, "Lacking that common ethnic history which purportedly bound Americans to one another, the immigrants could establish commonalty with the natives only on principle."<sup>16</sup> Norton's "only" is itself remarkably double-edged: if it points to the limited nature of the American community, it also captures the move toward universalistic criteria and the almost unique openness to social strangers that are so much a part of American history.

A willingness by immigrants to endorse the principles of Americanism as incarnated in the Constitution became the benchmark of citizenship. Indeed, as already noted, a predicate condition for becoming a naturalized citizen is the demonstration by applicants that they are "attached to the principles of the Constitution of the United States,"<sup>17</sup> to be followed ultimately by a public oath expressing one's "support [for] the Constitution."<sup>18</sup> This ceremony of community joinder aptly confirms Hans Kohn's description of the Constitution as "unlike any other: it represents the lifeblood of the American nation, its supreme symbol and manifestation. It is so intimately welded with the national existence itself that the two have become inseparable."<sup>19</sup> Huntington adds his own gloss to Kohn's comment as he argues that abrogating the Constitution is identical with abrogating the nation itself, for it would "destroy the basis of community, eliminating the nation and, in effect, re-

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15. S. HUNTINGTON, *supra* note 10, at 25.

16. A. NORTON, *ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE* 74 (1986).

17. 8 U.S.C. § 1451(c) (1982). See *infra* note 67 and accompanying text.

18. *Id.* § 1448.

19. S. HUNTINGTON, *supra* note 10, at 30 (quoting H. KOHN, *AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY* 8 (1957)).



turning its members—in accordance with the theory on which that nation was founded—back to a state of nature.”<sup>20</sup> The United States therefore should be recognized as a distinctive “faith community” organized in significant ways around the Constitution.

### C. *The Constitutional Oath*

Thomas Grey has pointed out a very important—though often ignored—structural feature of the Constitution’s mention of oaths of office in article VI of the document.<sup>21</sup> The third clause requires that all political officials of the new country, both state and federal, “be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”<sup>22</sup> The repudiation of religious test oaths was a major break with the English past; as Thomas Curry recently pointed out, it rejected distinctly American temptations as well, given the propensity of some of the states to adopt them.<sup>23</sup> Indeed, it may well be that the source of the clause is a defensive maneuver by religious groups afraid of their position in the religious marketplace rather than a genuine acceptance of the merit of religious toleration as such. Yet, as Grey noted, the constitutional oath “is a ritual of allegiance, requiring officers to affirm their primary loyalty”<sup>24</sup> to the value and commands contained within the document. He continues,

[T]he “but” suggests that the Framers considered the constitutional oath a *substitute* for the religious tests the colonists were familiar with under the English established church. To push the point a bit: America would have no national church yet the worship of the Constitution would serve the unifying function of a national civil religion.<sup>25</sup>

The constitutionally mandated “test oath” of fidelity to itself provides a way of differentiating the American community from what Karl Barth, analyzing a far more familiar European context,

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20. *Id.*

21. Grey, *The Constitution As Scripture*, 37 STAN. L. REV. 1 (1984).

22. U.S. CONST. art. VI, cl. 3.

23. T. CURRY, *THE FIRST FREEDOMS* (1986).

24. Grey, *supra* note 21, at 18.

25. *Id.* (emphasis in original).

termed "the civil community," which "has no creed and no gospel."<sup>26</sup> To be sure, the creed and gospel are not "religious" in the sense of enunciating a "common awareness of [the community's] relationship to God,"<sup>27</sup> but a "creed" and a "gospel" the constitutional epic most surely is. Irving Kristol has recently cited the Constitution as part of the holy "trinity" of the American civil religion, along with the Declaration of Independence and the flag.<sup>28</sup> And loyalty oaths, I have argued elsewhere,<sup>29</sup> serve as the equivalent of more traditional creedal affirmations, such as the Apostles' Creed, that announce one as a subscriber to the central tenets of a faith community

Robert Bellah pointed to an intimate link between republican political vision and civil religion. "A republic as an active political community of participating citizens must have a purpose and a set of values."<sup>30</sup> It proclaims itself as an "ethical" community worthy of "elicit[ing] the ethical commitment of its citizens."<sup>31</sup> There is therefore a "symbolization of an ultimate order of existence in which republican values and virtues make sense. Such symbolization may be nothing more than the worship of the republic itself as the highest good,"<sup>32</sup> although Bellah argues that the American civil religion includes "worship of a higher reality that upholds the standards the republic attempts to embody"<sup>33</sup> I am not concerned here with assessing Bellah's last claim. It is enough for my purposes that the Constitution be recognized as the symbolization of that which gives value to the American polity—by, as it were, defining the American way of life—and that we recognize as well our historic use of an oath of fealty to its purported commands as a way of creating the ethically republican citizen.

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26. K. BARTH, *The Christian Community and the Civil Community*, in *COMMUNITY, STATE AND CHURCH* 149, 151 (1960), quoted in *Cover, Names and Narrative*, 97 HARV. L. REV. 4, 14 (1983).

27. *Id.*

28. See Kristol, *The Spirit of '87*, PUB. INTEREST, Winter 1987, at 3, 5.

29. For an expanded discussion of loyalty oaths, see Levinson, *Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths*, 84 MICH. L. REV. 1440 (1986).

30. Bellah, *Religion and Legitimation of the American Republic*, in *VARIETIES OF CIVIL RELIGION* 3, 12 (1980).

31. *Id.*

32. *Id.* at 12-13.

33. *Id.* at 13.

Whatever the legal authority to require such oaths, they have proven, of course, to be controversial throughout our history. Although I will not rehearse in full the arguments concerning the propriety of requiring such oaths,<sup>34</sup> suffice it to say that opinion about oaths is divided. The debate is perhaps best summed up by Garry Wills in commenting on Abraham Lincoln's statement that he was "exceedingly anxious that this Union, the Constitution, and the liberties of the people shall be perpetuated in accordance with the original idea for which the struggle was made."<sup>35</sup> Wills notes that this assertion is "inoffensive to most Americans—which explains why things like the House Un-American Activities Committee were inoffensive for so long."<sup>36</sup> Indeed, Huntington also recognizes that one result of American creedalism has been a "pre-occupation with 'un-American' political ideas and behavior."<sup>37</sup> The problem, as Wills sees it, is that "[i]f there is an American *idea*, then one must subscribe to it in order to be an American."<sup>38</sup> Not only must it be affirmed "on entry to the country,"<sup>39</sup> but ways must be found to make sure that native-born citizens also partake of the requisite devotion."<sup>40</sup> I thus recognize the possibility that one plausible response to my question is anger and a principled refusal to answer on the grounds that I have no right to put into potential question your Americanness.

I am quite certain, though, that most of us here today have in fact taken a loyalty oath at one time or another—indeed, perhaps several times in our lives. If we are a member of a Bar, we have surely pledged our fidelity not only to the United States Constitution, but to a state constitution as well. Those of us who teach at state universities may very well have been asked to make the same promise. Everyone who has applied for a passport has signed such an oath. Indeed, from one perspective, my initial references to the Philadelphia exhibition and to the title of my talk are both moot, for all of us probably have at least indirectly pledged our support

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34. See Levinson, *supra* note 29.

35. G. WILLS, *INVENTING AMERICA* xxii (1978).

36. *Id.*

37. S. HUNTINGTON, *supra* note 10, at 25.

38. G. WILLS, *supra* note 35, at xxii.

39. *Id.*

40. *Id.*

of the Constitution by signing an oath that we support it. One way of understanding what will follow is as a meditation on the devotion we have already manifested.

Still, ironically enough, I suspect that one consequence of the coercive nature of the oaths we have signed is that many of us did not reflect with any great seriousness on their meaning, other than, perhaps, their signification of the presence of a too-powerful state. Assuming that we noticed them at all, many of us probably treated them roughly the same way my students at Texas respond to part of a document they are required to submit to the Bar Association as part of the process of becoming a lawyer. All applicants must sign a statement indicating that they have read the Code of Professional Responsibility and have pledged their adherence to its demands. The overwhelming majority of my students indicated that they had perjured themselves; they had not in fact read the Code, and they treated the affirmation that they had as a mere formalism, not to be taken seriously. My students, who surely would take umbrage at being called "nihilists," nonetheless treated the words they signed as without genuine meaning. They surely provided no guide either to what the signatories knew about the document in question, for they had not read it, or regarding their likely conduct as lawyers, for they had not reflected on what challenges to their sense of self might be presented by taking on the role of the lawyer. How many of us who have taken loyalty oaths are any different?

#### *D. Whether To Sign: A Significant Gesture*

A decision accepting the invitation proffered by the Philadelphia exhibit to sign the Constitution is, precisely because of its noncoerciveness, perhaps a more significant gesture than the routinized submission to authority signified by the standard loyalty oath. This is not to say that many visitors do not sign it without reflection, but the gratuitous nature of the deed—to sign or not to sign—invites a kind of reflection that the passport oath, for example, does not. From an ordinary utilitarian perspective, nothing rides on our decision. We do not have to balance the desire to travel abroad or the need for a job against the cost to our personal pride or dignity of signing a notoriously vague set of words. To add one's name to the Philadelphia scroll gets one nothing; to decline

to do so loses nothing—from one perspective, that is. From another perspective, perhaps, the answer is that one gains or loses everything; that is, one's true identity as a member—or rejector—of a peculiar American fellowship. Perhaps the analogy is to the simple box marked "religion" that many of us confronted in some document upon registering for college. It was precisely the ability to mark "none" that made the decision to affirm membership in a particular community potentially significant, especially insofar as that decision occurred at the moment of transformation from the maximally encumbered status of child to the presumably more fluid status of adult charged with shaping one's own identity.

Now one possible response, which I assume some of you are considering at this very instant, is that this is all very silly. The National Park Service, in setting up the scrolls, can be viewed as merely offering a kind of "hands-on" experience to appease otherwise bored children being taken to the exhibit by dutiful parents or, more likely, by a public school system trying to impose a rote patriotism on its charges. One may well doubt that the Service intends to be raising profound questions of national identity for the adults who wander in. Perhaps this description of origins is true, but is it really so relevant?

If modern literary theory has taught us anything, it is the presence within texts of words, signs, symbols, or other devices that undercut and subvert the "intended" message. The intended meaning of the bicentennial may be to ratify the authority of the Constitution; the invitation to sign, however, raises the possibility of challenging its authority. It is to bring the otherwise absent Jefferson, with his call for repeated constitutional conventions and his skepticism about thoughtless veneration, into the Madisonian presence. Surely it would be a devastating commentary on the Constitution if most of the visitors made a reasoned decision not to sign.

I am assuming that there is something meaningful—full of meaning—in the encounter at the Second Bank. Whatever is going on, I am asserting, it is not silly. Imagine, for example, that one of the visitors is Professor Salvemini, who wrote to Felix Frankfurter of the great pride he felt in taking the oath of citizenship. He describes "allegiance to the Constitution" as a commitment "to an ideal life. Thus, I took my oath with a joyous heart, and I am sure

I will keep it with the whole of my heart as long as I am alive."<sup>41</sup> Would Salvemini be making a mistake if he added his signature with pride and joy? Or, to put it perhaps more cogently, was his statement to Frankfurter any less silly, or more admirable, than it would be if delivered to his grandson, say, upon signing the scroll?

In any event, the designers of the Philadelphia exhibition have made of us a deceptively simple request, to sign the Constitution ourselves, and we must decide how to treat it. So please join me in an imaginative trip to the Second Bank as we place ourselves in front of the scrolls.

## II. CHOOSING WHICH CONSTITUTION TO ENDORSE

### A. *A Specific Document*

The first thing we—that is, highly self-conscious academics, though I recognize the imperialist move in trying to evoke a community that itself is questionable—must decide, of course, is what constitutes the Constitution we are being asked to sign. Are we being asked, for example, to endorse the specific document that was adopted by the Convention on September 17 and ratified by the states? Indeed, are we being asked to sign a “document” at all? The Philadelphia exhibit is inevitably driven toward a “documentary” understanding of the Constitution, but surely the Constitution we teach often has a most tenuous relationship to the text. After all, Paul Brest has spoken of contemporary constitutional law as primarily “the elaboration of the Court’s own precedents” and has referred to the documentary Constitution of 1787 as akin to “a remote ancestor who came over on the Mayflower.”<sup>42</sup>

I argue elsewhere that emphasis on the Constitution as a “document” bespeaks a specifically “Protestant” notion of constitutionalism, which focuses on the presence of a foundational “scripture.” But there is also the possibility of an equally legitimate “Catholic” or “Jewish” view that defines the Constitution, though including the parchment ratified in 1788, as being constituted as well not only by key decisions of the Supreme Court, Congress, and the

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41. Levinson, *supra* note 29, at 1441 (citing FROM THE DIARIES OF FELIX FRANKFURTER 211-12 (J. Lash ed. 1975)).

42. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234 (1980).

President, but also by fundamental documents such as the Declaration of Independence and the Gettysburg Address and, beyond that, aspects of the American experience that cannot be reduced to a text at all.<sup>43</sup> No one on today's panel is identified with "originalism" as a preferred or even cogent method of constitutional interpretation, and it is therefore a fair question what the meaning of signing any given document would be for us. I am willing to assume, however, in the remarks that follow, that it makes sense to view the Constitution as a specific document. Still, even if we concede its documentary existence, the vital question remains: which text captures the Constitution that we are being asked to, and that we would in fact, sign?

### *B. A Constitution Without a Bill of Rights*

Let us return, for example, to the centerpiece of the Philadelphia exhibit, the Constitution drafted in the Philadelphia summer of 1787. Signing that document obviously raises a number of problems. Do we want to sign a Constitution that does not include a Bill of Rights? Historically, of course, the failure of the Convention to include a Bill of Rights did not doom their handiwork, but certainly the conventional view is that ratification was purchased only through a de facto agreement that the text would be so supplemented as soon as possible, as was in fact done.<sup>44</sup>

As we make the Bill of Rights more central to our concerns, do we also make our signature contingent on our knowledge of the way the story turned out in 1791? We may be signing not the text presented to George Washington and his compatriots on September 17, but rather a text that was unavailable to them and one by no means presumed to be likely or even desirable. We might recall, for example, that several of the Philadelphia framers, including Madison, Wilson, and Hamilton, specifically derided complaints about the lack of a Bill of Rights, going so far as to suggest that

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43. See S. LEVINSON, *CONSTITUTIONAL FAITH*, chapter 1 (forthcoming).

44. Consider the fact that we are meeting today in the Fourth Annual Bill of Rights Symposium, sponsored in part by the Institute of Bill of Rights Law. Perhaps the origins of the Institute lie in a simple market calculation that the study of the Bill of Rights was an insufficiently occupied field. One suspects, however, that something more affirmative was intended by its formation and choice of name.

the addition of a Bill of Rights would actually make the Constitution worse by suggesting that the national government in fact had powers not specifically granted to it but which needed specific limitation.<sup>45</sup>

The lack of a Bill of Rights was obviously no small matter. George Mason, of course, was the most prominent member of the Convention who refused to sign because of the lack of a bill of rights. Was he wrong to have done so? Or, at the very least, was it a reasonable decision, one that we ourselves can honor even if we reject it and choose instead to give our maximum praise to those who signed?<sup>46</sup>

### C. *A Constitution That Legitimized Chattel Slavery*

Much more serious, for some of us, is the brooding omnipresence of American history—race and, more precisely, slavery. Now one can immediately try to evade the slavery issue in somewhat the same way one evades the lack of a Bill of Rights in the 1787 Constitution. That is, just as one can in effect stipulate that the document one is signing is that supplemented by the 1791 amendments, so can one announce that he or she is signing the post-1868 Constitution. But that is scarcely a satisfactory resolution to the context of the Philadelphia exhibit or, for that matter, to the title of this symposium, “1787: The Constitution in Perspective.” For surely we must decide what our stance—our perspective—is toward the specific work of Madison, Wilson, the Morrises, and others.<sup>47</sup>

We can, of course, take a rigorously historicist approach and say that it is absurd to try to place ourselves within the context of

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45. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 539-40 (1969).

46. Or can we honor Mason only because he was in fact unsuccessful in blocking ratification, so that the homage we pay him is a gracious gesture from the victor to the vanquished rather than a genuine recognition of what Dworkin might call “equal respect?” See Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 127-28 (S. Hampshire ed. 1978). Consider how we might react upon meeting the man our mother rejected in favor of our father. We might indeed view him as a fine person, maybe even better in some ways than the victor in the competition, but could we genuinely achieve an olympian indifference to the outcome, given its bearing on our own existence?

47. This may falsely suggest, incidentally, that there is only one perspective, whereas the problem is obviously a multiplicity of perspectives, not only among ourselves but even within the fabric of our thought. As with certain paintings, by Monet, for example, what one sees is entirely contingent on where one decides to stand.



1787 and decide whether we would have endorsed the Constitution then or, indeed, whether we now applaud the specific outcome of that year. I am sympathetic to that argument, given that I do not believe we can shed our historically located skin and engage in a mental equivalent of completely successful time travel. We can engage the past, to be sure, but we cannot rejoin the past. The historicist strategy has one fundamental problem, however. Designed, among other things, to save the Constitution—and its framers—from censure, the historicist strategy also has the effect of displacing the Constitution as an object of esteem. For if we distance ourselves from 1787 by treating it as an essentially “lost world,” to adopt Daniel Boorstin’s title of his brilliant book on Thomas Jefferson,<sup>48</sup> then it makes little more sense to select out what we like for praise than to focus on what we object to for censure.

But is not the bicentennial predicated on the notion that we are celebrating something that is recognizable as a continuing part of our own lives and political culture? Pole once referred to a “peculiarly American version of the space-time continuum”<sup>49</sup> which blithely ignored the possibility that the past had become irrelevant, that it was truly a *temps perdu*—a lost time. “[W]hat one misses is that sense, inescapable in Europe, of the total, crumbled irrecoverability of the past, of its differentness, of the fact that it is dead.”<sup>50</sup> We, on the other hand, often refer with pride to ours being a “living Constitution,” and not even Chief Justice Rehnquist is willing to endorse a “dead Constitution,”<sup>51</sup> however great his qualms about those who promote a perhaps too lively Constitution.

Does not the same predication of endurance through many generations, uniting the living, the dead, and the yet unborn, undergird in substantial ways the presentation of the standard constitutional law course, in which we often view ourselves as linked in discourse with John Marshall, and perhaps even Madison? That enterprise makes sense only if we deny the presence of radical paradigm shifts that, by definition, make almost impossible genuine

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48. See D. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* (1948).

49. Pole, *The American Past: Is It Still Usable?*, 1 J. AM. STUD. 63, 63 (1967).

50. *Id.*

51. See Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

conversation between those under the sway of different paradigms. I suspect that most of us here today are considerably more historicist than the previous sentences allow, though I wonder how much we have integrated that into our teaching.

So let us return to what is surely one of the most difficult problems presented those who would celebrate the Constitution—chattel slavery. An ever-present temptation revealed, among other places, in the contents of most casebooks on constitutional law is basically to ignore chattel slavery as a constitutionally legitimized presence in American history. To put it mildly, that does not seem to be a satisfactory solution, any more than is the mindless celebration of Western humanism or Christian sensibility which ignores the Holocaust's arising in a land of unusully high culture and piety.

What, for example, should we expect the black visitor to Philadelphia to do when invited to sign the Constitution? Many of us remember well Barbara Jordan's impassioned pronouncement, just before she cast her vote to impeach Richard Nixon, that "[m]y faith in the Constitution is whole, it is complete, it is total, and I am not going to sit here and be an idle spectator to the diminution, the subversion of the Constitution."<sup>52</sup> Could she possibly have made the same speech in regard to the Constitution of 200 years ago? Might she not have joined William Lloyd Garrison in describing it as a "covenant with death and an agreement with hell,"<sup>53</sup> with its subversion therefore becoming the heartfelt duty of a moral being? I am not primarily interested, however, in discussing the absent Barbara Jordan; instead, I want to know how we—the persons gathered here today, including the distinguished commentators on my paper—handle the Constitution's relation to slavery.

I suppose that one option open to us—and especially to those of us identified with what are perceived to be free-wheeling ap-

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52. B. JORDAN & S. HEARON, *BARBARA JORDAN, A SELF-PORTRAIT* 187 (1979).

53. This phrase, taken from the book of *Isaiah*, appeared in a resolution that Garrison introduced at a meeting of the Massachusetts Anti-Slavery Society in January 1843: "That the compact which exists between the North and the South is 'a covenant with death, and an agreement with hell'—involving both parties in atrocious criminality; and should be immediately annulled." W. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963). See also Address by Justice Thurgood Marshall, San Francisco Patent and Trademark Law Association Annual Seminar (May 6, 1987).

proaches to constitutional interpretation—is the adoption of an argument like that which Frederick Douglass made in 1860, when he labeled the Constitution, correctly understood, as in fact antislavery. “I undertake to say,” stated Douglass, “that the constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself. [T]he Constitution will afford slavery no protection when it shall cease to be administered by slaveholders.”<sup>54</sup> And, of course, nearer to our own time, Ronald Dworkin has made a somewhat similar argument.<sup>55</sup>

Douglass’s central move, of course, was a radical one: to split off the Constitution from decisions of the Supreme Court, which he recognized as recurrently protective of slavery. I personally have no problem with this, although the recent response to a similar move by Attorney General Meese certainly indicates a great deal of disquiet with such arguments. In any case, acceptance of Douglass’s view of the Constitution presumably allows an opponent of slavery to sign even the 1787 Constitution with a clear heart, the only price being the necessity to embrace some especially controversial theories of constitutional interpretation.

Assume, however, that the potential signer—perhaps you yourself—is unwilling to pay that price or, at the very least, is unable to agree with Douglass’s reading of the Constitution and accepts instead the more standard reading of the document as significantly protective of slaveholder interests. What follows? One might, for example, adopt Justice Story’s view that abominations like the Fugitive Slave Clause, not to mention the guaranteed protection of the international slave trade for twenty years and the added representation given to the South because of its slaves, were necessary in order to form the Union.<sup>56</sup> At this point the inquiry could branch off into at least two directions. The first assumes the desirability of union and then asks whether in fact achievement of that end required the means chosen in Philadelphia and therefore our

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54. F. DOUGLASS, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 477, 478 (P. Foner ed. 1950).

55. Dworkin, *The Law of the Slave-Catchers* (Book Review), *The Times* (London), Dec. 5, 1975 (Literary Supplement), at 1437. Dworkin states, “The general structure of the American Constitution presupposed a conception of individual freedom antagonistic to slavery.” *Id.* at col. 5.

56. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 536, 611 (1842).

retrospective, albeit reluctant, ratification. To ask the question this way, of course, inevitably gives greatest weight to the historical record as it actually developed and to the justifications offered at the time, for it indeed seems tendentious to deny the efficacy of the compromises offered to attaining the goal of creating a strengthened United States. We may, however, ask a second question: Do we in fact share the commitment to union that justifies the compromises?

Once again, one might quickly ask whether we can really ask such questions in a meaningful way. Can we genuinely imagine an alternative history for the last 200 years which would allow us to answer the question as asked? Indeed, as someone like Michael Sandel would remind us, isn't the very self that grapples with the question so much the product of the existence of the union that we are ultimately asking if we would wish to be radically different selves?<sup>57</sup> I acknowledge this possibility only to bracket it.

#### *D A Constitution That Provides a Republican Form of Government*

We know that many opposed ratification of the Constitution because of their fear of the centralized Union they saw implied by the document, and presumably it remains open to us to declare our sympathy with or opposition to some of these Antifederalists even though they were defeated. Few Antifederalists, of course, focused on the collaboration with slavery as the source of their discontent.<sup>58</sup> Much more important for most of them was the fear that popular participation in governance would become attenuated and that government would increasingly be placed in the hands of the elite. The most important response to this argument, of course, is contained in *The Federalist No. 14*, in which Madison delivered his crucial attack on the assumption that republican government can be maintained only in a relatively small territory.<sup>59</sup> Even if we think that Madison was right within his particular context—a

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57. See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

58. To their credit, some Antifederalists, such as Luther Martin in Maryland, opposed the Constitution at least in part because of its provisions in support of slavery. P. CLARKSON & R.S. JETT, *LUTHER MARTIN OF MARYLAND* 127-28 (1970).

59. See *THE FEDERALIST* No. 14 (J. Madison).

country of approximately three million people in thirteen states—one may doubt that his arguments apply quite so neatly to the country that ultimately developed and within which we live. It is hard to gainsay the feelings of utter marginalization and meaninglessness of participation within the present political order. Calls by Professor Sunstein and others for the revival of republican political sensibility,<sup>60</sup> however attractive to some of us, will remain implausible as prescriptions for a polity of such different size and scope as that which we have become.

This being said, it is hard to believe that a “balkanized” United States would necessarily have developed in any more participatory a fashion than the constitutional union. Our history has no plausible counter-rendering that would leave us with a small enough—or egalitarian enough—population to make generalized active citizenship a norm. Moreover, one must also ask about the costs imposed by actively attempting to maintain a small, homogeneous social order conducive to such citizenship. Many of us benefitted from generous immigration policies that might well not have survived a stronger emphasis on preserving a republican political order.

Still, one might well turn this argument around and maintain that a more balkanized political order divided along northern and southern lines nonetheless would have remained equally hospitable to immigration while not forcing the collaboration with slavery found in the Constitution, if those are indeed one’s central concerns. There is no good reason to believe that the northern states, whose economies generated pro-immigrant policies, would have behaved any differently had they not been joined with the southern states, which were historically more skeptical about open immigration. The problem, of course, is that we move into the realm of more and more counterfactual history that sends the imagination reeling. Assuming that Napoleon would still have been willing to sell the Louisiana territories, to whom would he have sold them, and so on?

And, of course, the central problem with “disunionist” thinking, as pointed out by some of Garrison’s own opponents,<sup>61</sup> is that it

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60. See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1986).

61. See, e.g., A. KRADITOR, *MEANS AND ENDS IN AMERICAN ABOLITIONISM: GARRISON AND HIS CRITICS ON STRATEGY AND TACTICS, 1834-1850*, at 178-224 (1969).

focused more on the immorality of collaboration with slavery than on the question of how one most quickly could bring slavery to an end. We know that with ratification of the thirteenth amendment, chattel slavery ended by 1865. Is there good reason to believe that it would have ended earlier if the Constitution had not been ratified and balkanization had followed instead? I suspect not. But the important point is surely this: Can one who believes that the ratification of the Constitution did enhance the prospects and the actuality of chattel slavery still sign the Constitution? What precisely is the value of the Constitution and of the concomitant nation that would justify even an extra week's slavery? What precisely is the omelet that justified breaking those particular eggs?

*E. The "Second" Constitution*

As I have already suggested, one might try to finesse these difficult, if not excruciating, questions by focusing on what some have called the "second" Constitution; that is, the post Civil War document distinguished by the addition of the thirteenth, fourteenth and fifteenth amendments. That allows a solution to the chattel slavery problem, though not necessarily other kinds of slavery such as wage slavery, and it might justify the decision of many blacks to add their signatures to the reformed document. But could Barbara Jordan necessarily sign even the 1868 Constitution? After all, the standard reading of that Constitution is that it did not guarantee women the right to vote. Women were not given this most basic attribute of community membership until 1920 and the nineteenth amendment. Some partisans of the Equal Rights Amendment would deny that women have been granted full rights of membership even today. Now, one might argue that the fourteenth amendment, correctly read, "in fact" invalidated allocation of the ballot by gender. I assume that most of us today would agree, although at the very least this makes problematic the existence of the nineteenth amendment and raises many important issues of constitutional interpretation.

But what of today's Constitution? Is it sufficiently "perfect" that signing is not problematic? For example, what might persons mired in poverty have to say to a Constitution that is seemingly indifferent, at least under the "orthodox" views articulated by the Court and taught in most law school classrooms, to their plight?

Protection of "negative" liberties are precious, but that does not make any less pressing the need for "affirmative" access to food, shelter, medical care, education, and the like. Should we expect the homeless victims of a literally careless political economy to sign the Constitution?

Even the well-off need hardly believe that the Constitution is sufficiently perfect to merit their unequivocal endorsement. I assume that no one need believe that it is truly perfect in order to sign; the question is what deviation from perfection is tolerable, justifying inevitable compromises. Consider, in this context, the recent report by Lloyd Cutler and other distinguished citizens suggesting that the vaunted system of separation of powers and checks and balances is in fact a recipe for immobilism and a government incapacitated from effective action or, what is worse, a government tempted to achieve "effectiveness" by the surreptitious practices carried to new heights—or depths—by the current administration.<sup>62</sup> The answer, according to these analyses, lies in such practices as tightening the connection between presidential and congressional elections, allowing members of Congress to serve in the Cabinet, and, most radical of all, allowing the calling of new elections should President and Congress be hopelessly deadlocked.

Perhaps one way of testing whether these truly would be "fundamental" changes in our constitutional system would be by asking whether a person who shares the premises of this analysis will sign the Constitution. An affirmative answer could well have two aspects. First, even with the defects of the present system of governance, it is still sufficiently protective of liberty and helpful to achieving justice that it deserves our support. Second, one could emphasize as key to the Constitution the existence of article V, the amending clause.<sup>63</sup> Article V is the best possible evidence for the proposition that the framers themselves did not believe that they had created a perfect document and that future changes were completely legitimate, at least so long as the changes arose through article V procedures.

Article V can become the great source of consensus—

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62. See Committee on the Constitutional System, *A Bicentennial Analysis of the American Political Structure* (Sept. 1986) (draft) (unpublished manuscript).

63. U.S. CONST. art. V

paradoxically, insofar as it appears to legitimize radical dissents. That is, so long as we do not believe that the Constitution is absolutely terrible, then presumably we can sign it by saying that we will strive to bring it more in line with our favorite vision of the polity through an article V amendment. But this emphasis on article V itself raises some profound problems.

### III. ATTACHMENT TO THE PRINCIPLES OF THE CONSTITUTION: *SCHNEIDERMAN V UNITED STATES*

Does article V stand for the proposition that any set of values or political beliefs is congruent with fidelity to the Constitution, so long as one is willing to endorse article V procedures as the mode of bringing them about? Or, on the contrary, can we expect our fellow signatories, should we decide to sign ourselves, to share with us certain basic commitments beyond the pleasure in potential transvaluation seemingly legitimized by the existence of article V?

#### A. *Attachment*

Imagine, for example, someone who believes that the Constitution is acceptable as it stands, though it would be even better with the renewal of chattel slavery, the institution of a state church, or whatever. Is there any bar to that person signing the Constitution while muttering what we might call the "article V proviso"? At least limited insight into the problem being discussed is presented by a marvelous 1943 case, *Schneiderman v. United States*.<sup>64</sup>

In that case the Justice Department tried to strip William Schneiderman of his American citizenship on the grounds that he had not been in compliance with the law when, in 1927, he had become a naturalized citizen. At that time he was, and remained, an active member of the Workers (Communist) Party of America. The Department argued that the commitments taken on by Schneiderman as a loyal communist made it impossible for him to have genuinely complied with the statutory requirement that an applicant for citizenship certify that he or she had behaved as a person "attached to the principles of the Constitution of the

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64. 320 U.S. 118 (1943).



United States.”<sup>65</sup> The case thus centrally concerned what counts as such behavior and, ultimately, the status of being “attached” to the Constitution.

Without rehearsing the complex set of dilemmas presented by Schneiderman’s case, suffice it to say that the government described Schneiderman’s projected changes in the structure of American governance as so “sweeping that he simply could not be attached to it.”<sup>66</sup> In addition, as one might expect, the Justice Department alleged that Schneiderman “believed in and advocated the overthrow by force and violence of the Government, Constitution, and laws of the United States.”<sup>67</sup>

The Government never denied that an alien or, obviously, a native-born citizen could consistently be attached to the Constitution even while believing “that the laws and the Constitution should be amended in some or many respects.”<sup>68</sup> It did argue, however, that “an alien must believe in and sincerely adhere to the ‘general political philosophy’ of the Constitution.”<sup>69</sup> One might have paraphrased Lincoln at this point by emphasizing the “propositions” to which America, and the Constitution, is dedicated and which members of the faith community are expected to affirm. The Justice Department offered the following specifications of what might be termed constitutional propositionalism:

The test is whether [the applicant] substitutes revolution for evolution, destruction for construction, whether he believes in an ordered society, a government of laws, under which the powers of government are granted by the people but under a grant which itself preserves to the individual and to minorities certain rights or freedoms which even the majority may not take away; whether, in sum, the events which began at least no further back than the Declaration of Independence, followed by the Revolutionary War and the adoption of the Constitution, establish principles with respect to government, the individual, the

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65. *Id.* at 121 n.2.

66. *Id.* at 135.

67. *Id.*

68. *Id.*

69. *Id.* at 140.

minority and the majority, by which ordered liberty is replaced by disorganized liberty.<sup>70</sup>

The majority of the Court refused to accept as dispositive the statements of "certain alleged Party principles and statements by Party Leaders which are said to be fundamentally at variance with the principles of the Constitution."<sup>71</sup> Instead, it emphasized "that under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."<sup>72</sup> Nonetheless, the majority did examine some aspects of the platform of the Communist Party, which included calls for the abolition of private property without compensation, the establishment of a proletarian dictatorship with political rights to be denied to persons who were not proletarian and/or members of the Party, and the creation of an international union of soviet republics. Justice Murphy denied that these goals necessarily implied nonattachment to the Constitution. Although the court below had stated that the views of the Communist Party "are not those of our Constitution,"<sup>73</sup> Justice Murphy and the majority in effect disagreed.

Although noting that the fifth amendment prohibits the taking of private property without compensation, the Court observed that

throughout our history many sincere people whose attachment to the general constitutional scheme cannot be doubted have, for various and even divergent reasons, urged differing degrees of government ownership and control of natural resources, basic means of production, and banks and the media of exchange, either with or without compensation.<sup>74</sup>

The Court went on to point out that "something once regarded as a species of private property was abolished without compensating the owners when the institution of slavery was forbidden."<sup>75</sup> Jus-

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70. *Id.* at 140 n.20 (quoting Brief for United States at 105).

71. *Id.* at 136.

72. *Id.*

73. *Id.* at 141 (quoting *Schneiderman v. United States*, 199 F.2d 500 at 504 (9th Cir. 1941)).

74. *Id.* at 141.

75. *Id.*

tice Murphy then went on to ask, thinking that he was asking an entirely rhetorical question, if "the author of the Emancipation Proclamation and the supporters of the Thirteenth Amendment were not attached to the Constitution."<sup>76</sup>

Justice Murphy continued his remarkable march through the program of the Communist Party and his indication of its potential congruence to attachment to the Constitution. Thus support of the dictatorship of the proletariat is "constitutionalized," as it were, by noting the "fluid" nature of the concept and the "meager indications of the form the 'dictatorship' would take in this country"<sup>77</sup> In particular, he stated that its adoption need not necessarily bring "the end of the representative government or the federal system."<sup>78</sup> It is true that the Party criticized checks and balances, the Senate's legislative role, and "the involved procedure for amending the Constitution," all of which were characterized "as devices designed to frustrate the will of the majority"<sup>79</sup> Indeed, Justice Murphy even took note of the 1928 platform of the Party, although it was written after Schneiderman's naturalization. There the Party "advocated the abolition of the Senate, of the Supreme Court, and of the veto power of the President," as well as "replacement of congressional districts with 'councils of workers' in which legislative and executive power would be united."<sup>80</sup>

These would, to be sure, be "significant changes" in the American government; however, "whatever our personal views, as judges we cannot say that a person who advocates their adoption through peaceful and constitutional means is not in fact attached to the Constitution."<sup>81</sup> Justice Murphy noted that unicameralism had been adopted by one of the American states, Nebraska, and thus presumably did not violate the "republican form of government"<sup>82</sup> sanctified by article IV of the Constitution.<sup>83</sup> As for the Supreme

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76. *Id.*

77. *Id.* at 142.

78. *Id.*

79. *Id.* at 142-43.

80. *Id.* at 143.

81. *Id.*

82. *Id.* at 143 n.24.

83. In terms of pure theory, abolition of the Senate through ordinary constitutional amendment does not violate the unanimity requirement of article V regarding equality of

Court, Murphy noted that criticism of its role was endemic in American politics. He cited Theodore Roosevelt, "whose sincerity and attachment to the Constitution is [sic] beyond question,"<sup>84</sup> as supporting the popular recall of judicial decisions with its attendant radical transformation of the Court's role in our constitutional system.

Turning from structure to substantive rights, the majority stated, "[I]f any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment."<sup>85</sup> The Court specifically declined, however, to reach the question of Schneiderman's possible repudiation of those principles by supporting the denial of political and civil rights to nonproletarians or non-Party members, "for on the basis of the record before us it has not been clearly shown that such denial was a principle of the organizations" within which Schneiderman was active.<sup>86</sup> Lenin, for example, has been cited both in behalf of suppressing class enemies and for the possibility of achieving revolution while maintaining certain liberties for the bourgeoisie.<sup>87</sup> It would have been illegitimate, therefore, to attribute to Schneiderman views that could not even confidently be assigned to those organizations.

### *B. The Article V Proviso*

The central motif of the majority opinion, though, is surely the multitude of political arrangements and substantive values congruent with "attachment" to the Constitution. "The constitutional fathers, fresh from a revolution, did not forge a political strait-jacket for the generations to come."<sup>88</sup> It is at this point in the opinion that the majority gives center stage to article V of the Constitution, which "contains procedural provisions for constitutional change by amendment without any present limitation whatsoever

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Senate membership. Each state would in fact retain an equal role in the Senate—none at all—following its abolition.

84. 320 U.S. at 144.

85. *Id.*

86. *Id.*

87. *Id.* at 145.

88. *Id.* at 137.

except that no State may be deprived of equal representation in the Senate without its consent.”<sup>89</sup> Article V, coupled with the reality of “the many important and far-reaching changes made in the Constitution since 1787,” according to the majority, “refute[s] the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution.”<sup>90</sup>

Murphy’s latitudinarianism was ultimately derived from a joiner of the ostensibly almost open-ended article V with a particular reading of the first amendment, that of Justice Holmes.<sup>91</sup> For, as just indicated, it is “the principle of free thought” that most “imperatively calls for attachment.”<sup>92</sup> Murphy adopted the Holmesian reading of the first amendment as extending toleration even to “the thought that we hate.”<sup>93</sup> Note well, however, that this principle easily can be reformulated as guaranteeing toleration even to those who clearly reject the Constitution and are by no plausible interpretation attached to it. The person who forthrightly refuses to sign the Constitution because she repudiates it in full, whatever that might mean, thus is quite properly protected from sanction. It seems thoroughly pickwickian, however, to state that such repudiation could count as the signification of attachment. But is it not equally pickwickian should she sign it while stating the article V proviso; that is, that she rejects everything except article V, which allows her to support anything?

Schneiderman’s lawyer, the defeated 1940 Republican presidential candidate Wendell Wilkie, argued, as described by the Court, that the absence of limitations in article V meant that “a person can be attached to the Constitution no matter how extensive the changes are that he desires, so long as he seeks to achieve his ends within the framework of Article V.”<sup>94</sup> The Court specifically declined to adopt this “extreme position,” finding instead that the Government had failed to meet its burden of proof even under its

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89. *Id.*

90. *Id.*

91. *Id.* at 138.

92. *Id.* at 138 (citing *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting)).

93. *Id.* at 138.

94. *Id.* at 140.

own, less generous test.<sup>95</sup> But would we accord such legitimacy to the article V argument? It is worth noting, incidentally, in light of Bruce Ackerman's recent writing on the background of the Civil War Amendments, that the limits imposed by having to remain "within the framework of Article V"<sup>96</sup> may themselves be less clear than one would at first imagine. Ackerman quite specifically denies that the article sets out the exclusive process of amendment, and he goes on to argue that the peculiar process by which the thirteenth and fourteenth amendments in particular were added to the Constitution serves as an equally legitimate constitutive act.<sup>97</sup>

The symposium format does not allow time for me to go through Chief Justice Stone's impassioned dissent, which Justices Frankfurter and Roberts joined. Suffice it to say that Chief Justice Stone viewed the Constitution as incarnating "principles," including "the freedoms guaranteed by the Bill of Rights," which would be "ended" if the program of the Communist Party were implemented.<sup>98</sup> It was therefore altogether legitimate to infer nonattachment to those principles from *Schneiderman*'s active membership in the Party at the time of his naturalization.

If one views *Schneiderman* as a proto first amendment case and places it within the context of the anti-Communist cases that would shortly thereafter lead to a series of dreadful decisions by a frightened Supreme Court, then it is hard not to applaud Justice Murphy's opinion. Still, I confess to finding *Schneiderman* a much harder case than *Dennis v. United States* and its progeny,<sup>99</sup> precisely because the earlier case deals at a formal level not with what kind of speech or conduct can be punished, but rather with what we deem ourselves to be as an American community purportedly organized around a common attachment to constitutional principles. *Schneiderman* tends to remove any real "bite" from a decision to affirm one's attachment, or to add one's signature. The

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95. *Id.* See *supra* text accompanying note 72.

96. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

97. *Id.* at 1057-70.

98. 320 U.S. at 193-94.

99. *Dennis v. United States*, 341 U.S. 494 (1951). See *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957).

Constitution ends up seeming trivialized by the end of the opinion, even as the cause of civil liberties probably has been vindicated.

#### IV CONCLUSION

I hope that I have sufficiently justified my title and the value of the question it asks. I also recognize, though, that I have been engaging in a process of repeated deferral, indicating the various ramifications of the question without indicating my own answers. It is time to cease the evasion, especially if I wish to draw out answers from all of you. I shall be in Philadelphia on May 25, which, not entirely by coincidence, is the 200th anniversary of the opening of the Convention. It will be easy enough to stop by the Second Bank once more. Will I add my signature to the scroll this time?

I can honestly say that I did not know what the answer would be when I began thinking about this paper, or even when I began writing it. No doubt there was a temptation to say no, whether to indicate a symbolic solidarity with the victims of the American Constitution—including but not limited to slaves—or simply to manifest a certain kind of iconoclasm. That opinion, however, just doesn't write, at least for me, though I do regard it as a genuine possibility for others.

The Constitution is a linguistic system, what some among us might call a discourse. It has helped to generate a uniquely American form of political rhetoric that allows one to grapple with every important political issue imaginable. As Jeff Powell has written, it provides "a common language with which to carry on debate about the distribution and use of power in our society"<sup>100</sup> The fact that its teachings are, according to some of us, indeterminate, is quite beside the point, for so is any system of language. There is little meaningful "determinacy" to English; it allows the formulation of a literally infinite number of sentences, many of which can be in logical contradiction with one another. But they all count as recognizable sentences of our language, which forms us just as much as we purport to form it. If the orthodox language of the Constitution promotes a stingy, "negative"-rights oriented view of the polity, there are alternate sentences available, as Mark Tushnet has em-

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100. H.J. Powell, *What the Constitution Means for Your Town, and for You*, Des Moines Register, Dec. 18, 1986, at 13a.

phasized, that can promote a socialist vision.<sup>101</sup> The key point is that one need not learn a "new language" in order to promote one's favored vision of the polity.

Obviously one can learn new languages, just as it is helpful to try to become less parochial about the so-called American way of doing things, but it is a radical step indeed when a person consciously repudiates an old language, and the renunciation and abjuration of that language almost always are accompanied by special circumstances. I have been told that there are some Afrikaaner writers who have chosen to stop writing in that language as a sign of their revulsion against the terrible culture linked with it; presumably, some writers did the same with German some fifty years ago. For a writer, no more magnificent, or terrible, gesture can be imagined.

In preparing these remarks, I have come to realize my refusal to sign the Constitution would require a much deeper alienation from American life and politics than I can genuinely feel, or, indeed, have ever felt. The Constitution—or perhaps what we might term "Constitution-talk"—has in some of its manifestations incarnated what is worst about the United States; but, of course, it captures as well what is best about this country. I recognize, of course, that as a definitely privileged member of the American class structure, I may be more genuinely aware of the benefits over the burdens or, more ominously, may be unaware of the extent to which my benefits are structurally dependent on what I purport to find less attractive. Still, the fact remains that I believe that constitutionalist discourse can be a valuable way of addressing crucial public issues, and I am not sure that any competing rhetoric is likely to prove more productive, not to mention all the costs attached to learning the new language of any such rhetoric.

Whatever its problems, *Schneiderman* is altogether accurate in evoking a sense of the fluidity of the Constitution, its resistance to any kind of fixity or closure, even though some would seek it either in the text or in the pronouncements of an authoritative institution like the Supreme Court. For me, signing the Constitution commits one not to closure but only to a process of becoming, and to taking responsibility for constructing the political vision toward

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101. See, e.g., Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777, 782-86 (1987).



which I, joined, I hope, with others, strive. It is less a series of propositional utterances—for I, at least, have proved singularly unsuccessful in reducing the Constitution to some essentialist distillation—than a commitment to taking political conversation seriously. I would want to distinguish this from an entirely “article V” view of the Constitution, however, because I do indeed believe that the Constitution is best understood as supportive of such conversations and of government predicated on respect for their maintenance.

There is, undoubtedly, little that is surprising in this conclusion. “Well-off law professor supports Constitution” is scarcely a headline likely to sell newspapers. Nor have I been able to achieve a self-satisfying elegance explaining this unsurprising development. Every text has a subtext, and perhaps the subtext of this talk is not so much the question, would you sign the Constitution, as a paraphrased version of the title of a Raymond Carver collection of stories on modern life and love, “How do we talk when we talk about law?” The answer, at the end of the twentieth century, is haltingly, ineloquently, with silences that become independent parts of the conversation. But even some of the refugees from Carver-land find themselves enunciating wedding vows with whatever self-conscious irony, and so am I willing to add my signature to the Constitution, secure mainly in the belief that a refusal to do so would be not only a far more hostile gesture than I am capable of, but also a yet further step toward the end of conversation itself, what Clifford Geertz has recently described as a life “marooned in a Beckett-world of colliding soliloquy”<sup>102</sup> I take it that most of us prefer to believe that some kind of dialogue remains more or less possible, the question being, of course, whether we can find a common language in which to speak and ask our questions.

In any event, I have tried to sketch out what constitutes my Constitution, and why I am willing to sign it and even to celebrate its presence in our culture. What is your Constitution, and are you willing to sign it?

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102. C. Geertz, *The Uses of Diversity* 271 (Nov. 8, 1985) (the Tanner Lectures on Human Values delivered at the University of Michigan).