

Is There a Paradox in Amending a Sacred Text?

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The occasion to attend the Maryland Constitutionalism Schmooze on the topic of religion and the Constitution (and the pressure associated with punching an “admissions ticket”) has afforded me the chance to revisit one of my favorite books, Sandy Levinson’s *Constitutional Faith*.¹ Throughout the manuscript, and especially in the concluding chapter, the author interrogates the self-conscious act of signing the text, the practice of (re)affirming one’s fidelity to the original constitutional instrument by literally placing pen to paper (parchment?) and *publicly* acknowledging acceptance. He recounts a story in which he was asked to sign the Constitution during the celebrations surrounding the document’s bicentennial, and his decision to sign was not without considerable anguish.² What does it mean to pledge allegiance to the Constitution by “adding one’s name” to the document, he asked? “How do we stand vis-à-vis the Constitution” when we are encouraged to carry out the representational act of ratification? How can we turn a blind eye to the startling inadequacies of the document? And yet how can we *not* endorse a document that, for better or worse, changed the nature of ordered government throughout the world?

Broadly speaking, Levinson’s story (and his dilemma) is intended to draw attention to two related measures: the *manner* and the *degree* to which current American citizens endorse the country’s constitutional charter. He is of course not alone in

¹ Sanford Levinson. *Constitutional Faith* (Princeton: Princeton University Press, 1988). In a sense, Professor Levinson (and many others) provides a shield for me: I figure if I focus on spiritual reverence for the Constitution as a secular phenomenon—though inescapably religious in feel—my complete ignorance for all things religious might be forgiven.

² In later work, Professor Levinson will revisit this moment and a similar one at the National Constitution Center to further examine the theory and practice of ratification.

examining these theoretical ideas. Others have been curious about various modes or methods of embracing the Constitution after the moment for formal ratification has passed. The act of taking an oath has been scrutinized as a method of expressing allegiance to the text. Public leaders, teachers, civil servants, and others regularly ask American citizens to reengage in various ways with the spirit of the constitutional document. Museums and exhibits have been built or installed that focus attention on the importance of the Constitution. And, of course, scholars have long been fixated on the text and the implications associated with contemporary approaches to ratification. Will Harris was (and is) fascinated by a citizenry's ongoing dialogue with the Constitution.³ More recently, Mariah Zeisberg asks whether citizens are engaged in a "new framing" by virtue of the National Constitution Center's interactive exhibits, including one that forces us to confront directly the self-conscious act of signing.⁴

There are innumerable reasons why one might choose to sign or not sign—symbolically ratify or reject—the Constitution; some are silly and some are genuinely profound. Levinson draws our attention to several of the more common reasons: for some, he says, adding one's signature to the text represents a sense of duty or obligation, a more or less uninformed commitment based on the assumption that support for the principles at the center of America's political experiment automatically signals support for the nation's fundamental law. The sentiment seems to be that the Constitution ought to be ratified because it is symbolic of the virtues of a free and sovereign people. For other signers, the Constitution represents a marvelous achievement in political negotiation and diplomacy; it is a compromise, to be sure, but it is also a hopeful, inspirational, and even majestic document worthy of esteem.

On the other hand, there are very significant reasons to reject the Constitution, says Levinson. It implicitly or explicitly perpetuated the institution of chattel slavery; it did not recognize a significant portion of the American population; several of its clauses and provisions are now outdated, and so on. In his most recent book, *Our Undemocratic*

³ William F. Harris. *The Interpretable Constitution* (Baltimore: The Johns Hopkins University Press, 1993).

⁴ Mariah Zeisberg. "A New Framing? Constitutional Representation at Philadelphia's National Constitution Center," *Perspectives on Politics*, Volume 6 No. 3 (September 2008), 553-568.

Constitution, Professor Levinson continues his inquiry into the usefulness and value of our current constitutional document, claiming that after a lifetime of reflection he has decided now to “reject the invitation to re-sign the Constitution.”⁵ Citing the “inadequacies” of the Constitution today, and the inability of American citizens to engage meaningfully with the document (and with the conception of constitutions more generally), Levinson suggests now is the time to abandon this particular charter and summon a new Constitutional Convention.

Embedded within these and other discussions about support for the Constitution, and about the self-conscious act of signing the document, the term “reverence” inevitably appears. Indeed, the constitutional text is so ubiquitous in the history of the United States, and even in the history of constitutionalism around the world, that it is not foolhardy to assume that this particular charter is worthy of such high esteem. Veneration for the Constitution, or at least the *idea* of the Constitution, commenced long ago, and by some pretty prominent figures. There are hints throughout the *Federalist Papers*—especially in those penned by James Madison—that the success of the constitutional order depends on a healthy veneration for the text.⁶ Half a century after Madison, Abraham Lincoln spoke of reverence to the Constitution and the law as a necessary feature of regime stability. Presidents from Washington to Obama have spoken eloquently about reverence for the constitutional instrument. Recently, the National Constitution Center surveyed citizens and asked about the various levels of their commitment to the Constitution, suggesting in some cases that respect for the text borders on awe. David M. Kennedy, the eminent Stanford historian, even goes so far as to say about the American Constitution: “It is our most fundamental political document, *reverenced by all*, the supposed cement of our society...”⁷ Sandy Levinson, of course, laments the unreflective veneration or reverence for the constitutional text, but even he has to admit that the sentiment is out there among America’s citizens. Siding decidedly

⁵ Sanford Levinson. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We The People Can Correct It)* (New York: Oxford University Press, 2006), p. 5.

⁶ See *Federalist* 49.

⁷ David Kennedy. “Reverence, Ignorance, and Blazing Apathy,” *New York Times* (September 14, 1986) (*italics added*).

with Thomas Jefferson, who believed that constitutional texts were not to be revered and were to be rewritten every generation, Levinson in fact argues that the first step to constitutional renewal is for Americans to “overcome” our curious reverence for the constitutional charter.

To suggest that the Constitution is worthy of reverence is to suggest that it merits special, heightened, even religious, status. Presumably, those who revere the text worship its many clauses, provisions, aspirations, and rights protections. Doubtless, they also revere the broad contours of the Constitution’s fundamental message(s) and, more generally, how those messages continue to inform the political and constitutional dialogue both at home and around the world. Americans are proud of their constitutional charter (even if they can’t tell us what it says) and they are impressed by its longevity and brevity. Moreover, they believe certain parts of the text are truly special. The Preamble, for example, resonates with an American citizenry sophisticated enough to understand the aspirational character of a constitutional instrument. The self-referential quality of the Preamble’s linguistic style,⁸ combined with its tangible promises of liberty, security, and justice, dovetail nicely with the widely respected (and revered?) language of the Declaration of Independence. More evidently, the Bill of Rights has come to represent the heart of the constitutional text, and in a society infatuated with personal liberty the reality that a list of freedoms is perceived as the cornerstone of the document will likely elevate that document to reverential standing. To be sure, the Bill of Rights has, in many ways, eclipsed the original constitutional document in the minds and hearts of the American populace. As I’ve written elsewhere, “both literally and figuratively, the constitution’s role in organizing various political institutions is now overshadowed by the perception that the text’s first priority is to identify and protect individual rights.”⁹ When

⁸ Akhil Amar put this point most accurately. He writes, “The Constitution, after all, was not just a text, but an act—a doing, a *constituting*. In the Preamble’s performative utterance, “We the people...*do*” alter the old and ordain and establish the new.” Akhil Reed Amar. *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), p. 27.

⁹ Beau Breslin. *From Words to Worlds: Exploring Constitutional Functionality* (Baltimore: The Johns Hopkins University Press, 2009), p. 83. In addition, just this past week, *The Washington Post* reported that several Latin American countries are undergoing “document driven revolutions”—constitutional “re-foundings,” the

asked by the National Constitution Center what the U.S. Constitution “means to them,” more than half of the individuals surveyed responded that the document is all about “freedom” and that it establishes the institutional “basis of our rights.” These two responses were, by far, the most prominent in the entire poll. Many Americans revere the Constitution, but (unsurprisingly) even more revere it because it is seen as the vehicle that protects individual freedom and liberty.

To revere is to “regard with feelings of profound respect, to consider something hallowed or exalted, or to be in awe of it.”¹⁰ One can revere something secular, but the quality or character of respect that accompanies reverence and veneration is usually reserved for the sacred texts of the world’s major religions (almost every formal definition of “reverence,” “veneration,” and “sacred,” includes some reference to religion). Not mere endorsement or affirmation, reverence connotes a deeper, more profound commitment to the item or instrument respected. The definition of reverence is tied up with the principle of faith, a largely unconfirmed (and unconfirmable) belief in the greatness of an object, text, person, or idea. For example, certain people might revere the word of God or the power of nature, and if they do, they cherish those things as sacred. As noted, many revere the Constitution for what it says and what it represents, and thus they too view that particular text as hallowed.

The Constitution’s reverential status raises a host of questions, including ones focused on the relationship between sacred texts and amendability: If the Constitution is so worthy of reverence—if it is, as many have suggested, sacred—should it also be alterable? If it is a hallowed institution, meriting the type of veneration typically reserved for religious tomes and teachings, should we be so at ease about the prospect of fundamental and radical structural change, especially if we imagine that the power to alter the constitutional document is so considerable that the text could conceivably be

newspaper calls it, in which regimes are attempting to solidify power by (among other things) making grand promises in their bills of rights. See Joshua Partlow. “Latin America’s Document-Driven Revolutions” *The Washington Post* (February 17, 2009).

¹⁰ See Webster’s Dictionary definition.

altered entirely out of existence?¹¹ If the Constitution is sacred, shouldn't it also be sacrosanct? Here, I'm specifically referring to the formal power granted in Article V to amend the text, and not the ability by the judiciary or other institutions to interpret the Constitution in ways that fundamentally change its meaning. Article V grants authority to various institutions—including the Congress and the state legislatures—to propose amendments to the Constitution or to call conventions for the purpose of proposing amendments to said text. The authority to alter small sections or large chunks of the constitutional document is embedded within the document itself; the rules for amendment, that is, are outlined in the text itself. This authority is a direct consequence of the Framers' Enlightenment beliefs, particularly in, 1) the imperfectability of human nature and, 2) the "new science of politics."¹²

Of course, some will claim that the amendment process is itself one of the reverential features of the American Constitution. The capacity to change the document through addition is a crucial mechanism aimed at constitutional maintenance, and without it the Constitution becomes far less esteemed (and probably unworkable). Along with the capacity to interpret the text in different historical moments and within different historical contexts, the ability to alter the document formally is what allows the text to stay current or timely. Interestingly, Stephen Holmes, Cass Sunstein, and others have further insisted that the perennial temporal problem faced by all constitutional regimes—namely, that a contemporary democratic people agree to live by rules and procedures established by a past generation of people—can be offset, at least in part, by the capacity to amend the text. Holmes insists that amendability is one antidote for the problem of precommitment.¹³

Even still, the power of amendment represents a curious and possibly disquieting component of a revered text. If we take seriously the various functions and features of a constitution, and we are willing admit that the articles, provisions, and clauses that give

¹¹ Presumably, the power to amend the American Constitution allows for the possibility that an amendment could be passed that would remove the Constitution as the regime's governing charter.

¹² See *Federalist* 9.

¹³ Stephen Holmes. "Precommitment and the Paradox of Democracy" in Jon Elster and Rune Slagstad's *Constitutionalism and Democracy* (1988).

meaning to those features are truly sacred, what does it say about our commitment to a document that includes an internal mechanism for eliminating or altering those exact articles, provisions, and clauses? What does it mean to admit to the imperfectability of the Constitution at the same time that we classify the document as blessed? Can a constitution be imperfect and still sacred?¹⁴ Is there an inherent paradox here? Jefferson was curious about a similar line of inquiry, and his response was to discourage the continued veneration of the present Constitution, to take it off of its pedestal: “some men look at constitutions with sanctimonious reverence,” he said, “and deem them like the arc of the covenant, too sacred to be touched.”¹⁵ For Jefferson, reverence should be reserved for other types of texts.

Certainly not an exact analogy, but the sacred *religious* texts—the Bible, the Koran, the four Vedas of Hinduism, and so on—do not similarly allow for radical alterations, at least not in any formal sense.¹⁶ It is true that they differ from the Constitution in several important respects. Most believers, for instance, view sacred religious texts as “divinely or supernaturally inspired;” only some see the product of Philadelphia’s constitutional convention as “miraculous” in a similar sense. Additionally, sacred religious texts serve fundamentally different purposes and appeal to different audiences than constitutions. These religious texts were not necessarily written as practical documents, nor were they inspired by enlightenment principles and a healthy respect for science and rationality.

And yet there are certain similarities in the way in which all of these secular and non-secular documents are described, exalted, and admired. Sacred religious texts are defined as such because they order the lives of believers, they provide moral and ethical guideposts by which individual followers measure their particular actions. Constitutions order lives too. Ceremonies and rituals separate sacred religious texts from the ordinary;

¹⁴ This possibility is more believable if, as I suspect, contemporary American citizens view the idea of a constitution as more sacred than the actual physical text. There is a folklore surrounding the Constitution that, I’m guessing, resonates more easily with the American populace.

¹⁵ Thomas Jefferson. Letter to Samuel Kercheval, July 12, 1816.

¹⁶ It is worth repeating that I am limiting my inquiry to the more *formal* method of alteration by amendment, and not to the very real possibility that a text’s meaning can change over time as a result of differing interpretations.

constitutions spawn a whole host of ceremonies and rituals (consider the role of oaths). Sacred religious texts often tell a story, a narrative that acts as metaphor for the teachings of the particular sect. More and more frequently, newly framed constitutions begin by describing—often in narrative form—those events that gave rise to the need for constitutional renewal. Religious texts inspire, comfort, influence, motivate, encourage, and so on. Their sacredness, in fact, stems primarily from their ability to inspire and elevate the human condition. The U.S. Constitution is inspirational to many. Sacred religious texts were written at a particular point in time and they reflect the ideas and prejudices of that moment. So are constitutions. Part of the success of a sacred religious text is due to its longevity and stability; indeed, most of the sacred religious texts are hundreds or even thousands of years old. The success of the American constitutional charter is also due in part to its enduring quality.

What is interesting (to me at least) is that these sacred religious teachings don't include passages analogous to Article V that suggest the presence of imperfections. More to the point, they don't automatically *invite* the possibility of amendment. Make no mistake: these documents have changed over time. It is customary, for example, to view the Gospels as representing some form of biblical amendments; they are, after all, revisions of the narrative surrounding Christ's life and teachings. Karen Armstrong, a widely respected biographer of the Bible, is helpful here. She insists that edits, changes, and alterations have been made to both the Old and New Testaments for thousands of years, usually to reflect the political or cultural concerns of the period. Recounting one of those early moments, she writes:

It would be many years before Yahwism became a religion of the book. The exiles had brought a number of scrolls from the royal archive in Jerusalem with them to Babylon and there they studied and edited these documents. If they were allowed to return home, these records of the history and cult of their people could play an important role in the restoration of national life. But the scribes did not regard these writings as sacrosanct and felt free to add new passages, altering them to fit their changed circumstances. They had as yet no notion of a sacred text.¹⁷

¹⁷ Karen Armstrong. *The Bible: A Biography* (Grove, Atlantic, Inc., 2007) p. 11.

The practice of editing, uniting, and altering the biblical narrative, Armstrong contends, continued until the nineteenth century, when a movement emerged that called for the *literal* interpretation of the text. Before then, few could have even conceived of a literal reading; part of the tradition of oral history is that the storyteller is granted certain license to infuse modifications. After the emergence of this group of literalists, though, few edits or changes have even been suggested. In fact, the call for a literal interpretation of the Bible seems to coincide perfectly with the ceasing of modifications altogether. Those who advocate a literal translation of the Bible have, in a sense, won an important battle: they've locked down the text and prevented the possibility of radical or tangible revisions.¹⁸ The Bible has been mostly unchanged for close to two hundred years now. That particular moment in the nineteenth century, therefore, helped to solidify the belief that the stories captured in the Bible, once textualized, were somehow sacred and unalterable.

No doubt other religious documents include similar histories; they too have been altered through the years and they too have taken on reverential status once in written form. And yet the ability to modify what is printed in the text is neither announced in these religious tracts, nor is the formal mechanism for fundamental change viewed as one of the principal virtues of the entire document. These documents are sacrosanct; believers celebrate the solidity of their governing text. The Constitution, in contrast, is only sacrosanct in spirit. Its broad contours and its central messages may be sacred (and that may be enough to satisfy most), but its particulars remain subject to review. In the end, perhaps *that* is what most distinguishes constitutions from certain revered religious manuscripts.

Which brings me back to the self-conscious act of signing the Constitution. Accompanied by my daughter, I too found myself recently in Signers' Hall of the National Constitution Center confronted with Sandy Levinson's principal dilemma: should I ratify the text, warts and all? Do I lend my signature to a document that I believe has changed the world, but has also not always lived up to its promise? Do I

¹⁸ Of course they have not been able to prevent the variety of interpretations from changing the book's meaning.

revere *this* text, or is it just the idea of the constitutional charter that stirs my emotions? Is this Constitution sacred to me? Is it worthy of reverence?

Spending a career thinking about the theory of constitutionalism and the importance of constitutions did not make the decision any easier. My daughter, Molly, eagerly signed (claiming something about just wanting to “get out of the museum to find ice cream”), but I was not so sure. To symbolically ratify or reject the constitutional instrument was a far more profound and difficult decision than I anticipated. As it turned out, it was precisely the imperfectability of the constitutional text that inclined me toward ratification. After acknowledging that the act of signing (as well as the physical environment of Signers’ Hall) has itself become part of the ceremony and ritual that renders the Constitution sacred, I could admit that the Constitution’s revered status is probably just a social construction. The *idea* of a constitution of this sort was enough for me, even if I share Sandy Levinson’s view that this particular charter is chock full of inadequacies. What the Constitution stood for, and its enduring potential, I concluded, rendered it sacred.

As such, Benjamin Franklin probably captures my sentiments on the issue most accurately. At the close of the Constitutional Convention, the elder statesman addressed General Washington and his fellow delegates and admitted to many doubts about what they had just accomplished. Too weak to stand and speak, his friend and fellow Pennsylvanian James Wilson read his remarks. They probably represent the thoughts of many at the time; what is more, they probably represent the thoughts of just as many today.

I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them; for having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others...In these sentiments, Sir, I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us...I doubt too whether any other Convention we can obtain, may be able to make a better Constitution.

Thus I consent, Sir, to this Constitution because I expect no better,

and because I am not sure, that it is not the best. On the whole, I can not help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility, and to make manifest our unanimity, put his name to this instrument.