THE AMBIGUITIES OF PLEDGING FAITH

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When I first read Professor Levinson's provocative challenge to reconsider our own allegiance to the Constitution, I had a most distressing—and, for a law professor, unusual—feeling of having nothing to say. For me, a refusal to sign the Constitution would simply be, in Professor Levinson's words, "a far more hostile gesture than I am capable of."[1] The Constitution, and the political structure and national community that it symbolizes, are too much a part of me for me honestly and realistically to repudiate. But of course, I too am a member of the privileged class—that segment of the American people that created the Constitution (largely for its own benefit), administered the Constitution (again, for the most part in its selfish interest), and garnered the lion's share of American prosperity and security under the Constitution. It would be remarkable if I didn't think well of it. But that, of course, is no compliment, either to me or to the Constitution. For me, Professor Levinson's paper was a forcible reminder of the ease with which I can sign, an ease not shared by black Americans, female Americans, poor Americans, or many others.

So, on first reading I found that as a commentator I had a real problem: I agree with the conclusion Professor Levinson reaches and I admire and concur in his sensitive discussion of the moral ambiguities of that conclusion. On a second reading, however, I began to realize that originally I missed or glossed over an important, if largely implicit, aspect of Professor Levinson's remarks. One would expect Professor Levinson, of all people, to be as interested in the process of decisionmaking as in the decision reached.[2] And so I began to consider the pointed nature of his concluding ques-

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1. Levinson, *Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?*, 29 WM. & MARY L. REV. 113, 144 (1987).

2. *See* P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (2d ed. 1983).

tion: "What is your Constitution, and are you willing to sign it?"[3] That is not, I realized, just an invitation to agree or disagree with his paper; it is a challenge to do what he has done: to recount and reexamine one's own personal constitutional story from one's personal and idiosyncratic perspective. That is what I will try to do here.

My personal starting point in thinking about constitutional matters is usually historical. In addressing Professor Levinson's question, therefore, I would like to call to my aid an historical figure whom I find rather intriguing, Hugh Swinton Legare. Legare was a white South Carolinian prominent in American letters and politics from 1820 until his death in 1843; for the last two years of his life he served as Attorney General of the United States. In many ways Legare was the archetype of the antebellum Charleston gentleman: college educated in South Carolina and Scotland, socially polished, intimately and equally acquainted with the ancient classics, contemporaneous European civilization, and American literature and law, and a slaveholder who fastidiously conceded slavery's abstract evil while staunchly denying the realistic possibility of abolition. In short, at first glance Legare is not an obvious candidate to help me or anyone else today address Professor Levinson's challenge. Legare wrote an essay in 1828, however, that seems to me to bring together and express with dramatic clarity several of the problems with my Constitution that I need to confront before deciding whether to sign it.

Legare's essay formed part of a book review of Chancellor James Kent's *Commentaries on American Law*,[4] which is often regarded as the first great American legal treatise, "The American Blackstone." Legare was an admirer of Kent, and the review was glowing. But embedded within it is a short essay on contemporaneous constitutional law that is one of the most damning indictments of the United States Constitution ever penned. The essay concludes: "The mischief has already been done—the first step is taken, the whole *system* is radically wrong."[5] There can be no doubt how

3. Levinson, *supra* note 1, at 144.

4. H. LEGARE, *Book Review*, in 2 WRITINGS OF HUGH SWINTON LEGARE 102 (M. Legare ed. 1845) (reviewing J. KENT, COMMENTARIES ON AMERICAN LAW (1826-27), in 2 S. REV., Aug. 1828, at 72).

5. *Id.* at 133 (emphasis in original).

Legare would have answered Professor Levinson's question in 1828. But why? What led this comfortable and conservative lawyer to so startling a conclusion?

In a way, the answer to this question is obvious. As a white South Carolinian, Legare was opposed to national power when exercised to favor Northern industry or, potentially, to threaten slavery. As an opponent of nullification, Legare was opposed to exercises of federal authority that, by exciting alarm, might tip the political balance in South Carolina toward the nullifiers. All this is true, but it is not, of course, what I find useful. I want instead to explore the explanations Legare gave for the Constitution's emergence as a threat to his values.

The first charge in Legare's indictment was an accusation that will sound familiar: the federal government created by the Constitution had been transformed, Legare wrote, from "one of enumerated powers and a circumscribed sphere" into one that "knows absolutely no bounds but the will of a majority of Congress."[6] In language used here at the symposium, an original Constitution of frustration had become a Constitution of possibility, at least of governmental possibility. In hindsight, to make this charge against the remarkably weak and limited federal government of 1828 seems faintly laughable, but as a prophecy of 1987, I think it is difficult to argue with Legare's assertion that Congress is "to all intents and purposes, omnipotent in theory,"[7] or as I would put it, omnicompetent with regard to all legitimate governmental means and ends. Legare got the timing wrong, to be sure. It took more than "the course of a very few years" for the federal government to assert jurisdiction over "all the pursuits, the interests, the opinions and the conduct" of Americans.[8] But surely it has done so now. My Constitution in 1987 authorizes national regulation of the most parochial of human activities and recognizes no principled limits on the scope of national concern except those limits found in the enclaves of personal liberty and equality of protection created by the Bill of Rights.

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6. *Id.* at 123.
7. *Id.* at 124.
8. *Id.* at 123.

There are several possible responses to Legare's observation or prophecy about federal power. One I am attracted to says, "So what?" This position was put most forthrightly by Charles Black a few years ago.[9] Black argues that the gradual creation of a genuinely national government empowered to deal effectively with any concern of importance to a national legislative majority is one of the great historical and constitutional achievements of the American people.[10] It is a cause for celebration, not a confession of despair. To question national omnicompetence, he points out, is to question America as we know it, the good as well as the evil.[11] To question is, in Professor Levinson's terms, to refuse to sign.

Another possible response to the accusation of change is to deny change. One can point to the nationalist train of thought present at Philadelphia and in the Federalist Party of Washington and Hamilton. As more and more social issues became genuinely national, the federal government naturally and appropriately took up and exercised powers to which it was always potentially entitled.

There is truth for me in both of these responses, and I certainly agree with Professor Black that the dream of dismantling the current national government and replacing it with what Black described as a "collection of fifty rustic and decaying urban republics" is a nightmare.[12] I am aware that Legare's concerns were fueled in part by his fear of one of the things I value most in my Constitution: a national government empowered to combat racism. But even accepting all this, I think Legare made a point that has continuing validity. Despite the existence of nationalism from the beginning, it seems clear to me that for most of the Founders, the Constitution contemplated a federal government with some limits to its powers and responsibilities. My Constitution of national omnicompetence is a confession that this original experiment in limited federal authority failed. This failure is significant not only to political theorists. When I contemplate the enormous concentration of power in the contemporary federal government and the erratic and wayward behavior of many of its recent stewards,

9. Black, *On Worrying About the Constitution*, 55 U. COLO. L. REV. 469 (1984).
10. *Id.* at 469.
11. *See id.* at 484-85.
12. *Id.* at 477.

Legare's fear of the "accumulation of power"[13] begins to make some sense. My Constitution endorses that accumulation for the sake of the good and just ends to which that power can be directed. But Legare reminds me that our constitutional history demonstrates nothing so clearly as the futility of predicting "the results of [our] own political contrivances."[14] If the limited government of 1789 can become the omnicompetent one of 1987, Legare may well be right that "no man can pretend to anticipate what shape the constitution of the United States is destined to take."[15] The New Deal and the Great Society, in other words, might be followed by a New Order with a different moral cast.

One might say that the transformation from limited to unlimited government was a mistake, the result of error or usurpation on the part of the national authorities. If only Congress, the President, or the Supreme Court had interpreted the Constitution correctly, the limits on national power would have remained in place. This, I suppose, is the theoretical, although certainly not the pragmatic, view of the present federal administration. But it is precisely with regard to this claim that I find Legare most fascinating, and most disturbing, for it was his contention in 1828 that the fundamental problem with the Constitution stemmed not from legislative or judicial error, but from the very nature of the American constitutional experiment.[16]

"Our political opinions," Legare wrote of Americans, "have been hitherto, in the last degree, wild and visionary We have unbounded faith in forms, and look upon a written constitution as a sort of talisman, which gives to the liberties of a nation 'a charmed life.' "[17] The written Constitution, Legare was reminding his readers, was meant to limit and channel governmental power, either by specifying government's legitimate authority or by defining ends and means that government was forbidden to use. But in fact, Legare claimed, "the effect of a written Constitution, interpreted by lawyers in a technical manner, is to enlarge power and to sanc-

13. H. LEGARE, *supra* note 4, at 124.
14. *Id.* at 123.
15. *Id.* at 130.
16. *See generally* H. LEGARE, *supra* note 4.
17. *Id.* at 124, 125.

tify abuse, rather than to abridge and restrain them."[18] The very means the Founders chose to prevent injustice became, in fact, the most insidious and powerful instrument of injustice.

How so? Legare pointed to a variety of ways in which the verbal, textual, documentary nature of the Constitution rendered it dangerous. First, to write down a constitution is to deliver it into the hands of those Legare scornfully called "mere professional lawyers,"[19] despite the fact that Legare himself was a lawyer and was no despiser of legal professionalism. Lawyers approach documents, including constitutions, "by technical rules" of interpretation.[20] They address moral and political controversies through a pseudologic of precedent and analogy that obscures their inevitable progression from sense to nonsense. Legare wrote of lawyers' constitutional arguments: "The consequences in [their] deductions shall be inevitable, and no man be able to say this or that link in the chain of reasoning is bad; on this side is Ionia and not Peloponnesus—here law ends and usurpation begins."[21] When constitutional discussion—high political debate over justice, freedom, and equality—becomes lawyers' disputation over the meaning of text and precedent, "[w]e look in vain for that plain . . . unsophisticated sense—that *instinct* of liberty, which characterizes the controversial reasoning of the great fathers of the English constitution—the Seldens, the Sidneys, the Prynnes—and their worthy descendants and disciples, the founders of our own revolution."[22] In other words, Legare argued that the practices of legal reasoning blind those who employ them to the truly constitutional questions of equality and oppression, justice and wrong.

Turning constitutional debate into legal wrangling not only perverts the substantive discussion, Legare wrote, it also inhibits the ability of the people at large to control and correct their governors.[23] In a remarkable anticipation of an argument of Alexander Bickel, Legare suggested that the Supreme Court's decision to uphold the constitutionality of a statute or other governmental action

18. *Id.* at 124.
19. *Id.* at 125.
20. *Id.*
21. *Id.* at 131.
22. *Id.* at 125 (emphasis in original).
23. *Id.*

functions as a legitimation of that statute or action. "The people at large, after a few unheeded murmurs, submit to this imposing authority, and think that their discontents must be unreasonable, because their understandings have been puzzled by sophisters, and awed by the learning of the bench!"[24] The end result of having a written Constitution is to enable governmental actors to deny or conceal their political choices and to work "an *estoppel* . . . upon [the] just complaints" of the victims of injustice.[25]

I recognize a disturbingly familiar picture in Legare's jeremiad against a written constitution. Whether it was so in 1828, in 1987 there is a tendency to translate questions of justice and equality into technical issues of legal constitutionality, and then to treat the latter as the province of the professionals on the Supreme Court rather than as the concern of us all. For example, Congress and the President may approve legislation of dubious legitimacy, arguing that the constitutional question is for the courts. The courts in turn are inherently—I want to say constitutionally—incapable of addressing many of the great substantive questions of political morality, and if Legare was right, are professionally incapacitated from resolving properly those questions they do reach.[26]

Having accepted much of Legare's criticism, however, I need to concede as well that he is criticizing *my* Constitution, the Constitution of text and gloss, precedent and lawyers' argument, the verbal Constitution that is an ever more complex tradition of discourse and disagreement. Legare was right that a written Constitution and the interpretive tradition that arises in its wake serve easily and often to bemuse and befuddle the well-meaning, and to strengthen and shelter the unjust.[27] How many white Americans before the Civil War avoided the great moral question of slavery with the tranquilizing reflection that the Constitution recognized slavery's legality? How many well-to-do Americans today avoid the great moral question of poverty with the tranquilizing reflection that the Constitution is a "charter of negative liberties,"[28] that

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24. *Id.* at 125. For Bickel's argument, see A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

25. H. LEGARE, *supra* note 4, at 125 (emphasis in original).

26. *Id.* at 123-28.

27. *See supra* notes 24-25 and accompanying text.

28. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

dealing with poverty is a matter of generosity rather than a fundamental demand of justice? I have intentionally chosen a controversial contemporary example to illustrate another related consequence of my Constitution: its tradition of discussion may lead to the rejection of my views, to what I and others would regard as the legitimation of injustice and inequality. If that happens, I will not be able to deny responsibility completely, to utter a self-exculpatory "It's not me, it's the Constitution," for my Constitution is what I, along with many others, make of it in discussion, debate, textual interpretation, ethical insight, verbal obfuscation, and failure of moral vision.

Although I accept the truth of much of Legare's critique, I do not join in his conclusion that "the whole *system* is radically wrong."[29] Why not? The alternative to my Constitution of text and discussion, of good and evil mixed together, is the utopian vision of a political order founded on unmixed good. The problem with a utopia is that once achieved, it leaves no rationale for argument and no room for dissent. Legare wrote with just such a utopian vision, I believe, in his case of revolutionary patriots rather like himself resolving political issues with their "plain, manly, unsophisticated good sense [and] instinct of liberty."[30] I have little doubt such men would build a society agreeable to themselves, but what about to women, blacks, the poor, and political dissidents? At least my Constitution recognizes the inevitability of discussion and the possibility of disagreement and a change of mind or heart.

I have come full circle, of course, and ended up with a Constitution very like Professor Levinson's. Like Professor Levinson, I will sign. But the enterprise has been worthwhile, at least personally, because it has compelled me to confront, once again, the moral ambiguity of the Constitution to which I subscribe, and my own moral responsibility for that Constitution's failures and injustices.

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29. H. LEGARE, *supra* note 4, at 133 (emphasis in original).
30. *Id.* at 125.