

CONVERSATIONS

WITH BILL KRISTOL

Conversations with Bill Kristol

Guest: Harvey Mansfield, professor, Harvard University

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I: America's Constitutional Soul (00:15 – 34:38)

KRISTOL: Hi, I'm Bill Kristol. Welcome back to CONVERSATIONS. I'm very pleased to have with me today again Harvey Mansfield, Professor of Government at Harvard and frequent participant in CONVERSATIONS. I hope we'll have many more, and discuss the many topics about which you can instruct us.

I thought today we would talk about constitutionalism, something you've written on. A book of your essays is called – I assume that was your choice – America's Constitutional Soul.

And we were reminded of the Constitution with the recent death of Justice Nino Scalia. The piece we had in The Weekly Standard on it was entitled – one of the pieces – “The American Constitutionalist.” I was thinking, I guess you really couldn't – one can't really imagine a piece about a lawyer or a judge from another nation with that kind of – constitutionalist is somehow very American. Since you wrote America's Constitutional Soul, explain.

MANSFIELD: How do we start? Well, Justice Scalia was one of America's greatest Justices. He's associated with a doctrine, originalism, I think, in a way that most Supreme Court Justices are not. Also, he wasn't known especially for landmark cases, but especially for his dissents. His stinging or blistering dissents are the terms that were often used. So he's a man of dissent. He wanted to bring the Constitution back. Back to its origin. That meant bringing back from its present abuse by the Progressives, or the Democrats, or the liberals, or those who understood the purpose of the Constitution as to adjust to changing times.

The name for this in a book was “the Living Constitution.” A book written a long time ago, and I think in 1924 by a progressive scholar, that the Constitution should have an organic growth to it instead of being a permanent framework, fixed. Scalia wanted to go back to a permanent and fixed Constitution. Now, this Constitution was made by Framers in 1787, '88 – when it was passed and ratified. Those Framers, I think, Scalia thought to be very wise.

The question arises how important is wisdom in the Constitution, and how important is it simply to take their word seriously. I think clearly if they hadn't been wise, he probably would not have been an originalist. Someone accused him of being a positivist. Somebody who believed that law consists of making a decision, and that's all there is to law. I think he saw that behind this law – the Constitution is a law – there was wisdom. Still, the idea of wisdom competes with the idea of original because the original might not be wise, or you might come upon the ways in which the Constitution needed improvement.

Of course, the Constitution has a provision for that, you can amend it. That hasn't often been done. So that suggests, I think, that the Constitution is a law. And this was Scalia's insistence all the way through.

John Marshall had said that, and others had said that. He wanted to remind his opponents – because I think he always had his opponents in mind – that the Constitution is a law. It is not a set of policy proposals.

That means that the Constitution is above ordinary law; it's law, which is above law. And yet it's not a higher law, it's not way up above, it's not in the sky or divine, anywhere up there. It's above ordinary law. That means that ordinary law, that it must not be considered in the same way as an ordinary law. An ordinary law you would work within the Constitution by following its procedures, but you would find a principle or policy that you'd want to enact. You would enact it constitutionally if you obeyed the due process that's in the Constitution.

So the Constitution should be – to maintain this distinction between itself and ordinary law – it should be not another ordinary law. Therefore, it has to be about process, or due process. And yet there is tradition in constitutional interpretation, constitutional history called “substantive due process.” That's a kind of oxymoron because “due process” means you do it the right way, therefore, it isn't substantive. The substance is alright as long as you do it the right way. There was this tradition – and it had been perhaps started by Republicans wishing to put the principles of the free market or economics into the Constitution, and then followed and picked up by the Supreme Court in the Roosevelt era and coming to a head, culmination, under the Chief Justiceship of Earl Warren.

In the course of the history of the Constitution, and especially the recent history, the distinction between constitutional and ordinary law has been eroded or even erased. So Scalia brought that back to mind and he made constitutionalism, or the Constitution, a political force by doing so. That, I think, is important.

Now, the principle behind the Constitution, then, is that it's based on, or it prescribes due process. So that it should only be a process. And that process implies a good deal of partisanship in an interesting and strange way, different from other countries. In Federalist 51 occurs the famous phrase, “Let ambition counteract ambition.” So the Constitution is very friendly to ambition. It doesn't expect the three branches to cooperate, but it sets up a separation of powers, which is a kind of contest for supremacy.

Each of the branches has its claims and its powers, and makes a contribution, but the contribution is not a harmonious contribution, which fits together easily with the others. The Constitution therefore is always in dispute. If you think of it as a way to settle disputes, that might be right, but the disputes are not settled by the Constitution itself because the powers are going to be interpreted each by, each separately by itself. So Congress has its view of itself, and the executive and the courts. So they each have a characteristic view that goes with being an executive, which means you're managing or running something. Or being a legislator, which means you're putting people together, meeting with them, listening to lobbyists or constituents, trying to find out what the people want or what they ought to want. Or you're on a court, you're a judge, you're sitting in your office or on the bench, comparing the result of this legislative process, a law, with the Constitution and trying to understand it, apply it in particular cases.

So these are three very different jobs. And the Constitution, you could say, takes advantage of those differences. Madison in Federalist 51 makes an interesting remark after he says, “Let ambition counteract ambition.” He says, “The interest of the man must be connected to the powers of the office.” So your interest develops if, say, you're a Senator, develops out of your membership in the Senate. That means that you will look at things from the standpoint of a Senator, and you're encouraged to do this because any action that you take would have to be the action of a Senator, you don't have access to a court or to an executive office. You are what you are. And that means therefore if you want to promote yourself, your ambition, make something big out of yourself, you've got to do it in your way through the office that you hold or maybe through the office that you want to hold. Because ambition occurs in people that don't hold the office but want to.

Here, we've got this ambition that is channeled or directed by the three different branches. They fight. They contest. They vie for a result, which is regulated by the Constitution, but not decided by it. The Constitution doesn't say exactly, say, what the Second Amendment means. That can vary, that's decided

by a contest that is ultimately at the will of the people. Who gets elected and so on is sort of the final say. There's a lot of process that goes on, but still it comes to an end when the people decide that, say, Congress is right on this, or the President is right on this. Then, of course, that doesn't necessarily remain uncontested. Later elections can come to different results and put in office different people.

So that is this picture of a very contestable Constitution in which a lot of people are making confident remarks about the Constitution, what it says and requires and demands, which often are, or usually, interpretations of ambiguous statements or generalities that could go one way or another. There are certain ways, certain interesting differences, say, that powers of Congress are enumerated, but then at the bottom of the enumeration is the so-called Necessary and Proper Clause, which says that all the enumerated powers are added to, must be supplemented by the power to do whatever is necessary and proper to enforce them. So that is something that adds a little steam to the enumerated powers.

Whereas the Executive isn't enumerated, that's a kind of interesting difference. There is no limit to the executive power, except that it's called the Executive Office. The President swears to uphold the Executive Office and his duties as President, only one of which is to faithfully execute the laws. He's also Commander in Chief, and he has a veto over legislation.

The Constitution does affect the way in which this battle or contention is carried on, but it doesn't decide. I think it's important to realize this, that the Constitution does not, is not a way to come to decisions, but it's a process by which – it is a way to come to decisions, but not to decide. It doesn't decide for you. You have to use it.

KRISTOL: The people still get to govern themselves. The people having established the Constitution, the Constitution is sort of above the people, but it also allows the people to govern themselves. So it's both democratic and a little more than democratic?

MANSFIELD: The Constitution begins "We the People." It's strange, in other words, "We the People" is the origin of the Constitution, and yet having passed the Constitution, the people end up as subjects – citizens, yes – but subjects to the decisions of the government that they're under. So they're both above the government, or above the Constitution, and underneath it. They're above it because they can always change it and because they get things started, but they're underneath it because the purpose of the Constitution is to govern them. Self-government is still a form of government. Both on top and right at the bottom, that's kind of an interesting feature of constitutionalism.

Now, the Constitution has this strange relationship to parties. If you look at The Federalist on parties, Number 10, Federalist discusses factions, which are pretty much identified with parties in The Federalist. The Framers looked down on factions and at the same time on parties. They didn't want to make a distinction between faction and party because I think they didn't want to encourage faction.

But a faction is a group that acts contrary to the individual rights of others or to the aggregate interest of the community. That opens up the possibility that there could be a group that favors, supports, promotes the rights of individuals and the interest of community. Like, say, the Framers themselves, or the authors of The Federalist, or generally speaking, the Federalists. But the Federalists didn't identify themselves or want to be identified as a party. They were identified only by their enemies, their opponents, especially Thomas Jefferson, who was in George Washington's first Cabinet, but then left and started to work against George Washington and against, especially, Alexander Hamilton. And the people who were called Federalists and who Thomas Jefferson called "Monocrats," he thought that these people were bringing the government back to the evils of monarchy. He wanted to promote a true republicanism.

That was his party, the Democratic-Republican Party, they wanted to make the American republic more democratic, and that is closer to true republicanism, and that also meant closer to the people. And this party succeeded in making what it called, and is generally allowed to be, a revolution, a political revolution in the election of 1800, when Jefferson came in. This was the first regular, sort of public, respectable party that called itself a party at that time.

What it did was, it tried to bring the government closer to the people. That, I think, is quite contrary to what the Federalists attempted to do. The Federalists had attempted to put a distance between the government and the people. They thought that republics throughout history had failed when they became too democratic. And so in Federalist 10, this is James Madison, later a Republican and a member of Jefferson's party, who makes a distinction between democracy, that's bad, and republic, that's good.

By democracy, he means something like pure democracy, like Athenian democracy, where there was no representation, but if you were a citizen you were automatically a member of the assembly. And such assemblies were open to manipulation, to demagoguery and to error and to impulse, passion, and finally to a demagogue who might become tyrant. This is how republics died. By becoming too democratic. The Federalists picked this up, and they thought that this danger, the danger of democracy was not something obsolete, it was not something that had been cured just by no longer living in the city-states of Greece, but it was still powerful in America. They wanted to make sure that government was at a distance from the people.

To do this, they had to enable the government. And to explain they used two words, in a political context, which hadn't been used before. Invented new words in *The Federalist*. Well, one is responsibility. That word had been used before, but in a different sense. Just as it had been used to mean responsiveness, so you ask me a question and I answer it, that's responsive. But responsibility in the way we now use it was used for the first time in *The Federalist* to mean taking charge of a situation that's in difficulty and danger and doing something about it. Doing something about it on behalf of the people who aren't there to do anything themselves. You act responsibly when you take care of something by yourself because perhaps the people who are normally supposed to take care of it aren't there or aren't able. So that's this new meaning of responsibility. "Take charge meaning."

The other new word was energy. This was a word from physics, from Newtonian physics. Energy of a particle that moves or motion of a thing. And that was now used to mean politics. And so that word was born, which now here all the time, energetic. So Jeb Bush, "low energy," as Mr. Trump said. So that's present day-use, and it begins here. There was another kind of power and that was stability, the opposite of energy. In other words, the government is supposed to have energy and is supposed to have stability, these two opposite things. Both of those are possible only for a government that has some distance from the people because the people all together can either be torpid, quite, passive and do nothing or they can be volatile and passionate. In the first case, they lack energy, and in the second, they lack stability.

All these qualities all depend on keeping government at a distance from the people. And this is what Jefferson tried to overcome or erode. Not that Jefferson himself didn't take, you might say, responsible, energetic decisions. The purchase of Louisiana, this is a great example. He didn't altogether leave the Constitution behind. But this principle perhaps he left. He made it harder for him to do what he did, by buying Louisiana, with the principles of his party. He created his own difficulty there, or at least worsened it.

And then ever since this, ever since the Federalist Party, American politics has become more and more democratic. Tocqueville's famous book – which this is in the 1830s, at the time of Andrew Jackson's presidency, a very democratic man – and Tocqueville took his cue, or his understanding of America as he saw it, from the presidency of Jackson. And he said that the representative forms and institutions of the Framers had been overcome or overwhelmed by democracy, and that those representations, the whole notion of keeping government at a distance, was no longer the case. No longer the truth of American democracy. That the people would always get what they wanted, and it was their power that one could always see triumphant.

Now, we come to – in other words, the parties, the political parties that we have now, become powerful. Still, those parties work through the Constitution in its different branches. In its devotion to due process. If you're a Senator, your interest and your principle is to maintain the importance of the Senate, but when parties come on the scene, this party character of each of the three branches is affected by the other of the political parties. Because you tend to want to promote the power of the branch that you hold and to demote the power of the branches you don't hold. So if you're the Democratic Party and the President is

Republican, you accuse him of being imperialistic and exaggerating the powers and tyrannical – you don't hear that word very much anymore – but encroaching and so on. Vice versa, if it's a Democratic president and a Republican Congress.

So the two layers are a set of partisanship, are set over against each other and don't completely match. And if you act in a principled manner, according to your party, then you're acting in an unprincipled manner, according to the branch of government that you happen to work in, or hold office in. This way we have, this sort of nonpartisan way of referring to people as principled. "Yes, I don't agree with him, but he's a man of principle," or person of principle. And that's a way of making disagreement tolerable and respectable. That doesn't work so easily when the Constitution, which has its own partisanship, is inhabited by political parties, each of which works within the Constitution.

But you could say as a whole that the Constitution makes use of our partisanship. Therefore, it understands and gives allowance for the partisan character of human beings. The fact that your reason is directed or connected to your self-love – this is Madison again – and that you have passions that you give reasons to and so your reason is passionate, but your passions have some rationality to them. That's, I think, a very good feature of our Constitution. Now, if you look at the parties today –

KRISTOL: Can I ask you – before you get to the parties today – Scalia, it seems to me, defended originalism, sometimes, at least, as curbing unelected judges from doing whatever they wanted in interpreting the Constitution because judges should follow the actual text and meaning of the Constitution and that left it up to the people, the democratic branches, to decide if they wanted to change the status of marriage or whatever these other issues are.

So originalism was in the service – as Scalia presented it and he presented it this way a lot – of democracy. But you're also saying originalism in a certain way tries to go back to a Constitution that was less democratic or less populist because it elevates the Constitution above the public. Are those both right? There's a tension there?

MANSFIELD: One way to keep your distance is not to decide on behalf of the people, without giving them a chance to vote on important issues.

KRISTOL: Make sure they go through regular forums and processes.

MANSFIELD: Due process of the Constitution is elections. And it's not part of the due process that the Supreme Court becomes a legislature. That was what he frequently – this is the in the service of the people. The Framers also intended it to work in the service of the people, and therefore, they were more democratic.

It's true. You could say Scalia's arguments are more suitable to today and to a democratized constitution. He's pointing out that the Supreme Court is usurping the right of the people and in that way getting too close to the people. Doing what they do instead of them.

KRISTOL: On the other hand, the respect for Scalia that was obviously shown at his death by so many people, and the sense that he had done something important in restoring originalism, I think points to the other side of the Constitution that you discussed that it's something above mere process or ground rules. He's a man who respected something and taught us to respect something that should be respected and was important to the country for that reason.

MANSFIELD: Yes, constitution has two meanings. There was a Greek word that was used by Aristotle to mean regime – Politeia was a Greek word – regime or constitution in a kind of biological sense of structure. The sense in which every political unit has a constitution as a certain way of going about and living in a certain way that it promotes. The structure, which includes the structure of the society that it wants to govern. In that meaning, every political unit has a – every state has a constitution.

The other meaning is – say, the meaning of our Constitution – that it's limited government. And it's a

written constitution, and it says what you can do and what you cannot do, and it sets up a distinction between state and society, state and a way of life. Our Constitution tries to leave the way of life up to the public, or to the private choice, free choice of those who are subject to the laws, but the laws are meant to still endow you with a choice of your way of living.

Somehow, we are in-between, or we combine, these two opposite meanings of constitution because our Constitution – if you say constitution means limited government, then certain states are unconstitutional and certain actions are unconstitutional, and it's not the case that every state has a constitution, some don't, or some have fake constitutions. Still, this is a kind of paradox of liberalism, then – of the kind of free society that we live in and live under, which is, on the one hand, you need a strong state to provide security, both externally against enemies and internally against invasions of rights, but still leaving the way you live up to your choice, and the fact that a free constitution isn't going to survive a people that isn't free, that doesn't know how to live freely, or that lacks, what Tocqueville called, "the art of being free." You have to use your liberty with a certain moderation. You have to be sensible. You have to not be lazy, or tumultuous, or insistent, you have to be tolerant, but you also have to act, you can't just sit back and let things happen.

In other words, you have to have a certain character. Even a free country has a character to it. That's a kind of paradox because it means that it isn't perfectly free, it isn't free to be perfectly free, it isn't free to be free against the interest of its own freedom.

KRISTOL: And I think the admiration for Scalia – don't you think – had to do with his character actually, in a sense of a judge, but really more broadly as a public figure or public servant, as we say. He was courageous, he didn't buckle to the tides, he was proud of his sole dissent in *Morrison v. Olson*. That was the case he was most proud of, which was the independent counsel case. He was alone, and then he was vindicated. People underestimate that side of why one admires someone like Scalia.

KRISTOL: Democrats kind of admire him. They do.

KRISTOL: And non-lawyers and non-judges. Just citizens. Sort of the model for legislators and executives, too.

MANSFIELD: He's a great figure, he's not just a great Republican, or a great conservative jurist. He was a great man. An example for us all.

KRISTOL: Which the Constitution allows.

MANSFIELD: Yes, which the Constitution allows and encourages.

KRISTOL: Which is impressive in a way.

II: The Constitution and Our Parties (34:38 – 56:28)

KRISTOL: But you were saying so about, and so the parties meanwhile –

MANSFIELD: The parties today are divided in their attitude towards the Constitution. The Democrats use the Constitution when it helps them and chafe against it, or try to evade it when it doesn't. They're lacking in respect for the Constitution, and that's because they consider it something fixed, which is hostile to their notion of progress. Their notion of progress means progress and equality – more and more equality one must have. Different programs to promote equality and these all these programs require government action. When you add them all up, you have the thing called "big government," already which you can find in Tocqueville's *Democracy in America*. 1840 that came out, or that part of it came out. And we've seen the result of his prediction today.

So if you're in favor of big government, it's hard to be in favor of a Constitution that's solely devoted to process. And you're tempted to use the Constitution to accomplish the goals of your program and what

could have been otherwise an ordinary law. Big examples would be the abortion case, and more recently, the same-sex marriage case. Both of those are usurpations of the people's right to choose through Congress. Both of them have been fairly controversial, the abortion one especially. People thought that sending the abortion issue to the Court would resolve the problem and calm people down and give them a decision that everyone could live with, and the reverse has happened. Partly because it was such an extreme case, such an extreme decision of the Court. So the Democrats for the most part are not – you can't be accused of being constitutionally scrupulous, or overscrupulous.

The Republicans, on their side, are more respectful of the Constitution and have indeed made it one of their party purposes or principles to return to the Constitution, and this can be done both in a more sensible or more questionable way. The Tea Party, for example, wants to find its – everything and anything that it dislikes, it opposes by saying it's not in the Constitution. And everything it likes, then would have to be in the Constitution. That's a way of turning the Constitution again into an ordinary law instead of standing above ordinary law. You can do that in this questionable way, but still the Republicans have also more sensibly demanded a return to the principles of the Founders and they speak of the Constitution much more frequently and with much greater admiration than the Democrats do.

This is, I suppose, good if you're a constitutionalist, but it can sometimes hamper the Republicans as we saw in the cases on Affordable Care Act. And there Justice Roberts, Chief Justice Roberts, looked as if he said to himself that it's not the business of the Supreme Court to do the work of the Republican Party. That's a very constitutionalist way of looking at the problem. He refused to gut, or to severely damage the Obamacare act, and took a step that I think he regarded, and I think could well be regarded as a constitutional one, on behalf of the voters. Let them decide if they want to repeal Obamacare. We shouldn't do it; they should do it.

That is, you could say Scalia in a different guise. Trying to keep the Court independent from politics. Which means from the politics of elections. It has its own politics, and its politics is what it is devoted to and what its legitimacy rests on. A legal politics. That's one thing. But just to make it a corrector of Congress, that's usurpation.

KRISTOL: And all this, now almost – what, century and a half, two centuries, maybe, if you go back to Jefferson – of progress and progressivism and egalitarianism and democracy – will we still have a constitutional soul? Is that your argument or assertion, or at least one of our two parties has a constitutional soul? How much does the Constitution still shape our politics, I guess, would be my question?

MANSFIELD: A very great deal, I would say, even though we may not equally, at any rate, in both parties pay homage to it. It's a source of our public-spiritedness. And the ground of our public-spiritedness. Public spirit in our country refers to our self-government, and the Constitution is the document by which our government governs itself, our people governs itself. I think that's what makes it the soul.

It's both active and reflexive. Active because it makes people act on their behalf through constitutionally provided institutions, or constitutionally permitted institutions, the parties. You can act because you have these rules of process, which enable you to act and to act regularly and with some notion of how to proceed. It's not chaotic.

At the same time, it's reflexive because the Constitution is above ordinary politics. It encourages people, partisan as they are, to think of the country's good, which is embodied in the Constitution. The Constitution is our most precious common possession. In thinking in this way, you rise above yourself, your self-interest to your self-government. You realize that you're governing yourself. That's a reflexive thought as well as an active motive. That gives a certain intellectual satisfaction and rational grounding for politics, which is full of unreason and passion and disagreement and disappointment, only occasional satisfaction or triumph.

So yeah, I think that the soul of our Constitution is this public-spiritedness that Americas have. They don't

all have it equally. It's sometimes put up against us, against American democracy, that we don't vote in the same percentage as other places. Why don't we force everybody to vote, or why don't we get everybody to vote with incentives? Pay them to vote. You can find that in Aristotle.

This may sound funny, but I'm going to say that I think it's the wisdom of nonvoters that keeps them from, keeps them from voting. It's their modesty. If you're not interested and if you haven't taken the trouble to inform yourself, why should you bother to do something, which has no meaning for yourself, and which only gets in the way those who do vote meaningfully?

I'm rather glad at this, and I think there is an informal distinction between the citizens with public spirit and those are not so public-spirited, but rather like it that others do what they don't need to do or don't want to do. Because there's such a thing is too much public-spiritedness. You can see that in certain ambitious types, but also in revolutionary times when everything is up for a decision and nothing is regular or understandable.

KRISTOL: I want to come back to this question about the Constitution being process, but somehow also more than process. It is process, but it's more than a Robert's Rules of Order for how the branches should behave, and you can see that when Madison says – I guess it's Federalist 49 – asks, expects, or anticipates, or hopes that there will be reverence for the Constitution. I mean, again just the ambiguity of the Constitution being merely process, on the one hand, and the founding document.

MANSFIELD: Founding document that we all respect and admire.

KRISTOL: Look up to.

MANSFIELD: Revere.

KRISTOL: Difficult to change.

MANSFIELD: Difficult to change. And we don't want to change it. We like it. The Constitution is our form of government. How is it related to the Declaration of Independence, one could ask. The Declaration of Independence doesn't mention any form of government. It just says that the people have a right to alter and abolish the government they live under and to form one that they prefer.

It's clearly a republic that they have in mind – the signers of the Declaration – but they don't attack England because it's a monarchy, they attack it because it is the English King and the English Parliament have acted against the interests and the rights of Americans. What they declare is independence from England.

So it leaves it quite open, or at least apparently open, to what the Constitution then specifies, or provides at a form of government. And the question is then whether this form of government is merely a form, and therefore a process, or whether it's something more. The Constitution is sometimes likened to the rules of a game. The rules of a game, which you're supposed to play. You're supposed to play the game of self-government, and that is what the Declaration says. How you play that then becomes extremely important because you might have to play it in a certain way so that your freedom and your equality are combined and supported in a lasting and effective way.

What about equality? Lincoln said that the Declaration gives the principle or inspiration, and the Constitution gives the specification. He likened this – I think with a phrase out of the Bible – to “the apple of gold” – that's the Declaration – and “the frame of silver,” as in the Constitution. The Constitution was the way of making actual the promise of the Declaration or the statement of the Declaration that all men are created equal. He said that with a view to slavery, the situation in his time. I think that his speech in that regard is specific to his time and to the abolition or the overcoming of slavery and its consequences because there's the other difficulty, too, which is that relevant inequalities will be overlooked in this by concentrating solely on this Declaration principle that all men are created equal in making that sort of the purpose or the inspiration of all your policies.

So I think that it goes too far to absolutize Lincoln's situation and suppose that the making of equality is the only thing needed and that therefore, the inspiration of the Declaration is more important than the instantiation of it in the Constitution. The Constitution becomes important when you see that liberty and equality have to be combined and that they are in many ways contrary. You can make equality your sole goal when equality means liberation from slavery, but when afterwards, or when otherwise you have to consider all the relevant human inequalities, how does one make them democratic? How does democracy come to grips with the fact of human nature that we're all diverse?

Today, when people say diverse or diversity they're thinking diversity without differences. Diversity means differences, and differences mean a little bit more or a little bit less of a quality that someone else has. That's inequality. Diversity, therefore, is inequality, and it's a problem for a democracy. To put together diversity, which means liberty, and equality – equal opportunity is way that sometimes people have, and I think in general a very good way, of reconciling the two. As long as you understand it's equal opportunity to become unequal. This is what the Constitution provides, whereas the Declaration only gives you that first fundamental equality, that is, equality in consenting to government as a whole.

Even so that's done through, in the case of a written constitution, a ratification process that was difficult. It had a rather restricted electorate, to put it mildly. In practice, in practice, equality becomes inequality. Inequality that has to be reconciled with its beginning principle. You have to show somehow that the equality you want allows for the inequalities that you can't avoid, and which on second thought, you also want.

KRISTOL: And I guess Lincoln earlier in his career did call for reverence for the Constitution, with his famous Lyceum speech, and the rule of law –

MANSFIELD: All the way through –

KRISTOL: As president even?

MANSFIELD: As president, or before president. The whole principle of the Republican Party as he founded it was to be opposed to the abolitionists. They simply wanted equality, they wanted to abolish slavery by any means possible, or any means necessary. So they would deny the constitutional rights of the South.

And it wasn't until the South itself departed from the Constitution by refusing to accept the decision in the election of 1860, which was a fair election that Lincoln won with only 40 percent of the vote, still a majority of the Electoral College. He won it legitimately, constitutionally – and the South seceded, and that Lincoln said that is rebellion. He presented the whole question of slavery and, therefore, of equality under the aegis of the Constitution of the Union. It was the Union Army, not the anti-slave army. It was because the South was against, was trying to destroy the Union that the Civil War was fought.

KRISTOL: And Dred Scott, according the Republicans, was a misinterpretation of the Constitution. And contrary to the Declaration, perhaps.

MANSFIELD: That's good. Yes.

KRISTOL: Bad constitutional interpretation and argued and probably correctly – I'm sure correctly. I've always wondered about "the frame of silver around the apple of gold" because it does seem to undervalue the importance of the Constitution. I suppose Lincoln at that time was arguing against people who want to forget about the Declaration and make the Constitution just a process, so to speak. Popular sovereignty, and he had to elevate the principle of equality in that moment.

MANSFIELD: Anyway, that phrase appears in a fragment of his, it wasn't in a speech. Maybe it's something he might have had second thoughts about. Anyway, it's such a beautiful thought.

KRISTOL: From the Bible. That's a very good point. It's more than just a frame. We say Framers – I

guess I haven't really thought about this before – we don't really think about Framers like picture-framers. I don't know where that metaphor comes from. Builders, right?

MANSFIELD: Framers frame our framework.

KRISTOL: You might have a plan or principle that the building should look this way rather than that. But the actual framework for building the building is pretty central.

MANSFIELD: I should say.

KRISTOL: Thus, America's Constitutional Soul. Harvey, thank you so much for going me today, this was a very interesting. Thank you, and thank you for joining us on CONVERSATIONS.

[END]