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ONWARD CONSTITUTIONAL SOLDIERS

Milner S. Ball*

CONSTITUTIONAL FAITH. By Sanford Levinson.** Princeton: Princeton University Press. 1988. Pp. xii, 250. \$19.95.

We are unlikely to be given a more careful, thoughtful, and candid insider's account of the American "civil religion"¹ than Sanford Levinson's *Constitutional Faith*, the fruit of a decade's reflection by a leading legal scholar.² Much good can come of the constitutional religion. It may bind together diverse groups into one polity, for example, or may expand the polity's embrace of the dissentient, the disestablished, and the poor, as its heroes Abraham Lincoln and Martin Luther King, Jr. taught us. American civil religion has also a seldom-considered downside, however, revealed through its anti-heroes like Richard Nixon and Oliver North, that can issue in exclusion and division and uncritical obedience to the powers that be. Not the least strength of Levinson's study is its frank examination of the disintegrating, fragmenting potential that constitutional religion shares with all the "many fighting faiths."³ Religious ambiguity, tension, and division

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1. Rousseau invented the phrase "civil religion" to describe the religion he believed necessary to a republic, concluding that Christianity would not serve this purpose. J. ROUSSEAU, *THE SOCIAL CONTRACT* 176-87 (M. Cranston trans. 1968). Debate about the existence and content of an American civil religion was precipitated by Bellah. See *Civil Religion in America*, in R. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* 168 (1970) (written for a 1966 conference). The American civil religion is said to be a set of religious symbols and practices supporting political legitimacy and not fused with either church or state — a kind of worship of the republic or of a higher reality upholding the republic. It is prototypically expressed in presidential inaugural addresses with their predictable invocations of a nonpartisan, amorphous God. The courts, it has been proposed, are this religion's "new pulpits." Hammond, *Pluralism and Law in the Formation of American Civil Religion*, in *VARIETIES OF CIVIL RELIGION* 138, 161 (1980).

Levinson describes his book as part of the "interest in civil religion" (p. 62), and relates how he signed onto a "limited constitutional faith" (p. 193). These self-descriptions coupled with the tenor of the book are my grounds for referring to it as an insider's account. Full disclosure compels that I note my unsympathetic regard for American civil religion. My misgivings about both American civil religion in particular and state Christianity in general are stated, among other places, in Ball, *Cross and Sword, Victim and Law: A Tentative Response to Leonard Levy's Treason Against God* (Book Review), 35 *STAN. L. REV.* 1007, 1007-09, 1028-31 (1983); Ball, *Obligation: Not to the Law But to the Neighbor*, 18 *GA. L. REV.* 911, 919-27 (1984). Readers of this review may wish to take my preconceptions into account when considering both my positive assessment of Levinson's work and my criticism of it.

2. See Levinson, *"The Constitution" in American Civil Religion*, 1979 *SUP. CT. REV.* 123.

3. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

compose the organizing principle of the book.

The frontispiece is a telling cartoon. It depicts a stylized columnar swirl of robing from the top of which emerges the stovepipe-hatted head of Lincoln and his right hand with the index finger pointing skyward toward the light. At the base, the enfolded head of Nixon scowls down at the darkness. The drawing may be taken to suggest a weathervane rotating vertically. With the political winds upwelling and blowing divinely, the American civil religion does lift, inspire, enlighten — Lincoln ascendant. But as we and Levinson know only too well, winds shift.

Accordingly, when, in the last chapter, Levinson tells of adding his signature to the Constitution in a Philadelphia bicentennial exhibit — personal testimony to acceptance of membership in the company of believers — he speaks circumspectly of “a limited constitutional faith” that commits him only to “a process of becoming and . . . to taking political conversation seriously” (p. 193). This is hardly the irrational, unseeing enthusiasm of the freshly born-again and for that reason, among others, his views will likely be found to bear weight. Even so, it is a religious commitment and for that reason should give pause to readers, especially those Levinson refers to as “more ‘God-oriented’ ” than he.⁴

I. LEVINSON’S DIALECTICS OF CONSTITUTIONAL FAITH

Levinson draws categories from the theory and history of other religions to aid his explication of the American faith centered on the Constitution.

A. *Protestants and Catholics*

He begins by applying to constitutional faith’s divisions over text and interpretation a typology informed by Protestant-Catholic disputes about doctrinal authority (pp. 18-53). Protestants, in his scheme, take sacred text as the source of authority. They are doubly protestant (his category of protestant-protestant) when they repose interpretive authority in the individual, each believer reading and interpreting the Bible for herself. Catholics believe that it is not scripture

4. I am not at all sure, but I think Levinson would consign me to the “more ‘God-oriented’ readers, with whom many of us do not identify” P. 56. My uncertainty arises from his description of such readers as “those who identify ‘religious beliefs’ as the knowable words (or commands) of a divine presence rather than either idiosyncratic metaphors concerning an ineffable mystery or, more likely, psychological or sociological projections of all-too-human anxieties or social structures.” P. 56. I cannot locate myself within his unnecessarily limited (and pejorative?) range of alternatives. He seems to be unfamiliar with contemporary reflection upon and response to biblical critique of human religiousness. As Harvey Cox has noted, “religion is not always and everywhere a good thing,” and those of us who attempt to understand the biblical sagas are hard-pressed to do so in a time “when the rebirth of religion, rather than its disappearance, poses the most serious question.” H. COX, *RELIGION IN THE SECULAR CITY: TOWARD A POSTMODERN THEOLOGY* 19-20 (1984). See also *infra* notes 21-23 and *supra* note 1.

alone but unwritten tradition and scripture that serve as the joint source of authority. They are catholic-catholic when the hierarchical, institutionalized Church rather than the individual has the decisive authority to interpret.

Differentiating practitioners of constitutional faith according to this typology — instead of casting them as originalists/non-originalists or interpretivists/non-interpretivists — produces interesting results. Frederick Douglass and Ed Meese, who contrast in almost every other imaginable way, may be understood to share a protestant-protestant commitment to the validity of individual interpretation of the sacred text of the Constitution standing alone. Pitted against the protestant-protestants are the catholic-catholics, like John Marshall Harlan, who take unwritten tradition together with the Constitution for their source and the Supreme Court for their authorized interpreter. In the fray in-between are protestant-catholics (Hugo Black and other believers in text and judicial supremacy in interpretation) and catholic-protestants (Ronald Dworkin and those who believe in more than text and less than exclusive judicial supremacy) (pp. 51-52).

The point of the exercise is not a new academic game of pin-the-tag-on-the-believer but a demonstration of both the relevance of religious categories and the religious-like nature of the divisiveness in constitutional theory as constitutional theology.

B. *Constitution and Morality*

Other religions confront the problem of theodicy, the problem of explaining evil in a world in which God is omnipotent and just. Does submission to God entail abandonment of human standards of good and evil? Is whatever God does good? Levinson identifies as a weaker version of this dilemma American civil religion's concern for relating the Constitution and morality: Can the order created out of citizens' submission to the Constitution claim to be just as well as powerful? Is whatever is constitutional good?

Some constitutional commentators deemphasize or do not discern a difference between law and morality.⁵ One consequence of assuming a happy correlation of the American legal system with goodness and justice is to assure attorneys that they may take untroubled moral pride in the full range of their professional activities — the good lawyer is the good person.⁶

Levinson credits the need to sanctify constitutional law in a diverse contemporary society that lacks a shared moral vision, for the Constitution may be, after all, the only binding principle of order that re-

5. Levinson discusses Owen Fiss as an example of a commentator who deemphasizes the difference. Pp. 58-59.

6. Charles Fried is discussed as an advocate of such a point of view. P. 167.

mains. Nevertheless — playing out his fundamental theme of religious ambiguity and disintegration — Levinson also cautions that constitutional faith is “idolatrous if it leads its adherents to suspend their independent evaluation of the tenets of the faith” (p. 88). He describes without resolving the dilemma of a more-or-less necessary constitutional fealty that inevitably becomes a self-destructive idolatry.

C. *Loyal Sheep and Questionable Goats*

Religious communities employ creedal affirmations to determine who is a member and who is not, who is orthodox and who unorthodox. This method of separating insiders from outsiders is characteristic as well of the American civil religious community. The American creed⁷ is an instrument of inclusion when endorsement of it allows immigrants to be accepted as citizens, and it is an instrument of exclusion when it serves as a benchmark for dividing true Americans from un-Americans, real from false patriots (pp. 94-99).

In performing this basic sorting function, American creedalism, according to Levinson, creates a constellation of problems or tensions. One not fully addressed by the traditional learning is that of the conflict or hierarchy of attachments (pp. 122-54). Loyalty oaths of the type required of many officeholders and public employees raise the question of exclusivity of attachment: supreme loyalty is sworn to the Constitution (or country), but American citizens have multiple loyalties to other political entities, to other institutions, to other religious communities, any of which may legitimately claim supremacy. What does it mean, then, to require a pledge of allegiance to the United States? Is this to insist on primary loyalty to Constitution, nation, or flag over loyalty to family and religion? The dilemma is typically glossed over rather than confronted or resolved or acknowledged.

A second ambiguity of attachment raised by subscription to the American creed is one of content. If we profess supreme loyalty to the Constitution, what Constitution are we agreeing to become attached to and by which tokens of allegiance? Levinson draws again upon forms of religious thought to illuminate the question.

In the Jewish and Christian traditions, a distinction is sometimes made between revelatory events and the texts that bear witness to them, between the acts of God and the biblical stories about them. A similar distinction can be drawn in the American civil religion between the sacred events and the sacred texts. Which then is the object of reverence — the revolutionary, law-breaking acts of the beginning or the culminating Philadelphia text? Do we venerate the idol-smash-

7. The notion of an “American creed” is attributed to Samuel Huntington and is described as “a set of overt political commitments that includes an emphasis on individual rights, majority rule, and a constitutional order limiting governmental power.” P. 95.

ing or idolize the Constitution? And what form does our devotion take — inner adoration or outward compliance, faith or good works?

Levinson explores two examples of the ambiguities of constitutional attachment. The first is *Schneiderman v. United States*,⁸ in which the Supreme Court was confronted with the problem of identifying the Constitution it was to interpret. When he had become a naturalized citizen, Schneiderman claimed both that he behaved as one attached to the Constitution and that he was a Communist party member. Some years later the United States sought to set aside his citizenship as illegally procured. Was internal, mental disposition or external, observed behavior to be the accepted manifestation of attachment to the Constitution? A devoted Communist may be an outwardly law-abiding citizen for a variety of reasons, including prudential calculation about what is possible in the meantime before the government can be successfully overthrown. Correspondingly, persons firmly attached to the principles of the American creed may act illegally, out of the most American of motives and after the fashion of the founders. Which is the truer: doing what the founders did or what they wrote? Then, too, is a Communist program of the dictatorship of the proletariat totally incongruent with constitutional commitment to a federal republic governed by the people?

In *Schneiderman* the Court punted. It did not approve Schneiderman's position but set a high standard of proof for removal of citizenship and held that the government had failed to meet it in its attempt to show absence of constitutional attachment.⁹

The other example of the problems of constitutional attachment is Abraham Lincoln's combination of reverence for law and indifference to legal niceties (suspension of habeas corpus, military arrest). To Levinson, Lincoln is the incarnation of the tension between nationally responsible and constitutionally faithful action. It may be easier, he observes, "to reinterpret the Constitution to be congruent with Lincoln's actions" than to interpret the actions into congruence with the Constitution, but "such reinterpretation . . . raise[s] the possibility that we may have 'many Constitutions,' " requiring that we "decide *which* Constitution garnered Lincoln's attachment and which, in turn, deserves our own."¹⁰

D. *I Believe, Help My Unbelief*

The book concludes with two chapters of honest, more directly personal assessment of belief and practice in the American civil religion. Levinson addresses the question of what it means to be a profes-

8. 320 U.S. 118 (1943). The discussion begins at p. 126.

9. 320 U.S. at 154. See p. 126.

10. P. 141. Levinson says he borrowed the "many Constitutions" passage from Che Guevara. *Id.*

sor of constitutional law in the legal academy — what it means, in his terms, to profess the constitutional faith to its future professional practitioners (pp. 155-79).

The issue has been given some currency by in-house tempests about whether members of the Critical Legal Studies movement should be allowed on law school faculties. Levinson frames the issue in religious terms of the sort employed throughout the book: whether law schools are either divinity schools or schools of religion, whether Crits are atheists and blasphemers, and whether, if they are blasphemers, they should be admitted to law faculties.

After a balanced consideration of the conflicting possibilities, Levinson confesses to personal beliefs that are liberal (as opposed to illiberal, not as opposed to conservative, *i.e.*, not in the sense of George Bush's demagogic talk about the "L word"). The law school is to him less divinity school than "department of religion" where law "always remains worthy of our study" although it may be "unworthy of our faith" (p. 179). Levinson would admit the Crits. At least he says he would admit the Schneidermans of the world were they to apply for faculty positions. However, the issue of tests of faith for teachers of the young — identifying Schneidermans and Crits, doubters and heretics, and determining their status — cannot be resolved by "cold logic and analysis" (p. 179). It requires that we "choose between two fundamentally different cultural visions of legal study. A leap must be made, whether of faith or of something else" (p. 179).

Levinson ends with the confession of his own choice by telling the story of his Philadelphia experience and the struggle in his heart when he found himself in the Second Bank of the United States before the National Park Service bicentennial exhibit, "Miracle in Philadelphia," confronted, with every other tourist-become-pilgrim, by two endless scrolls and the question of whether to add his name to the foot of the Constitution (pp. 180-94). He relates how his hand was finally compelled to move by "the memory of Frederick Douglass and *his* willingness to embrace the Constitution" (p. 192). Levinson testifies that in giving his signature he yielded the "sign of our willingness to join in affirming a 'constitutional faith,' whatever the attendant difficulties in giving content to the notion" (p. 181) and whatever the accompanying qualifications and reservations.

II. RELIGION OR JUST RHETORIC AND AMAZING GRACE?

This is a fine volume. It deserves and will command a good audience. No summary can capture the subtleties in which its successes reside. Levinson is deeply, winsomely committed to dialogue and invites readers to engage in it with him (p. 8). I shall be understood to accept his invitation and to authenticate my positive, tributary assessment of his book if I raise a question about his enterprise.

The American civil religion is shot through with ambiguities, and Levinson succeeds in describing them. He also succeeds in honestly revealing his own ambivalence as an adherent of the faith, one who is a thinking, tolerant practitioner with a firm grasp of the limits of the belief, one who cautions against the idolatry of unqualified constitutional faith.

In addition to the intentionally addressed ambiguities of the object studied and the studying subject there is a further and nondeliberate ambiguity running through Levinson's book. His talk of an American civil religion, which has the Constitution for its central sacred text, is variously and irreconcilably metaphorical, analogical, and factual talk. The title *Constitutional Faith* seems to be a metaphor, and Levinson frequently employs it or specifically identifies it as such.¹¹ With equal frequency, however, he treats or specifically characterizes the relation between law and religion as one of analogy,¹² and he draws on the concepts and history of religion to compare them — analogize them — to secular American constitutional law. At other times “constitutional faith,” “American civil religion,” and “American faith community” appear as statements of fact and not as statements of analogy or metaphor.¹³

An analogy starts from the premise of difference between two things compared and suggests possible likenesses across the gulf of their difference; it is the statement of an equivocal relation. A metaphor, on the other hand, starts from the premise that the thing said and the thing meant share at some fundamental level an identity that happens in the metaphor; it realizes a univocal relation. Finally, a statement of fact is a statement of identity and not of relation.

Constitutional faith has one set of implications and claims if it is an analogy, another if it is a metaphor. The implications and claims grow in complexity and become wholly unacceptable if constitutional faith is a statement of fact.

Levinson says he would not be surprised “if many readers felt intense disquiet at the implication of the analogy between law and religion that is the foundation of this book” (p. 121). I do not think any reader will be disquieted by the implications of the analogy. Analogies are the common currency of teachers. If they work and provide instruction — this one does both — then the execution gives pleasure. Of course the content of the instruction provided can be troubling (e.g., American treatment of Native Americans is like genocide). But where does trouble arise from saying that American politics is like religion, that respecting and interpreting the Constitution is like re-

11. *E.g.*, pp. 15-16, 158-59, 194.

12. *E.g.*, pp. 16-17, 27, 36, 59, 121.

13. *E.g.*, pp. 51-52, 93-94, 96, 180, 193.

specting and interpreting a sacred text, that social disintegration is like sectarian disintegration?

On the other hand, one might feel some disquiet about the implications if constitutional faith is a metaphor. Readers might experience enough of a shock of recognition to rethink the relative importance of rendering dues to Caesar and to God. Generally, however, a metaphor's power — of whatever kind, whether to unsettle or inspire or startle or delight — depends upon the distance between the thing said and the thing meant: the further apart, the greater the power (the swimming fish is a grey, monotonous soul; the encampment of the poor on the D.C. Mall is Resurrection City). My own sense is that belief in American constitutional government and religious belief (love of country and love of God) are generally regarded as so close together (“for God, for country, and for Yale”) that many readers will not feel intense disquiet at constitutional faith as metaphor and its implications.¹⁴

But constitutional faith as a statement of fact should cause alarm. The Constitution was the invention of men of the eighteenth century. “There is no ultimate mystery in what the Constitution is about, at least for those who accept [the] premise that [the world] is in principle subject to human understanding. It is this secularist premise that makes constitutional interpretation, for all its complexities, something fundamentally different from the interpretation of a scripture”¹⁵ The Constitution is an artifact. To worship it is idolatry plain and simple.

Levinson cites the contention of Justice Brennan, a Roman Catholic, that he had settled in his mind to undertake “an obligation under the Constitution which could not be influenced by any of my religious principles. . . . [T]o the extent [Roman Catholic belief] conflicts with what I think the Constitution means or requires, then my religious beliefs have to give way” (p. 56). Certainly this statement of subordination of Christian to constitutional faith must be taken seriously. Without more it is troubling, even shocking. Does it have any more than face value as a confessed privileging of constitutional faith, as idolatry?

The author notes that, especially for Roman Catholic candidates for the Supreme Court, the confirmation process has been a degrading ceremony (owing presumably to majoritarian suspicion or prejudice) (p. 56). Is it in this light that Brennan's 1956, pre-President Kennedy belief is to be understood? Does it belong to a type of concession wrung by an orthodox majority from a minority of believers?

14. I itch whenever Levinson shifts from analogy to metaphor and/or fact but am uncertain how many others will share my need to scratch.

15. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 16-17 (1984) (footnote omitted).

May the statement be seen in the interpretive context of Brennan's life as a judge, the history of his work on the Court? Is there to be discerned in his record the work of a Christian infidel? His is not the story of a judge who set aside one faith to serve the oppressive, nationalist institutions of another. For this reason, it is misleading for Levinson to strip the statement of its post-Holocaust, post-*Brown*, Brennan-Court context and to describe it as an echo of Justice Story's *apologia* for an opinion supporting slavery: "I shall never hesitate to do my duty as a Judge, under the Constitution and laws of the United States, be the consequences what they may" (p. 56). Brennan was not puffing judicial duty as an excuse for ducking out on the oppressed.

There is a related inattention to context in Levinson's use of the statement — pivotal to him — made by Representative Barbara Jordan in the Watergate/impeachment hearings: "My faith in the Constitution is whole. It is complete. It is total" (p. 15). This is political rhetoric, not religious confession. Jordan certainly intended to highlight the special relationship between herself as a black woman and the Constitution within whose protection she had "finally been included."¹⁶

Jordan drew attention to the rhetorical character of her comments both directly ("I believe hyperbole would not be fictional . . ." ¹⁷) and indirectly. L.H. LaRue correctly notes that her rhetorical technique "came down to the contrast between the nobility of her language (both her own and that which she quoted) and the actuality of Nixon's conduct."¹⁸ To her own constitutional faithfulness and that of others, she juxtaposed Nixon's failure in the constitutionally charged "task of taking care that the laws be *faithfully* executed."¹⁹ Nixon committed an impeachable offense, not apostasy or heresy. And Jordan was employing the exceptional political rhetoric demanded by so extreme an occasion.

Much the same thing needs to be said about Douglass, whose example has also exerted great influence on Levinson. Douglass was animated by the urgent need to end slavery. He broke with the Garrisonians when he concluded that dissolution of the Union would only leave the institution of slavery intact in the southern states. To uphold the Union, he had to uphold the Constitution. To uphold the Constitution, he had to argue it as an anti-slavery document, which he did with remarkable skill and tenacity. His example is deeply but not religiously affecting. Douglass' embrace of the Constitution was an exercise in prudential politics and rhetoric rather than religion.

16. L. LARUE, POLITICAL DISCOURSE: A CASE STUDY OF THE WATERGATE AFFAIR 116 (1988). For the entire speech, see *id.* at 116-20.

17. *Id.* at 117.

18. *Id.*

19. *Id.* at 120 (emphasis added).

Granted “that constitutionalist discourse *can* be a valuable way of addressing crucial public issues” (p. 191), why transmute or transubstantiate the usefulness and, perhaps, necessity of constitutional rhetoric into constitutional religion? Briefs, lawbooks and the other media of constitutional talk are not sacramental tokens. There may be an analogy here but not a free-wheeling metaphor and certainly not a fact.

Levinson’s undifferentiating use of analogy, metaphor, and fact in discussion of constitutional faith arises from irresolution about his commitment to it. He wants it both ways, wants both his religion and his secular rhetoric at the same time. He is a self-confessed if circumspect member of the — stated as fact — “American faith community” (p. 193). He knows there must be more, an outside basis for judgment, but lacks the discourse and distance of genuine transcendence. One foot is planted in constitutional faith. The other uncertainly tests the empty air around it for a necessary, unlocated foothold.

What beyond American faith guides him and can preserve him from the idolatry he warns against? What provides him with a basis for sensing the ambiguities and limits of constitutional faith and for evaluating them? What lies outside the American civil religion to inform his reservations about it? The engaging clarity of Levinson’s exposition of constitutional faith does not extend to the spare hints at an apparently essential faith beyond constitutional faith.

Important to his teaching (professing) of law, Levinson says, is the attempt “to prevent the deification of positive law at the cost of recognition of one’s membership in the broader human community” (p. 169). Alternatively, he says that he opposes socializing his students “in unstinting respect for law” and so insists on making them aware “that disobedience to the commands of the law may on occasion be required of someone committed to self-respect and the respect of other morally admirable people” (p. 170). Is membership “in the broader human community” or “self-respect” or “respect for other morally admirable people” the more transcendent commitment that allows for evaluation of the less transcendent constitutional faith? What is its content? By what criteria are we to identify the others who are, like the self, morally admirable? Why have regard for the morally admirable only and not also for sinners? Is the judging self the standard of judgment? Is there not grave danger here of solipsism or ethnocentrism or nationalism?

Levinson notes how little it surprises that he, “a white, male, well-paid law professor,” would become a born-again constitutional believer, and he understands how others might well have greeted the bicentennial with rage (p. 193). He therefore concludes that “[t]he vital challenge facing the American faith community is the possibility of expanding the relevant ‘we’ in ‘We the People,’ who must ultimately

endorse the faith if it is to live as anything other than an ideological charade" (p. 193). The point is well taken but not preemptive. Is the best or most vital or only thing to expand the "we"? To write "I" ever larger? Is it not one of the problems that we can only think of writing the "I" larger, expanding an "us" to include a "them"?

If nothing else, the presence of Native Americans is a continuing reminder that there are on this continent other political realities older than the constitutional one. There are people here who want no part in "We the People," who want only that "we" acknowledge the integrity of their life and their tribal way and that we suspend our aggressive belief — oppressive to them and self-destructive to us — that the Constitution is the supreme (only, transcendent) law of the land.

Levinson disclaims having written a book of moral philosophy and seeks to avoid misunderstanding by explaining that his use of the phrase "moral seriousness" does not imply any form of absolute or revealed moral grounding and connotes instead "the evaluation of one's actions or intellectual positions in terms of the welfare of others . . ."²⁰ Nevertheless, *Constitutional Faith* is a book of religion. Levinson is impressively aware of the controversial nature of assertions of the supremacy of this religion. He cautions against the faithful abandoning "their independent evaluation of the tenets of the faith" (p. 88). But how are they to do so? What is the basis and content of their independent evaluation? What are "terms of the welfare of others"? How are they to achieve the terms or the welfare?

Having squarely raised the religious issue with this noteworthy book and having lent to American civil religion the weight of his (qualified) willingness to profess it — the more weighty because the more carefully considered — Levinson should have explained or at least indicated what keeps this religion in perspective for him and what might do so for others. If not the biblical stories, then what?

If the legal academy continues to entertain the idea that its subject is religion as a matter of fact or of metaphor, then, sooner or later, it must come to terms with Karl Barth's insight, central to his theology, that religion is a form of unbelief.²¹ Levinson says "[w]hether constitutional faith maintains itself depends on our ability to continue taking it seriously" (p. 194). I think its maintenance depends on our taking it less seriously, *i.e.*, either from the distance that comes with the stance

20. P. 57 n.*.

21. The point is specifically made at 3 K. BARTH, *CHURCH DOGMATICS* pt. 4, 479 (Mackay, Parker, Knight, Kennedy & Marks trans. 1961), and is systematically treated in 1 *id.*, pt. 2, at 280-361 (Thomas & Knight trans. 1956). It also lies at the heart of Barth's famous, fateful *THE EPISTLE TO THE ROMANS* (E. Hoskyns trans. 1933). The distinction between religion and religious practices, on the one hand, and, on the other, the biblical stories and theology is also drawn by, among others, Dietrich Bonhoeffer. See D. BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* 262, 361, 381 (E. Bethge ed. 1971); M. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* 181-85 nn.15-17, 186-88 n.32 (1985).

of the outsider²² or from the critical, comic distance that comes with recognition that American civil religion is unbelief.²³

22. See W. STRINGFELLOW, *AN ETHIC FOR CHRISTIANS AND OTHER ALIENS IN A STRANGE LAND* (1973); W. STRINGFELLOW, *CONSCIENCE AND OBEDIENCE: THE POLITICS OF ROMANS 13 AND REVELATION 13 IN LIGHT OF THE SECOND COMING* (1977).

23. Those seized of genuine belief may find that different contexts require different responses to the demanded tokens of civil religion. Dietrich Bonhoeffer, the German theologian eventually arrested and killed by the Nazis,

had been eagerly on the watch for people who could summon up the courage to say No publicly, and were willing to accept dismissal from their posts in consequence. There now came a period [after frustration of the first anti-Hitler conspiracy] when it was of the utmost importance that people of character should remain at the controls in all circumstances and not allow themselves to be displaced. That meant that what had hitherto been a question of character now became a mere bagatelle — a greeting with the Hitler salute, for instance.

Instead of refusing this, one had to see that it meant nothing if by it one could get into key positions. That meant that the use of camouflage became a moral duty.

E. BETHGE, *DIETRICH BONHOEFFER* 532 (Mosbacher, Ross, Clarke & Glen-Doepel trans. 1970). For the faithfully nonreligious to employ the indicia of civil religion as camouflage requires both ethical agility and confidence in forgiveness.