substantive overtones. On the other hand, questions of political and civil equality are increasingly pulled into the orbit of the judiciary.

If Verba and his colleagues err, it is in thinking that the preference given to political rights over those conventionally thought of as purely economic reflects some sort of eternal truth. American history reveals that this primacy is rather recent and the result of social changes of types that a time-bound study of this nature is unlikely to detect. Moreover, within the American political system this shift of attitudes is of the utmost significance: so long as property questions are seen as matters more profane than sacred, we can confidently expect that, for better or worse, many constitutional scholars will continue to favor narrow interpretations of the property clauses of the Constitution.

CONSTITUTIONAL FAITH. By Sanford Levinson.[1] Princeton: Princeton University Press. 1988. Pp. xii, 243. $19.95.

Herbert Hovenkamp[2]

This well written, intelligent volume takes up a subject that is too big for its two hundred forty-three pages, but takes it up well nonetheless. Professor Sanford Levinson seeks to discover the religious content of the Constitution. Not the religion clauses of the first amendment, but the civil religion of the Constitution as a whole. In what ways is belief in the Constitution like religious belief? Specifically, in what ways are the various doctrines of constitutional interpretation like the doctrines of religious, or scriptural, interpretation? How is the constitutional oath like the pledge of service that the religious believer might offer to his religious organization or his god? When does dissent or unlawful behavior amount to an admission that one is not "committed" to the Constitution, or to American constitutional government? Does the law school teacher of the Constitution have true academic freedom, liberally defined? Or do we have some overriding obligation of basic fidelity to the constitutional enterprise? These are big questions, and Professor Levinson provides some perspectives, though not an answer, for each of them.

Levinson notes that, ever since the Constitution was written, its supporters have used religious language and imagery to defend it

1. Charles Tilford McCormick Professor of Law, University of Texas.
2. Professor of Law, University of Iowa.

or describe it. After two centuries of great American successes, it's not surprising that we speak of the "Miracle at Philadelphia." But even at the founding, no less an Enlightenment figure than Presbyterian Benjamin Rush concluded that "in its *form* and *adoption*, it is as much the work of a Divine Providence as any of the miracles recorded in the Old and New Testament . . . ."

As Levinson notes, the Sacred Text can have an invaluable unifying effect on religion—giving diverse groups a common heritage and an appeal to a shared authority. But Levinson is more concerned about an alternative, darker effect of the written Sacred Text: its "potential . . . to serve as the source of fragmentation and *dis* integration." "Indeed," he concludes, "many classic constitutional controversies have their parallels within the religious disputes of the sixteenth and seventeenth centuries." An important purpose of the book is to "attack by implication any confidence that having 'the Constitution' as a common symbol guarantees meaningful national political unity."

Levinson finds distinctly "Protestant" and "Catholic" strains of constitutional interpretation, which account for most differences in constitutional ideology. The Protestant constitutional interpreter is one who, like Martin Luther or John Calvin, claims *sola scriptura* as a guide: we must rely, he says, on the text and little or nothing else. The Catholic constitutional interpreter, on the other hand, believes that interpretation requires an examination of text plus tradition—the tradition in this case being principally the nearly two centuries of constitutional decisions.

Levinson finds another division, likewise drawn straight from Reformation controversy, over *who* has the authority to interpret. Catholics tended to believe that interpretation may come from the Church alone. Protestants were not as unanimous on the issue. Conservative Protestants (e.g., Lutherans, Congregationalists and Presbyterians) tended to believe that educated and ordained clergy had an authority to interpret that was not shared by the laity. Radicals (e.g., Anabaptists and Quakers) tended to believe that every person had equal authority to interpret. Levinson characterizes this last belief as "Protestant." This gives him four schools of constitutional interpretation: (a) "Protestant-Protestant"—the notion that the text of the Constitution alone determines its meaning, *and* that each person (or government official) has authority to interpret it; (b) "Protestant-Catholic"—the text of the Constitution alone in some way determines its meaning, but the Supreme Court is the supreme interpreter; (c) "Catholic-Protestant"—the meaning of the Constitution is its text plus the traditions handed down over the

past two centuries; but each person (or, at least, persons other than judges) have authority to do constitutional interpretation; and (d) "Catholic-Catholic"—the meaning of the Constitution is its text plus the traditions handed down over the past two centuries, and only the Supreme Court is the authoritative interpreter.

"It is my central argument," Levinson asserts, "that a significant number of constitutional debates can be organized under one or another of these four categories." For anyone familiar with the historical course of religion in the United States, this is a pessimistic picture of constitutional theory, at least if one accepts the usual assumption that we ought to have a rational debate about constitutional jurisprudence, with our goal being to unite behind a single wise or "legitimate" approach to the Constitution. In the religious environment of the United States, where no particular set of religious beliefs achieves state sanction at the expense of others, the most common effect of hermeneutic difference has been an end of debate. Over most of our religious history, American Protestants have not bothered to debate with American Catholics over the relative values of Protestant and Catholic hermeneutics. They have simply talked about each other, called each other heretical, and competed for followers. For most of our history many believed that our religions lacked enough common ground even to begin a dialogue.

Religious unity almost never comes when one leader or group convinces the others through force of argument. It comes, if at all, only through the use of other kinds of power, whether excommunication or warfare. The one significant difference between Americans' constitutional faith and religious faith of the ordinary variety is that almost absolute variation in the latter is protected by the Constitution itself. Discipline for heresy is entirely intra-institutional, and can easily change our religious affiliations. In the matter of the Constitution, however, we are still an "established" church: some forms of heresy can still be punished. Rejecting the Constitution may not be an option unless one is willing to renounce his American citizenship altogether.

Levinson recounts one now famous "excommunication" debate: an article by Paul Carrington, then dean of Duke Law School, suggesting that certain legal "nihilists" resign from teaching in American law schools. Dean Carrington was referring to members of Critical Legal Studies, who had expressed varying degrees of contempt for law as nothing but a disguise for political preferences. Because he was constrained by a concept of academic freedom, Dean Carrington could not advocate that law schools fire CLS

teachers for their views; rather, he suggested that these people should conclude that they "have an ethical duty to choose a career other than teaching law."[3] Carrington believed that even within a community as diverse as the academic legal community, there is such a thing as "heresy." In this case, heresy was contempt for the entire enterprise of defending any kind of rule of law. One can believe almost anything one chooses about the nature of God, but one may not be an atheist.

Responding to Carrington, Levinson points out that there is plenty of room for atheists in the academic study of religion. When later called upon to defend his views, Carrington distinguished between general academic departments and professional schools. The latter have, as part of their mission, an obligation to inculcate in practitioners a basic acceptance of the enterprise being studied. For example, Carrington noted, although an atheist teacher might be perfectly appropriate in a university religion department, an atheist who teaches in a divinity school, which is dedicated to the training of clergy, has a "conflict of interest." His fundamental beliefs are inconsistent with the fundamental institutional commitment of his employer. If Catholic and Protestant institutions can discipline academics for heresy—and they do it all the time—then why can't the law schools?

Professor Levinson's is an illuminating and even useful message for one seeking to understand why so many people can claim reliance on the Constitution, even view it with reverence, yet differ so dramatically on questions of constitutional meaning. Levinson cites both Ronald Dworkin ("Catholic") and Ed Meese ("Protestant") as venerators of the "Constitution"—a similarity that is rarely revealed in analyses of constitutional thought.

Such powerful insights notwithstanding, one gets the impression that Levinson takes his religion much too seriously. While reading his analogies between religion and the Constitution I was drawn back to H. Richard Niebuhr's *The Social Sources of Denominationalism*, a book that, although written more than a half century ago, has never lost its force. Religious diversity within a single community, Niebuhr and others of his generation observed, may indeed be the product of deeply held religious faith. But that deeply held faith is nevertheless a mask over differences that are cultural, political, and economic. Political "in" groups tend to be orthodox and traditional in the matter of religion. Political "out" groups tend to be radical. Religious tolerance prevails mainly for an unprincipled reason: no single group has enough power to drive out

3. Carrington, *Of Law and The River*, 34 J. LEGAL EDUC. 222 (1984).

the others or make them conform. The American doctrine of separation of church and state, for example, developed during a regime when surprisingly few people were committed to disestablishment as a matter of principle. We became separationists because, although most of us would have preferred to see our own religious institutions established, we were loathe to run the risk that some other church would win that status. Even Catholics sought disestablishment in America, where they were in a political minority. American Baptists, great champions of separationism at the time of embattled Roger Williams, have been very quick to legislate religious values (on such subjects as abortion, Sunday closing, and the teaching of evolution) more recently in states where they have become dominant.[4] The sad story is that separation of church and state is accepted as a matter of *principle* only by those such as Thomas Jefferson or the liberals of the Warren Court era who do not passionately subscribe to organized religion.

And so it is with our constitutional faith. Popular constitutional faiths should not be taken too seriously as expressions of principled positions. As a rule, they are verbal disguises for underlying cultural, political or economic predispositions. Unlike Professor Levinson, I do not take Ed Meese's "Protestant-Protestant" constitutional theory all that seriously. Mr. Meese does not like what the Supreme Court, particularly the Warren Court and the early Burger Court, has done with the Constitution. In order for his political and economic agenda to succeed he must challenge the Catholic-Catholic notion that the text and traditions (which include *Miranda* and *Roe v. Wade* and some statutory decisions such as *Runyon v. McCrary*) constitute the meaning of the Constitution, and that the Supreme Court is its only authoritative interpreter.

I am confident that if Meese were somehow thrust into the position of attorney general in the Harding administration in the early 1920s he would profess a very different faith. At that time a "Catholic-Catholic" Supreme Court was in its first great period of constitutional activism, when "due process" was interpreted to mean that states could not regulate minimum wages, the method of wage payment, or occupational licensing—decisions with little warrant in either the text of the constitutional amendments or the recorded debates. When Justice Holmes accused the Court in 1905 of reading "Mr. Herbert Spencer's *Social Statics*" into the fourteenth amendment, he was making the same charge that Meese has made more recently. Nevertheless, I suspect that a 1920s Ed Meese, U.S. Attorney General to President Harding, would sing a hymn to the

4. *See* W. MCLOUGHLIN, NEW ENGLAND DISSENT: 1630-1833 (2 vols. 1971).

unwritten Constitution and to the Supreme Court, its highest interpreter.

In this respect, Meese is no worse than most Americans; he finds his constitutional religion in the same way that most of us do. He begins with a set of political or economic or social values and then selects a constitutional theory that best gives them effect. The religious language can be powerful, and we use it when it suits our purposes. But we really do not believe it anymore. We leave that for the unwashed.