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THE JUDICIAL OATH AND THE AMERICAN CREED: COMMENTS ON SANFORD LEVINSON'S THE CONFRONTATION OF RELIGIOUS FAITH AND CIVIL RELIGION: CATHOLICS BECOMING JUSTICES

Howard J. Vogel*

Judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.¹

INTRODUCTION

There is an American creed and the confirmation proceeding for a nominee to the United States Supreme Court is a catechetical exercise which enforces compliance with this creed as a condition for judicial office. This is evident in Sanford Levinson's sympathetic discussion of the confirmation hearing experience of the three sitting Catholic justices; Brennan, Scalia and Kennedy. In an article entitled, The Confrontation of Religious Faith and Civil Relig-

* Professor of Law, Hamline University School of Law, Saint Paul, Minnesota. My thanks go first to Sanford Levinson for continuing to raise constitutional issues in a way that invites and fosters an important conversation about the American identity and what it means to be committed to a constitutional political order. Special thanks are due to my colleague Karen Gervais, Ph.D., for her critical reading of an earlier draft and a conversation which extended over several weeks. Her comments helped me secure a greater measure of clarity about my views on the issues addressed in this Article even though I have not resolved the most difficult questions she posed to me. Thanks also to Timothy Nipper for valuable research assistance and critical comment provided cheerfully on short notice.

1. U.S. CONST. art. VI. The full text of article VI reads as follows:

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Id.

Note that while all public officials are required to pledge "support" for the Constitution, state court judges are singled out as "bound" by the "supremacy clause."
Professor Levinson demonstrates how the nominees were operationally required, by the force of the senators' questions in the confirmation hearing, to declare that they would subordinate their Catholic religious commitments to their commitment to "support" the Constitution in cases of conflict between the two. This experience demonstrates the power of the Constitution, as understood by the senators, to serve as the central and supreme creedal document of the American civil religion with respect to judicial nominees holding Catholic religious commitments.

Professor Levinson's article raises a host of questions about the American creed which go far beyond his important discussion of the experience of the Catholic Justices. For example, what of others with markedly different religious commitments or no religious commitments at all? What does the experience of the Catholic Justices disclose regarding what might happen to non-Catholic nominees holding personal moral commitments, whether religiously grounded or not? What questions may be asked by senators, or anyone for that matter, of others who might serve in public office in light of this experience? May United States Senators, in the performance of their duty to advise and consent on judicial nominations under the Constitution, require judicial nominees to declare their willingness to subordinate their personal commitments regarding the existence of moral truth, the possibility of moral discourse and the relation of morality to law when such commitments conflict with the senators' understanding of the American creed? What do the answers to these questions reveal about what it is we are asking judges to do when they are called upon to serve as judges? Do we want them to subordinate their moral sensitivity regardless of its source? If that is what the senators' questions are based on, what does such subordination leave the judges with from which to speak at all in matters requiring judgment? Is there a kind of civil morality, rooted in a diffuse American civil religion, that may be imposed on public officials by the senators under Article VI?

These questions point to the existence of underlying premises which I will explore in my comments on Professor Levinson's article. The question I shall explore is: Is there an unwritten "civil religious" creed embodied in the senators' questions, and what does it require of those who take the oath of judicial office? As Professor Levinson notes, the senators' questions may well have been motivated by an anti-Catholic bias. Beyond that, however, there are deeper premises which make it possible to ask a similar set of questions of all judicial nominees who hold personal moral commitments regardless of whether such commitments are religiously grounded or not. To examine this deeper set of premises, we shall explore what the senators might.

4. Id. at 1062-65.
ask of two hypothetical judicial nominees; one who is a Quaker and one who is a secular moralist. The results of this exploration demonstrate that there may well be more than an anti-Catholic animus operating in the questions posed to the Catholic justices. Examination of the questions which senators have posed to the Catholic nominees yields a good deal more than a description of the creedal power of the Constitution in a Catholic context. If we look behind the questions to the premises which inform the questions, we shall catch a glimpse of the diffuse but powerful "civil religious" creed that they serve.

This Article summarizes Professor Levinson's discussion of the Catholic Justices' experience, argues that a potential for "creedal" conflicts arises under article VI of the Constitution, and explores the dimensions of the "creedal" conflict experienced by the Catholic nominees. The Article then goes beyond the Catholic context to examine the dimensions of such conflicts as they might arise for a judicial nominee with Quaker religious commitments and one with secular moral commitments. The Article then turns to consider whether the requirement that one subordinate one's religious and moral commitments to one's commitment to the Constitution in the performance of the judicial role is an occasion for hope or caution. The Article closes with some brief comments on whether, given the "religious" nature of moral commitments which cannot be grounded solely in reason, we can talk about these issues.

I. Professor Levinson on Catholics Becoming Justices

Once again Sanford Levinson helpfully explores what it means to be an American by focusing on the Constitution as the central document in the civil religion. His article on the Catholic Justices sheds light on the power of that document to coerce what might be called a "creedal requirement" as a condition for judicial office. As a matter of history, Professor Levinson notes, religious tests have not played a role as a qualification for office in the confirmation hearings of the Supreme Court. The recent history of Catholic and Jewish nominees to the Court, however, demonstrates that commitments to the Constitution as superior to personal commitments were required by the force of the questions asked by senators in the course of the confirmation proceedings. Professor Levinson's exploration of the "confrontation of religious faith and the [American] civil religion" in his illuminating remarks on the confirmation hearing experiences of Justices Brennan, Scalia and Kennedy provides a persuasive argument for the conclusion "that, in a variety of subtle ways, the views of outright anti-Catholics have become

5. Id. at 1056-58.
6. The article commented on here extends his earlier treatment of loyalty oaths and the "American Creed" in S. Levinson, Constitutional Faith 90-121 (1988).
7. Levinson, supra note 3, at 1049-52.
8. Id. at 1062-65.
9. Id. at 1048.
incorporated into the self-understanding at least of American Catholics forced, by the demands of the political process, to appeal to them for support.' More succinctly, this has caused Catholic judicial nominees to present "their faith [in a way that is] influenced by the experience of living as a minority within a society that has often been characterized by at least a certain skepticism, if not virulent hostility, toward the legitimacy of the Roman Catholic Church." This, Professor Levinson demonstrates, is manifested in the explicit subordination of their faith in the performance of their judicial responsibilities to the requirements of the Constitution as supreme authority.

To be sure, this "subordination" may be accomplished through the move of strictly privatizing one's religious faith. While such a move is technically not an act of subordination, it effectively removes religious faith as the only ground for moral consideration of public questions. At best, privatization of religious commitments splits off, rather than subordinates, such commitments as a ground for moral views. In either case, subordination or splitting, the confirmation hearing experience renders the Constitution, as understood by the senators, immune to challenges on the basis of personally held moral views grounded in Catholic religious commitments. This assumes that a strict line may be drawn between the private and the public realms of experience. Religious faith, (and the moral beliefs grounded in religious commitments), are thus consigned to the private sphere while politics and adjudication are preserved in the nonsectarian public sphere.

Whether we view this as subordination or splitting, Professor Levinson concludes that, as a matter of formal ritual, the confirmation hearings required Justices Brennan, Scalia and Kennedy to publicly state a willingness to subordimate their religious commitments as Catholics to the requirements of the Constitution in cases of conflict as a condition for office. Professor Levinson notes that Jewish nominees experienced a somewhat similar requirement to declare their American commitments while minimizing their identity as Jews. For Jews and Catholics alike, then, it seems plausible to argue that there is a price attached to entry into leadership positions within the polity. This price has been the modulation, if not outright suppression, of much awareness of anything within their respective religious traditions that might be significantly different from—let alone pose a challenge to—the wider American (and Protestant?) culture.

In this passage, Professor Levinson seems to argue that the civil morality presumably embodied in the Constitution is one which is likely to be consistent with the religiously based morality of a Protestant Christian. To the

10. Id. at 1055.
11. Id. at 1056.
12. Id. at 1058.
13. Id.
extent that might be true, it seems that the American identity forced upon Catholic and Jewish Justices, then, is a Protestant Christian American identity. In any case, it is clear from Professor Levinson's discussion that Catholic and Jewish Justices alike were required to conform their personal identity to some competing identity through a declaration of their willingness to subordinate personal religious and moral commitments when such commitments clash with the Constitution.

To require, as a condition for public office, subordination of the deepest personal commitments from which a person's own identity springs, raises deep questions concerning American constitutional and political commitments to pluralism and religious liberty. Does the Constitution permit senators to ask questions that require, as a condition for serving in public office, a commitment of "support" for the Constitution over competing moral claims on the content of justice only when such claims are rooted in religious faith or regardless of whether they are so grounded? As we shall see, the operational effect of the senators' questions enforces commitment to an American creed which is virtually indistinguishable from a "religious" test.

II. THE POTENTIAL FOR CREEDAL CONFLICT UNDER ARTICLE VI

I do solemnly swear (or affirm) that I will support the Constitution of the United States of America.

Creeds are intimately related to the identity of those who hold them. As Professor Levinson notes in his book on the subject of constitutional faith, "'traditional creedal affirmations . . . announce the speaker as a subscriber to the central tenets of a faith community.'"16 This definition captures the importance of creeds as an expression of identity. Creeds also serve as a statement of one's membership in the faith community in which the creed was formed. As such, they express the identity of the community. In addition, creeds are important in ordering one's loyalties for they contain within them statements regarding one's ultimate loyalty in relation to others.

14. Many would argue that is exactly how Federalist No. 10 should be read notwithstanding Madison's commitment to the robust exchange of views on the "common good." The Federalist No. 10 (J. Madison).
15. For the actual text of the oath, see 28 U.S.C. § 453 (1989). This section provides: Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, —, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."
16. S. Levinson, supra note 6, at 93-94.
Professor Levinson’s discussion provides a very helpful resource for further consideration of an important loyalty oath—that of the judge to “support” the Constitution. In the process, we are given a deeper understanding of the power and constitutional sanction for the American civil religion which is centered on the Constitution as the central document of that “religion.”

Professor Levinson frames the discussion as a confrontation of religious faith and the civil religion. His discussion demonstrates that it is more accurate to frame it as a confrontation between two different centers of loyalty: a conflict of one set of religious commitments (Catholic) with another set of “religious” commitments (constitutional civil religion). In light of this, the operational understanding of the “support” clause incorporated in the senators’ questions to Justices Brennan, Scalia, and Kennedy, demonstrates that, at least for Catholics, a “civil religious test” was required notwithstanding the absolute prohibition on religious tests from “ever being required as a qualification for office” under article VI. In the process our national commitment to pluralism is seriously undercut, if not abandoned.

The framers of the Constitution took commitments of loyalty very seriously. They risked their very lives by a disavowal of loyalty to the British Crown, and in the wake of their experience under the Articles of Confederation, they sought to provide the means for fealty to the Union on the part of state officials under the terms of article VI of the United States Constitution.¹⁷

Members of the Religious Society of Friends, commonly known as Quakers, also take commitments of loyalty very seriously. When the state solicits such commitments in the form of an oath, Quakers resolutely refuse to submit to swearing oaths. Instead they will affirm, if permitted, to “tell the whole truth” when called upon to testify in a court of law. That Quakers refuse to swear oaths, and instead are willing to make and follow personal affirmations, reflects their ultimate loyalty to a living God. This ultimate loyalty has the potential for bringing Quakers into conflict with the claim of the state for obedience to law. Indeed, Quakers have long risked arrest, persecution and even death at the hands of the law for their religious faith.¹⁸

The latent possibility for Quakers and Catholics, to say nothing of other religiously identified citizens, to come into conflict with the state typically breaks forth into actual conflict in the face of individual laws to which they might, on religiously grounded moral views, take deep exception. In the twentieth century, citizens have demonstrated this conflict in public acts of civil disobedience on behalf of positions they have taken on a variety of positions.

¹⁷. As Professor Levinson notes, the reasons for the “no religious test” clause are not clear. He speculates that it emerged from a fear by members of each sect that they might be the “victim” of such a test. Levinson, supra note 3, at 1051-52.

issues such as racial segregation and the war in Vietnam. Most recently, it has been demonstrated in civil disobedience aimed at halting the manufacture and deployment of nuclear weapons. In each of these cases, moral opposition to a particular policy, whether embodied in the law violated or not, was the claimed justification for the disobedience. At the heart of that claim was the refusal to place the command of law above the perceived demands of morality, and the conviction that the demands of morality arose from an ultimately authoritative source (whether that is identified as God, reason, intuition, conscience or something else).

Religious commitments are not the only basis on which individual identity may come into conflict with the Constitution. Moral commitments, whatever their grounding, may provide a similar clash so long as this grounding is deemed to be ultimately authoritative. While the experience of Catholics may pose a special problem in light of a perceived institutional threat of Papal authority to the civil authority of the state posed by traditional Catholic commitments, clashes over ultimate allegiance to sources of authority for decisionmaking can arise in a Protestant Christian as well as a secular moralist context. All of these clashes involve commitments that are arguably "religious," given the place that these conflicting loyalties occupy in the lives of the persons who hold them. In those conflicts are the seeds that point to the existence and describe the content of an American creed. This American creed, in the hands of the senators, is less elaborate than the creeds employed by the church down through its history, but a creed it is nonetheless—and one of great power.

Article VI of the United States Constitution compels public officials to make a specific commitment to "support the Constitution" as a "Qualification to any Office of public Trust under the United States." This requirement appears in the important, but often neglected, provisions of paragraph three of article VI. This paragraph contains a mandate and a prohibition that govern the tests which are required of persons who assume state and federal public office. The mandate requires nominees to the United States Supreme Court, along with thousands of other state and federal officers, publicly to pledge themselves to "support [the] Constitution" of the United States. The first paragraph of article VI reinforces this requirement through a declaration of the Constitution and federal law as the "supreme Law of the Land." At the same time, paragraph three absolutely prohibits the use of a religious test under any circumstances as one of the qualifications for judicial nominees. It is interesting to note that the language of article VI says nothing whatsoever about moral judgment or its source. Thus article VI does not, on its face, legitimize the specific questions posed by the senators to the Catholic Justices.

Given the importance the framers attached to pledges of loyalty, what is the content of the requirement to pledge a commitment to "support" the Constitution? Does the prohibition on religious tests as a qualification for public office shed light on the content of the commitment required by the "support" clause? These are not trivial questions even though they are often
dealt with in a pro forma manner in confirmation proceedings before the United States Senate Judiciary Committee.\textsuperscript{19} Given my brief discussion in the preceding paragraph, the best that one might be able to say about the "support" clause is that judicial reasoning must be constitutionally grounded, but this does not preclude the use of religious opinion or moral insights \textit{per se}. To require no more than that judicial reasoning be constitutionally grounded, however, settles very little about the conventions and content of constitutional argument as the recent outpouring of constitutional scholarship demonstrates.\textsuperscript{20}

As we take up this question it soon becomes apparent that it gives birth to a whole series of questions relating to the character of the American character and polity as well as to the character and content of public discourse as it might be shaped by constitutional commitments and requirements.\textsuperscript{21}

\textsuperscript{19.} The requirement to "support" the Constitution has taken on significant importance in the wake of the confirmation proceedings on Robert Bork's nomination. In that case, the importance of a commitment to particular interpretive style reached a new pinnacle of public attention. During Richard Nixon's time in office, he raised this issue by frequently stating his desire to find a "strict constructionist" to appoint to the Court. For a discussion of Nixon's view, see R. Dworkin, \textit{Taking Rights Seriously} 131-49 (1977).

\textsuperscript{20.} For a discussion of the persistent disagreement over which and whose Constitution we are discussing when we engage in Constitutional argument, see S. Levinson, \textit{supra} note 6, at 54-89.

\textsuperscript{21.} In the judicial confirmation setting the following questions arise: First, what is the proper range of questions that may be addressed to judicial nominees during their confirmation hearings? Second, what is the proper range of questions on the relation of law to morality and moral discourse that may be addressed to judicial nominees during their confirmation hearings? Third, may a senator specifically inquire into the nominee's views on the relation of law to morality in the context of adjudication? Finally, to what extent may such questions explore the way in which the nominee's views on morality in relation to law are grounded in religious views, if at all, or may they be explored only in the context of their content and relation to the task of adjudication without respect to their grounding?

Beyond the judicial confirmation hearing room the additional questions that might be raised implicate the relation of law, religion, politics and morality in American life with special concern for how the purported division of human experience into public and private realms impinges upon the response one might make to these questions, as well as to whether they are even permissible questions in public discourse. Some additional questions to consider might include the following: What about the case of Justices who have important personal commitments that give shape to their identity but which are not rooted in a Catholic religious commitment? What if the commitment is rooted in Protestant or Jewish commitments? What if the commitments are rooted in secular moralist commitments? What if the commitments are rooted in secular moral skepticism?

These questions all contain within themselves the deeper question of the relation of law to morality—whether the grounds of morality be given, for example, as religious or secular. This is the central focus of this Article.

To return to the judicial confirmation setting, consider the following additional questions—all of which arise out of the issues to be addressed in this Article. Is the requirement of a pledge to "support" the Constitution a mere matter of intentionality? Does it require a particular habit of mind and course of conduct with respect to, for example, a particular interpretive commitment toward the task of adjudicating cases under the Constitution? Or, is the Constitution made for adjudication of cases under its provisions by Justices of different views? If so,
the extent that these larger issues are touched upon in what is to follow, my comments are offered as a contribution to the important interdisciplinary conversation about pluralism, religion, morality, law and politics in American society that is now emerging in many quarters.

III. CATHOLIC JUDICIAL NOMINEES FACE THE QUESTION OF FAITH AND JUDICIAL OFFICE

Ontological and epistemological commitments are linked and they in turn can have a significant bearing on one's jurisprudential views. Thus, for example, the traditional Catholic position makes three claims. First, that ultimate moral principles exist (ontological claim). Second, that moral knowledge can be known is possible through a combination of reason, revelation, how different may their views be and with respect to what aspects of adjudication? Or are there no limits on the interpretive commitments (or lack thereof) that judges may employ in the task of interpreting the Constitution and in the course of deciding cases. (We would do well here to recall the words of Oliver Wendell Holmes, Jr., dissenting in *Lochner v. New York* that the Constitution was made for citizens of fundamentally different views. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). May the same be said for judges? Are judges different from citizens?).

Political skirmishing over presidential appointments to the United States Supreme Court has become a prominent feature of American political life in the twentieth century. The debate over the nomination of Robert Bork raised these issues to front page consideration for an extended period of time. Other judicial nominations which have stirred considerable public debate in recent years include the failed appointments of Clement Haynsworth and G. Harrold Carswell by President Nixon.

In the Haynsworth and Carswell cases, the focus on political or personal facts seemed to be a surrogate for disagreement over their perceived commitments of interpretive style. In Bork's case, however, commitment of interpretive style was the focus. For some that was enough; for others interpretive style was itself a surrogate argument for objections to political commitments that opponents ascribed necessarily to a particular style. In a nation of expanding pluralism and deep dissensus on a wide range of issues, these questions posed problems which pitted the very differences of how a court might interpret them to permit some religious testing under certain circumstances. Beyond these questions, are those questions relating more broadly still to the implications of the experiences of these Justices for the bounds and character, permissible public discourse?

The range and scope of such questions are beyond the few comments I want to set forth here. The difficulty in addressing these issues of large range and scope is compounded for me, as my comments later will more fully reveal, by a central premise upon which my comments are based, namely, the fundamental and intractable human impossibility of fully and finally discussing such questions. These questions ultimately touch upon the extent to which we can ground our identity, individually or collectively, at all in light of the contingent character of human experience.

22. The most pertinent recent work in this vein, upon which Professor Levinson draws, is the important work by Kent Greenawalt. See K. GREENAWALT, RELIGIOUS CONVICTOINS AND POLITICAL CHOICE (1988). Other recent contributions to this discussion include M. PERRY, MORALITY, POLITICS & LAW: A BICENTENNIAL ESSAY (1988) and S. LEVINSON, supra note 6. These issues not only implicate the question of the content of the American civil religion and its relations to other religious commitments in the context of public office and discourse, they shed light as well on the following deeper question: What is the character and content of any commitment (faith) in a pluralistic world?
and the teachings and tradition of the Church (epistemological claim). Third, that positive law which violates the requirements of morality fails to be valid law, and thus fails to be law (jurisprudential claim). Professor Levinson frames his inquiry in a way that considers the fundamental ontological, epistemological, and jurisprudential commitments that are implied in acceptance of traditional Catholic Church doctrine. He asks: "Is it legitimate to be especially concerned about the views held regarding these epistemological and jurisprudential issues by someone who comes out of the Roman Catholic community?" Is it any more reasonable to ask these questions of Catholic Justices than of anyone who is nominated to be a judge? As we shall see, one need not hold to natural law theory in the "Catholic mode" to hold personal moral commitments that may conflict with a commitment to support the Constitution.

In the case of the confirmation hearings for Justices Brennan, Scalia and Kennedy, each was asked a line of questions which sought to bring out the


24. Readers steeped in the depth and rich nuances of the Catholic tradition may find this summary description of the "traditional Catholic position" too cryptic. Timothy Nipper has called to my attention the point that a discussion of the role of the *magisterium* in relation to individual conscience can lead to a much more sophisticated understanding than that which simply places the *magisterium* in a superior position and individual conscience, when at variance with the *magisterium*, in a subordinate position. Such a discussion raises much more complex issues than often appear on the surface, as in the case of the judicial confirmation proceedings that are the focus of Professor Levinson's article and my response. Indeed, an extended examination of the relation of the *magisterium* to individual conscience illustrates the difference often encountered between traditional doctrine and traditional practice. Traditional Catholic doctrine holds that individual conscience is supreme, but conscience must be properly formulated to claim superiority over the *magisterium*. This view requires that the individual consult the *magisterium* in developing one's conscience, and when that is properly done, acknowledges individual conscience as supreme. Evidence for this may be found in the Pastoral Constitution on the Church in the Modern World, VATICAN II, GAUDUM ET SPES, para. 16 ("Dignity of Moral Conscience") (Dec. 7, 1965) in DOCUMENTS OF VATICAN II 903, at 916-17 (A. Flannery, O.P., ed. 1975). Traditional practice, however, can take this doctrine to mean that when individual conscience is at odds with the *magisterium* the individual has not properly consulted the *magisterium*. Thus, in practice, the *magisterium* can tend to take the superior position. This catch-22 is not unlike the experience of the child who receives a stern and insistent admonition by a parent concerning the evils of a proposed course of action the child is considering, only to hear the parent sum up by saying, "but of course, it's your decision, and I'll abide by that." The words of the closing summation, considered in isolation outside the realm of the child's experience, are similar to the position of traditional Catholic doctrine. Individual conscience seems to be accorded supremacy. When the words are uttered in the context of a history of parental imposition of sanctions for departing from the parent's "advice" they tend to take on an altogether different meaning which makes the parental view superior.

In the political realm, the current controversy that has erupted in the pages of the New York Times, concerning Cardinal O'Connor's criticism of Governor Cuomo's position on the moral responsibilities of Catholics serving as public officials in light of their Catholic religious commitments (discussed by Professor Levinson supra note 3, at 1067 nn.65-66), may be read as an example of the difference that can arise between doctrine and practice.

25. Levinson, supra note 3.
extent to which their commitments as Catholics might bear upon the performance of their role as Justices of the United States Supreme Court in the case of a conflict of loyalties between their commitments as Catholics and their commitments as Americans. These lines of questions are helpfully subsumed, by Professor Levinson, under one grand synthesized question as follows:

You belong to a religious community that claims of human beings that they are able to discern, through a mixture of revelation and reason and presumably the help of authoritative Church officials, the requirements of morality and justice. That is, the Church has set itself resolutely against the various doctrines that can loosely be brought together under the rubric "moral skepticism," which suggests that nothing can be known about moral duties or, what is functionally similar, that moral positions are hopelessly idiosyncratic. First, do you accept the Church's teaching that genuine knowledge exists (and is knowable) as to what is required of us if we wish to be moral beings? Second, if you accept these ontological and epistemological claims, do you feel bound to accept the Church's teachings whether delivered through Papal encyclical or the more general magisterium, concerning the specific content of natural law? Finally, do you accept the proposition asserted by St. Thomas and other distinguished theorists that any command by a putative sovereign that requires violation of natural law is not itself to be described as "law"?

Although this specific question was not asked of any of the three nominees Professor Levinson discusses, his analysis demonstrates that the upshot of the lines of question put to the Catholic nominees plausibly suggests that the concerns embedded in this synthesized question informed the actual questions raised by the senators.

The synthesized question poses an institutional issue in a way that draws out a response which might disclose the ontological and epistemological commitments of the nominees. This would permit one to extrapolate the jurisprudential implications of such commitments for one who is about to sit on the United States Supreme Court. Thus, these ontological and epistemological commitments are important for testing the content and character of the judge's commitment to "support" the Constitution against the potentially conflicting religious commitments of the judge.

In the case of the confirmation proceedings for Justices Brennan, Scalia and Kennedy, the question led these nominees publicly to subordinate the jurisprudential claims of the natural law tradition of the Catholic Church, which hold that "any command of the putative sovereign that requires violation of natural law is not itself to be described as 'law'." This Catholic jurisprudential claim was subordinated by each of the Justices to the jurisprudential claim of the Constitution that it is supreme and no other claimed authoritative source of law may be invoked to displace its claim to supremacy in the case of a conflict.

26. Id. at 1074.
27. Id.
In disavowing the primacy of the Catholic natural law tradition, they were faithful not only to the "support" clause but also to the "supremacy" clause. Why would they do this? At least three answers are possible. First, they may have premised their response on the notion that there is no constraining substantive content in the Constitution. Second, they may have anticipated no clash between these commitments. Third, if neither the first nor the second answers apply, they may have simply compromised their religious commitments.

What are the implications of each of these positions? First, if there is no content in the Constitutional oath then why swear at all? (Or for that matter why not?) Second, if there can be no clash, religious commitments must necessarily be viewed as purely private, and the judicial function must necessarily be viewed as purely public. From this viewpoint all that is needed from the law, in order to resolve perceived "clashes" between religion and adjudication, is strict policing of the border between the private and the public dimensions of human experience. This view claims that, contrary to the historic interaction of law and religion, these dimensions can be effectively separated. Such an absolute separationist perspective would thus claim that all "clashes" are the result of either law (public concerns) or religion (private concerns) reaching beyond the proper scope of their respective concerns. Third, if the justices compromised their religious commitments then what is the value of having them in the first place? What did they think they were saying when they answered the questions as they did?

Notice that in each of these three cases we must incorporate "meaninglessness" to get an answer. In the first case the constitutional "support" clause is meaningless. In the second, the idea of an intersection between public and private life is meaningless. In the third, the religious commitment is meaningless, at least in the terms on which religious faith claims a Catholic's ultimate loyalty to a sovereign living God.

We are left with a nagging question. What is it about the judicial function, under the Constitution, the same Constitution that guarantees religious liberty and bars religious tests as a qualification for public office, that permits senators to ask questions that would lead a judicial nominee to subordinate or split off one's Catholic religious commitments which presumably play a major role in the formation of one's very identity? Is this not risking the sale of one's soul for a mess of pottage? Does the operational reality of the confirmation process coerce Faustian deals on the part of the nominees? Or is the question better put by asking whether the constitutional text permits the senators to raise such questions when they no doubt do so with the view


29. Professor Levinson takes a similar view on this last point. Levinson, supra note 3, at 1049.
that such questions do not constitute a religious test? To explore the possibility of an answer to these questions as well as to consider the full range of the implications of Professor Levinson's conclusions drawn in a Catholic context, I now turn to consider a variant of Professor Levinson's synthesized question beyond the Catholic context. We shall see that more than one's religious commitments may be at stake in the confirmation process.

IV. THE QUESTION BEYOND THE CATHOLIC CONTEXT: A QUAKER FACES THE QUESTION OF FAITH AND JUDICIAL OFFICE

Dearly beloved Friends, these things we do not lay upon you as a rule or form to walk by, but that all with the measure of light which is pure and holy may be guided, and so in the light walking and abiding these things may be fulfilled in the Spirit—not the letter, for the letter killeth, but the Spirit giveth life.

In the examples discussed by Professor Levinson, the questions are specific to a Catholic context with respect to the stakes that are raised for the Justices. They address the specific religious commitments of Catholics. These questions might differ for nominees who hold other non-Catholic religious commitments or no religious commitments at all. To explore these possible differences, I shall consider how these questions might be raised and what conclusions they might produce in the context of the nomination of a Quaker to the United States Supreme Court.

To place this issue in a Quaker context is to place it in a Protestant context. But Quakers are far removed from the Protestants that emerged from the continental upheaval unleashed by Martin Luther in the sixteenth century. Quakers were, to begin with, English. Henry VIII, not Martin Luther, unleashed the great upheaval in the relations between England and Rome which forever changed the face of England. The Quakers emerged roughly 100 years after Henry VIII in the religious, social and political upheaval of the seventeenth century English Civil War. The "Elizabethan arrangement" of the church, for which Henry VIII provided the animating event, was well under way. Quakers rebelled against established church practices, including church government, set forms of worship, and especially against the ordination of what they called "hireling" ministers. They soon swelled in numbers and experienced harsh persecution at the hands of the civil authorities. Acts of Parliament were passed against them. The perception

30. This well-known quotation from a Quaker statement (known as an "advice" among Quakers) on church government was appended as a postscript by the elders of Balby in 1656. John Punshon notes:

The use of this text, 2 Corinthians 3:6, summarizes the whole approach to church order. The appeal is not made on the authority of the elders, as if issuing instructions. The appeal is from the light in them to the light in Friends. Their words are to be followed because they express the Truth, not obeyed because they are written from the meeting. The question of disagreement will, therefore, not arise.

of them as a popular-based threat to the civil authority in the midst of the English Civil War, was in part responsible for the restoration of the monarchy in the person of Charles II. The Quaker commitment, made to Charles II, by which they refused to take up arms was grounded in practical considerations of safety as well as religious scruples.\(^{31}\)

Quakers, like all Protestants, adhere to some form of what Paul Tillich calls the "Protestant principle."\(^{32}\) They, like all Protestants, say no to form. They do so, however, in a way that makes them more radical in this respect than most other Protestant sects. Other sects are organized around a hierarchically arranged polity. Quakers, to be sure, have an organizational structure, but it is highly decentralized, gives extraordinary deference to individual conscience, and, in its twentieth century mode, is rarely used to impose the severe disciplinary measures common in the nineteenth century.\(^{33}\)

The chief point to note here is that Quakers emphasize individual conscience as a source of authority, in contrast to Catholics who emphasize the institutional authority of the magisterium.\(^{34}\)

The Quaker context presents circumstances which avoid the institutional dimensions of the concerns behind the questions actually posed to Catholic nominees. For Quakers there is no body of "teachings of the church," nor any established body of "doctrine" which might inform the religious commitments of a Quaker as a judicial nominee. Despite the "free church" character of Quakers, there is a discipline and core content present in their religious commitments. Quaker folkways and core attributes of their views on religious experience, as experienced by each individual in the community of Quakers, play a significant role in the identity of a Quaker. Nonetheless, it is important to note that Quakers have historically eschewed "theology" because of what early Quakers referred to as a distrust of speculative

\(^{31}\) B. Reay, supra note 18, at 62-106.

\(^{32}\) See, e.g., 1 P. Tillich, Systematic Theology 3, 227 (1951); 3 P. Tillich, (The Divine Spirit and the Ambiguities of Life), Systematic Theology pt. IV, § III, at 162-282 (1963). Van Harvey's comments on Tillich's use of the term Protestant principle are helpful in gaining an understanding of it in the context of this Article:

[Tillich] regards it as but a name for a universal principle that, while embodied in the Prot[estant] Reformation, is effective in all periods of history and is implicit in all great religions. The [Protestant principle] may be negatively expressed as the protest against any absolute claim made for a finite reality, whether it be a CHURCH, a book, a SYMBOL, a PERSON, or an event. Positively it may be expressed as the confession that GRACE is not bound to any finite form, that God is the inexhaustible power and ground of all BEING, and that the truest FAITH is just that one which has an element of self-negation in it because it points beyond itself to that which is really ultimate.

V. Harvey, A Handbook of Theological Terms 197-98 (1964).

\(^{33}\) These measures included, most notably, the practice of purging errant members by "reading them out of meeting."

\(^{34}\) See the discussion of the relation between individual conscience and the magisterium, supra note 24.
"notions." Instead, Quakers place their trust in the actual individual experience of what is variously referred to as the "leading of the Light," the "Spirit," and the "Inner Light" of Christ encountered within their experience.36

The faith of a Quaker may be summed up by noting four chief characteristics. First, that Quakers are a peace church. Second, that they practice no sacraments such as baptism or the eucharist. Third, that they rely on an open ministry that includes everyone in the community. Fourth, that their reliance on the Bible is accompanied by a refusal to be bound by the letter.37 As the 1656 statement on church government set out by the elders of Balby notes, it is the immediate presence and continuing revelation of the Spirit, directly accessible by each person, that is for Quakers the source of authority and the sovereign of their lives.38

Most significant for our purposes, Quakers take the possibility and practice of moral discourse, especially as an expression of their identity through action for peace and social justice, as central to their self-understanding. This means that they are unwilling to separate the demands of morality from law and would likely insist on the idea that while law is not morality, law is subject to moral judgment in terms of whether its claim for obedience is authoritative or not.

In light of these distinctive Quaker characteristics on the question of religious authority, we shall now turn to reconsider Professor Levinson's synthesized question. By rephrasing the question posed to Catholic judicial nominees so that it engages the particular characteristics of Quaker religious commitments on morality and law, we shall be able to explore the full range of implications present in Professor Levinson's discussion of the experience of the Catholic Justices. In addition, we may gain further insight into the deeper issue of the content of the "no religious test," and the requirement of an oath or affirmation to "support the Constitution" found in article VI. In turning from the Catholic context to a Quaker context, my concern is not primarily to explore whether, as a condition of judicial office, one must subordinate religiously grounded moral commitments. Beyond that important issue I want to explore whether a judge must subordinate moral commitments, regardless of whether they are religiously grounded or not. Must a judge adopt, as one's central American commitment as a judge, the position of secular moral skepticism? By focusing on this question I hope to engage Professor Levinson's concern for the pervasity and impact of the public/private split in American political discourse.39

35. H. BRINTON, FRIENDS FOR 300 YEARS 180 (1964).
36. See id. (discussing the history and beliefs of the Quakers).
38. See J. PUNSHON, supra note 30, at 77 (for text of quote).
39. Levinson, supra note 3, at 1059.
I see it, is to raise the question of whether American cultural/political commitments require a kind of split identity on the part of citizens who engage in our common public life. Beyond that, I am interested in considering whether such a view is constitutionally required and may thus serve as the basis for developing a constitutionally permissible line of questions for judicial appointees under article VI.

Professor Levinson's synthesized question, rephrased in a way to engage the particular characteristics of Quaker religious commitments on morality and law, might look something like this:

You belong to a religious community that claims of human beings that they are able to discern, through direct revelation encountered by individuals who wait expectantly upon the leading of the Spirit, and presumably with the help of conscience, reason, and through consultation for clarity with your religious community, the requirements of morality and justice. That is, Quakers have set themselves resolutely against the various doctrines that can loosely be brought together under the rubric of "moral skepticism," which suggests that nothing can be known about moral duties or, what is functionally similar, that moral positions are hopelessly idiosyncratic. First, do you accept the faith that genuine knowledge exists (and is knowable) as to what is required of us if we wish to be moral beings? Second, if you accept these ontological and epistemological claims, do you feel bound to accept the leadings of the Spirit that you discern in your practice of expectant waiting upon such leading, concerning the specific content of justice? Finally, do you accept the proposition that any command by a putative sovereign that requires violation of the content of justice, as you are led by the Spirit to understand it, does not, solely on its own authority, require obedience?

This inquiry clearly rests upon a presumed clash of loyalties between Quaker religious faith and the American creed. The institutional "threat" of the Catholic *magisterium* is replaced by the "threat" of religiously informed individual conscience. Now it is possible that the absence of an institutional threat might lead senators not to ask a question like this of a Quaker nominee. To the extent that the questions posed to Justices Brennan, Scalia and Kennedy arose out of fear or hostility toward Catholics, Quakers might well avoid the difficult choice posed in the rephrased question. Hostility toward Catholic religious faith is one cost that Professor Levinson identifies in the Catholic context he discusses. That hostility seems clearly based in a fear of a clash between constitutional authority under the text of the Constitution and the institutional authority of the Vatican.

What remains unchanged in the rephrased question is the "threat" that a moral judgment, whatever its ground, may challenge a claim by the state for obedience to its law. The question in this Quaker context points to the fact that a non-religiously grounded moral claim might raise an issue similar to those raised in a Catholic context on the relation of law to morality. Notice that what remains unchanged in the rephrased question is the challenge of a moral claim for disobedience in the face of a claim by the state for obedience to its law. This part of the question, seen so clearly in the Quaker context in which individual conscience is emphasized, demonstrates the heart
of the original question. At base, the question posed to the Catholic Justices prompts them to disclose the extent to which they might be willing to subject the claims at law for obedience to independent moral judgment in their judicial role. To the extent the question prompts such an answer it does so because there is a moral position subsumed by the "support" requirement. This includes, at a minimum, that the Constitution will occupy a certain identifiable place in the hierarchy of the judge's commitments.

**V. THE QUESTION BEYOND THE RELIGIOUS CONTEXT: A SECULAR MORALIST FACES THE QUESTION OF "FAITH" AND JUDICIAL OFFICE**

Hostility toward Catholics and Catholic commitments suggests a wider hostility toward religious faith of any sort. This, in turn, raises serious questions of religious liberty under the Constitution, especially in light of the "no religious test" clause. What I find even more ominous in the experience of the Catholic justices, as may be illustrated in the case of the hypothetical Quaker nominee, is the suggestion that moral discourse itself, unless rooted in some determinate American constitutional definition of the limits of such discourse, is beyond the pale of the judicial function. And yet, if that is the true state of affairs under the operational impact of article VI, as understood by the senators asking questions in the confirmation process, then we can say there is a kind of civil morality that is rooted in the civil religion Professor Levinson describes. While not specifically spelled out by the senators, the outlines of this civil morality include a requirement that a judicial nominee set aside all identity defining religious and moral positions that are at odds with the civil morality, whatever that might be.

Consider now a second rephrasing of the question, this time to match the commitments of a secular moralist. I take it that a secular moralist is a morally serious person. In using this phrase to describe the commitments of a secular moralist nominee, I explicitly adopt the definition Professor Levinson provides for this phrase in his book, *Constitutional Faith*. Professor Levinson states:

>[L]et me emphasize that I do not equate being "morally serious" with adopting any kind of "absolute" grounding of morality, whether in natural law, divine revelation, or any of the other candidates that have contended with one another over the centuries. To be "morally serious" here means that one is concerned with the evaluation of one's actions or intellectual positions in terms of the welfare of others; that one always accepts as relevant and takes into account, when discussing the merits of a particular position deemed to have some consequences within the world one lives in, the likelihood that others will suffer. ("Suffering" can obviously range from infliction of physical pain to the deprivation of opportunity for access, say, to what one regards as great works of art.) That persons may be unable to offer a "foundational" defense of their views does not mean that these views are not of great import in "constituting" their identity.41

40. Professor Levinson acknowledges this supra note 3, at 1051-52.
41. S. Levinson, supra note 6, at 57.
I take it that this position will suffice to illustrate the commitments of a secular moralist who might be nominated to the United States Supreme Court. I would only add that a "morally serious person," as I am using that phrase here, is one who gives ultimate authoritative status to the moral principles by which they determine a morally right course of action in their lives. To rephrase Professor Levinson's synthesized question, posed to the Catholic nominees so that it matches the commitments of a "morally serious person" who makes no claim to religious faith as a basis for this seriousness, yields the following question:

You hold the position that claims of human beings that they are able, through a commitment to concerned evaluation of one's actions or intellectual positions in terms of the welfare of others, to choose such actions and intellectual positions, in a way that always accepts and takes into account when considering the taking of such action or intellectual position deemed to have some consequences within the world in which you live, the likelihood that someone will suffer. That is, you have set yourself resolutely against the various doctrines that can loosely be brought together under the rubric "amoral" and "nihilism" in regard to what people, either individually or as collectively organized, can do to one another, despite your skepticism in finding an "absolute" grounding for a moral judgment that will secure a consensus. First, do you accept the view that conversation can be had about moral issues, in an effort to secure morally appropriate courses of action and intellectual positions for our individual and collective lives? Second, if you accept these ontological and epistemological claims, do you feel bound to accept the moral conclusions that you are persuaded to accept in such conversations, concerning the specific content of justice? Finally, do you accept the proposition that any command by a putative sovereign that requires violation of the content of justice, as you are persuaded in conversation to understand it, does not, solely on its own authority, require obedience?

This rephrased question is based on the premise that the personal moral commitments reached by the secular moralist nominee in conversation are taken as authoritative by the nominee. The clash emerges when these personal moral conclusions conflict with law. At that point the secular moralist is in conflict with the American creed, notwithstanding the fact that the moral commitments which lead to the clash are not religiously grounded. Despite the absence of such religious grounding, the character of the clash in this case is similar to that experienced by the Quaker nominee because of the central role that individual conscience plays in both cases.

This rephrased question squarely raises the issue of whether any nominee committed to moral discourse, regardless of its grounding, is willing, as a condition of judicial office, to set aside the moral conclusions they might reach in moral conversation when those conclusions conflict with law. The hard case involves the possibility of engaging in civil disobedience. But the question also arises in cases of constitutional interpretation that are directed at the most general terms such as "due process," "equal protection" and those unspecified rights which are ostensibly protected by the ninth amendment. As Professor Levinson points out in Constitutional Faith, the model of decisionmaking to be chosen in approaching the text of the Constitution
is not easily determined by the text itself.\textsuperscript{42} "[W]hatever model . . . we use . . . will require us to link law and morality together in ways seemingly denied by the most artless reading of legal positivism."\textsuperscript{43}

The operation of the question, when posed to a secular moralist who is morally serious, illustrates that it may not be too much to claim that what lies under the senators’ questions to the Catholic Justices is an effort to secure a nominee’s operational commitment to an “artless reading of legal positivism”\textsuperscript{44} which insists on the absolute separation of law from morality in the context of adjudication when there is a direct clash between a law and a moral position. While one might argue, in the style of the formalist approach identified with the nineteenth century,\textsuperscript{45} that when there is a clear clash between law and morality a judge must apply law, this does not solve the problem of identifying whether one indeed has a case that presents such a clear clash. Even when such a clear clash is presented, there is, among other things, the additional problem of enforcing the law to secure unjust results which, in turn, erodes the consensual basis upon which conscientious obedience to law and thus of law itself is based.\textsuperscript{46}

Whether the senators questioning Justices Brennan, Scalia and Kennedy were committed to an “artless legal positivism” as the core content of the American creed is open to doubt. Indeed without an explicit adoption of such a position by the senators, I am reluctant to ascribe it to them. It is also open to debate whether the constitutional text requires the senators to take such a position. It is clear that the text itself does not prevent taking this position. The important point, however, is that the operational effect of the senators’ questions pushes the judicial nominees toward such a position by seeming to require the strict separation of personal moral views along with religious views from legal interpretation in the case of a clash with law. How such an “artless legal positivism” might function in a judge’s views \textit{qua} judge is difficult to demonstrate. One example, however, is Justice Fortas’s published comments on the civil unrest of the 1950’s and 1960’s. Writing on the limits of dissent in American society while he was serving on the United States Supreme Court at the height of civil unrest and public protest over the Vietnam War, he said:

\begin{itemize}
\item \textsuperscript{42} \textit{Id.} at 54-89. Indeed our history has yielded a variety of styles of interpretation that emerge and pass with time only to re-emerge in the light of another day according to the felt necessities of the time as illustrated in P. Bobbitt, \textit{Constitutional Fate: Theory of the Constitution.} (1982).
\item \textsuperscript{43} S. Levinson, \textit{supra} note 6, at 87.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} For a description of this view, which dominated American legal history from the Civil War to World War I, see, \textit{e.g.}, K. Llewellyn, \textit{The Common Law Tradition: Deciding Appeals} 38-41 (1960).
\item \textsuperscript{46} For a discussion of conscientiousness as a central criterion in both obedience and disobedience to law see, \textit{e.g.}, M. Sibley, \textit{The Obligation to Disobey: Conscience & the Law} (1970).
\end{itemize}
In my judgment civil disobedience—the deliberate violation of law—is never justified in our nation where the law being violated is not itself the focus or target of the protest. So long as our governments obey the mandate of the Constitution and assure facilities and protection for the powerful expression of individual and mass dissent, the disobedience of laws which are not themselves the target of the protest—the violation of law merely as a technique of demonstration—constitutes an act of rebellion, not merely of dissent.

Civil disobedience is violation of law. Any violation of law must be punished, whatever its purpose, as the theory of civil disobedience recognizes. But law violation directed not to the laws or practices that are the subject of dissent, but to unrelated laws which are disobeyed merely to dramatize dissent, may be morally as well as politically unacceptable.

Notice the superior position which the Constitution occupies in Fortas’s argument about the permissibility of disobeying laws which are not the focus of the moral criticism behind the disobedience. Here the Constitution serves to justify both a civil moral judgment as well as a political judgment on the acceptability of certain forms of civil disobedience. The moral judgment that Fortas is speaking about, however, is a civil moral judgment presumably valid under the Constitution, not a personal moral commitment that may be at odds with the Constitution. Thus, presumably, civil disobedience of a state or federal law that turns out to be unconstitutional is morally and politically permissible. A law which is not itself the subject of moral criticism, say a trespass law, but which is violated as a “technique” of protest for a cause deemed to be just, is clearly, for Fortas, neither morally nor politically defensible given the protection of political speech under the Constitution. In such a case, Fortas would subordinate personal moral commitments to the superior obligation of obedience to laws that conform to the Constitution. Thus, the only source of “moral authority” which Fortas seems willing to consider consulting as a judge is that which conforms to the civil morality presumably embodied in the Constitution. This reveals that Fortas’s assertion that the Constitution may serve as a “moral” basis for disobeying a state law, rests on a civil morality identified with the Constitution, not on other personal moral commitments grounded in a source outside the Constitution.

To require, as a condition for judicial office, that moral seriousness which might differ from a vague and diffuse civil morality, be wholly or partially divorced and separated from any discussion of legal obligation, or argument in litigation and adjudication, is incomprehensible given the nature of the kinds of decisionmaking required in constitutional cases. To claim that such separation can be effected is to claim a more determinate character for both the text of the Constitution and the interpretation of it than our history will support. If truth be told, there is an operational intersection of adjudication

47. A. Fortas, Concerning Dissent and Civil Disobedience 63 (1968). For a vigorous critique of Fortas’ views see the direct response by the historian Howard Zinn. H. Zinn, Disobedience and Democracy: Nine Fallacies on Law and Order (1968).

48. See, e.g., P. Bobbitt, supra note 42 (describing the range of interpretative styles which have marked the history of constitutional decisionmaking as well as arguing that theoretical scholarship can not adjudicate finally between the range of styles found in that history).
and moral discourse which contradicts the apparent "artless legal positivism" I find lurking behind the questions posed to the judicial nominees in a Catholic context. Our exploration of these questions in the context of a secular moralist nominee demonstrates this clearly. When pushed to their underlying premises on law and morality, the questions posed to the Catholic nominees demonstrate that individual views on the relation of morality to law as well as religious faith is privatized by the American creed. One can make the argument that only religious faith, as opposed to moral seriousness, is so privatized by what went on in these confirmation proceedings. Yet, without a clear statement by the senators on how morality may be interactively related to law in a way that does not always require subordination of morality to law, the conclusion we are led to is that moral seriousness, at best, is also privatized in these proceedings.

VI. HOPE AND CAUTION IN CONVERSATION ABOUT THE QUESTION

[Is this tale hopeful or cautionary . . . for whom of us is it the one, for whom, the other?]

In my brief comments on Sanford Levinson's essay, I have argued that his exploration of the confrontation of religious faith with the American civil religion in the Catholic context reveals that more than religious faith is privatized, subordinated, or split off at best, as an operational requirement of constitutional "faith." The experience of the Catholic Justices and our hypothetical Quaker and secular moralist nominees demonstrates that any recourse to moral judgement, whatever its grounding or institutional character, unless it conforms to the underlying presuppositions about the relation of law to morality in the American creed as they may from time to time be understood by senators and judges, is prohibited in the course of the judicial function. Thus personal commitments regarding the existence and accessibility to humans of principles of moral truth, are subject to subordination in judicial confirmation proceedings because of the power of the constitutionally mandated judicial oath to "support" the Constitution. The American creed, as applied by the senators in the confirmation hearing of the Catholic Justices, denies the possibility of engaging in moral discourse when performing the interpretative task of adjudication, testing the obligation for obedience to specific laws, or examining the legitimacy of an entire legal-political order.

Perhaps such a conclusion is a bit too extreme. Indeed Professor Levinson's comments on Kent Greenawalt's Religious Convictions and Political Choice suggest that it is the religious character of the ground of a judge's moral views that is the problem. The popular view that "judges ought not rely on their personal moral views" in adjudication, however, compels us to take

49. Levinson, supra note 3, at 1081.
50. Id. at 1061 n.41 (citing K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 5 (1988).
seriously that the moral character of a judge's view on the relation of law to morality is at least as problematic as its religious grounding. Beyond that, we might consult history to moderate the conclusion I have set out here. No doubt the framers would be appalled at the suggestion that discourse in the public square was to be purged of moral discourse. Their concerns over the emergence of dominance by one institutional religious authority over another led in part to the establishment of religious liberty. The particular way in which such liberty came to be established has not been helpful to maintaining the moral content of public discourse. Thomas Jefferson and James Madison sought to insulate and protect the public square of political discourse from the emergence of a dominant religious institutional authority, as well as to keep it free of religiously engendered bloodshed. Roger Williams' determination to insulate, protect, and thus preserve religious faith from governmental tampering, led him to adopt a commitment to religious tolerance and liberty. From the perspective of 200 years we can see that the chief architects of American religious liberty took positions which contributed to the contemporary phenomenon of the privatization of religious commitments, and ultimately to the privatization of moral judgments. This renders public moral discourse problematic in our day.

Let us attempt a more modest conclusion: no determinate constitutionally-grounded answer is available to the question of the relation of law to morality when it comes to the issue of whether a law is to be obeyed or not, or how the interpretative task of adjudication is to be performed. Thus, the best we can hope for is an operational definition that law does not exhaust or defeat the claims of moral judgment. Such a view of the relation of law and morality can command our best efforts to secure our aspirations under the Constitution for justice more widely shared. Such a view of the relation of law and morality will likely change with time in the same way that interpretive styles have changed, but that need not prevent us from the journey toward justice in conversation with each other along the way.

For many this will not be enough on which to ground a hope for justice under the Constitution. But hope by definition is best based on fragile yearnings that recognize the possibility for idolatry at every turn of our efforts to ground more fully such hope through our limited human understanding. Thus hope with caution is our best guard against the idolatry that comes from a more confident 'faith' in law as the embodiment of sovereign reason. A commitment to moral seriousness, whatever its grounding, along with cautionary doubt, is needed if our constitutional 'faith' is not to

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52. The indeterminacy to be found within the creative function of adjudication is reflected in the indeterminacy of an answer to the question: What is the proper relation of law and morality under the Constitution?
become an idol enforced by a creed which recognizes will alone as the basis for law and legal obligation.

What lies behind my exploration of the question posed to Catholic Justices is the painful recognition that there is no answer to the objectivist foundationalist quest in law, religion or morals. Here we must confess the elements of truth in the moral skeptic's stance toward the question we have examined. But is it the final answer? Where might one turn to secure the "faith" that one can find hope in a serious commitment to the conversation that animates Professor Levinson's exploration of these issues? (A stoical resolve in the face of the tragedy of law's role in the systemic exploitation of exclusion based on gender, race and economic class is hardly sufficient to quell our fears.)

And so the vision of justice goads us on to find another answer. Instead of seeking another answer, however, frustration in our quest tells me it would be far better for us to turn our efforts to addressing a different question altogether. Just as the altars of a dead religion hold no attraction for liturgical practice, so the quest for neutral objective (eternal?) principles need not deter us any longer. What if we were to ask instead a question grounded in the deep thicket of our lived experience here on this blue-green globe bathed red by tooth and claw? Here, on earth, where death as well as life are encountered together and at once, our quest for a vision of law linked to justice suggests that we look deep within that experience, with an openness to this intractable mystery. Just there we may encounter an even deeper and more inscrutable mystery from which our yearning for justice seems in some way to emanate. In this stance of openness to mystery we may yet more seriously find hope in the value of conversation about law and justice. Such hope, "ungrounded" in encounter with mystery, neither demands nor depends on finding a final solution of neutral objective principles, fully determinate and everywhere applicable. The rub here, of course, is that something akin to religious faith may be required. And while that may repel many, to turn away from mystery can only send us back to the cold altars of a commitment to the sovereign Rule of Law which has failed to satisfy our yearnings for justice in the past. Thus to faith I tentatively turn for an answer.

Faith does not solve the objectivist foundationalist quest, it simply points to another way, guided by the question posed by deepest mystery. Faith is chiefly marked by trust entered into with eyes wide open. It is not the intellectual assent we call belief. It does not abandon reason, but rather welcomes it as an important guide in identifying idols along the way as well as those we carry in ourselves. Instead of confidence, faith seeks repose. It

53. Professor Levinson "confesses" such a "faith" in conversation in general and in constitutional conversation in particular in S. Levinson, supra note 6.
54. See Leff, Unspakable Ethics, Unnatural Law, 1979 Duke L.J. 1229.
is not confident, in the style of confident empirical materialist reason. It is at peace in the journey of peace toward peace. Its journey and its quest are the adventure of becoming open to mystery in a way that permits everything to be understood, while not yet comprehended. Faith may lead one to speak in descriptive terms—but only with great caution. Even here our powers of illusion and delusion dog us to the last and remind us to approach the mystery expectantly without designs for its capture, but rather with a willingness to be enveloped by mystery, just as we are if we only open our eyes to see its truth. In such experience we can be empowered, with willingness and humility, to join in conversation with the stranger encountered along the way in the hope that we might yet be friends—on the journey.

VII. EPILOGUE: CAN WE TALK ABOUT THESE THINGS?

The closing paragraphs of the previous section no doubt will be unsettling to many. For some they will smack of mystical mumblings that cannot provide the basis for testing the qualifications of our judges nor provide principles for adjudication of the cases that come before them. More precisely, they seem to employ the methods of negative theology in the task of legal scholarship, an outrage not to be countenanced by those who worship confidently at the altar of sovereign human reason alone. I cannot claim finality for these thoughts, lest I fall into the idolatry that leads to Professor Levinson’s cautionary note quoted above. I do claim that these thoughts demonstrate the “theological” character of legal scholarship. If a discussion of the judicial oath of office, as a creedal requirement of the American civil religion that gives the Constitution a central position in that “religion” makes any sense at all, then issues of legal scholarship are no more resolvable than controversies in systematic theology. At just this point negative theology

56. “Negative theology” refers to the work of those mystical writers and theologians, who stand in the negative (apophatic) stream of theology often associated with pseudo-Dionysius of the seventh Century. These writers, as compared to those in the positive (cataphatic) stream, emphasize the incomprehensible nature of God talk, and thus of theological language in general. Positive theology deals with the description of the attributes of the transcendent and works with images, metaphor and symbols. It seeks to move toward greater theological insight into the One who is transcendent. Negative theology holds that both theological insight and the One are hidden. Thus it holds that theology cannot ultimately reach full knowledge of the One. The issue that is faced by both of these streams of theology is this: If God is the unknowable One, how does one then make the move to God? This is a theological problem that at its core includes a deep epistemological dimension. How can one work-theologically in a way that transcends theology as it must be transcended if the One is to be approached? This is the problem that Dionysius engaged. Dionysius emphasizes the ultimate inadequacy of positive theology but that does not necessarily negate the value of nor need for engaging in it since images, metaphors and symbols are needed if these things are to be spoken of at all. For a helpful discussion of Dionysius see Sheldon-Williams, The pseudo-Dionysius, in THE CAMBRIDGE HISTORY OF LATER GREEK AND EARLY MEDIEVAL PHILOSOPHY 457 (A. Armstrong ed. 1967).

57. Professor Levinson develops his own stand against idolatry in constitutional conversation, in S. Levinson, supra note 6, at 87-89.
serves as a helpful reminder that idolatry of the products of our construction fails to recognize that they are always contingent. Our constructs never fully describe the mystery that motivates our actions. Whether that motivating force be named God or justice is no matter, our premises, and thus our legal scholarship, are more closely akin to the creative character of theological scholarship than they are to the methods of science. 58 And thus the theological turn in my remarks raises the deepest question of all: On matters such as these can we talk at all?

58. A similar point is made in Mensch & Freeman, A Republican Agenda for Hobbesian America? 41 FLA. L. REV. 581, 622 (1989) ("Today even legal scholars are recognizing that there are some specific issues we cannot address without resort to religious discourse"). See also J. Vining, THE AUTHORITATIVE AND THE AUTHORITARIAN 187-201 (1986) (considering the similarity of theological method and legal method).