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Cover Page Footnote

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**SOME THOUGHTS ON SANFORD LEVINSON'S
"DIVIDED LOYALTIES: THE PROBLEM OF 'DUAL
SOVEREIGNTY' AND CONSTITUTIONAL FAITH"**

*David Novak**

According to my reading of his stimulating paper, "Divided Loyalties: The Problem of 'Dual Sovereignty' and Constitutional Faith," Professor Sanford Levinson is dealing with two different kinds of "divided loyalties." The first divided loyalty he deals with is when the positive law sanctioned by the constitution of a polity, such as that of the United States, is in conflict with more universally existent (or more universally conceived) justice. The second divided loyalty he deals with is when religious norms specifically conflict with the norms of a secular state. These two kinds of divided loyalties could be seen as involving two essentially different philosophical conflicts; but they could also be seen as involving the same essential conflict, namely, the conflict between loyalty to God-made law and loyalty to human-made law.

This second option, though, would require taking the category God-made law to have two related subsets. The first subset would be God-made law (what Professor Levinson calls "religious norms"), which surely means norms of a particular religious tradition, like Judaism, which is *revealed* to certain people: the Jews, on a certain occasion (shortly after the exodus from Egypt), at a certain place (Mount Sinai), written down in a certain book (the Torah), then transmitted and developed by a certain tradition (what Jews call *masoret*). The second subset would be God-made law that is generally revealed to every rational human being through practical or moral reason, and which applies to everybody, everywhere. That is what the Talmud calls laws that, had they not been revealed, humans by

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virtue of reason would have been able to discern anyway.¹

Religious norms could be related to these more general norms in one of two ways. First, the especially religious norms could be taken to be further specifications of the more general norms. Second, these more particular laws could be taken to presuppose an acceptance of universal justice already in the world that makes the acceptance of the more particular revealed laws an intelligent choice and not just a blind leap of faith. Here, universal justice functions as a criterion that determines not what the special laws can command, but rather what they ought not command (*conditio sine qua non*). As the American-Israeli Yeshivah Dean, Rabbi Aharon Lichtenstein, put it so well in an oft cited essay: “[N]atural morality establishes a standard below which the demands of revelation could not possibly fall.”²

Now it seems that Professor Levinson sees justice and religious norms *not* to be in the same category. For he quotes with approval Justice Johnson’s metaphysically charged statement in *Fletcher v. Peck*,³ which speaks of “a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”⁴ Actually, it could be shown that Justice Johnson’s view of universal standards of justice, whether he knew it or not, followed Stoic and Grotian notions of universal justice—called by some “natural law”—much more than it followed more biblically based Judeo-Christian notions of universal justice which teach, conversely, that even such an exalted creation as universal justice is nonetheless a creation of God and, therefore, like any other creature it has no right to “impose” anything on its Creator.⁵ Regardless, the universal justice recognized by Professor Levinson is something even God is subject to, not something God has made. So, in response to what Professor Levinson seems to think, I will concentrate on the conflict he sees between universal standards of justice and positive religious law prescribed by religious authority (who is always God immediately or ultimately). But I will not deal with the conflict he also sees between

¹ See *The Babylonian Talmud: Yoma, Talmud - Mas. Yoma 67b* (discussing commandments that “should by right have been written”).

² Aharon Lichtenstein, *Does Jewish Tradition Recognize An Ethic Independent of Halakha?*, in *MODERN JEWISH ETHICS: THEORY AND PRACTICE* 62, 65 (Marvin Fox ed., 1975).

³ 10 U.S. (6 Cranch) 87, 143 (1810).

⁴ *Id.* at 143 (Johnson, J., concurring).

⁵ See David Novak, *Law: Religious or Secular?*, 86 VA. L. REV. 569, 578-82 (2000) (discussing the concept of human involvement in the creation of a divine law).

explicitly religious law and secular law. As such, it would seem that what Professor Levinson calls "over-venerat[ion]" of the constitution of a nation-state like that of the United States is similar to what could be, *mutatis mutandis*, "over-venerat[ion]" of a body of religious law, even the Torah.⁶ Moreover, it would seem that such "over-venerat[ion]" of *either* body of positive law, secular or religious, be it the Torah or the United States Constitution, can only be corrected by engaging in what Professor Levinson calls "serious criticism of what might be termed the *givens* of a particular constitution—or aspects of a religious tradition—depending on the degree to which we venerate it."⁷

Certainly, such "serious criticism" must be based on some objective criterion lest it become a kind of negative carping, coming from nowhere so to speak, and which too often becomes explicit nihilism. Indeed, though he only regards it to be "a contingent possibility,"⁸ Professor Levinson still says "[o]ne might hope that law will be congruent with justice or morality,"⁹ and, accordingly, he quotes with apparent disapproval the famous words of Chief Justice Taney in the *Dred Scott v. Sandford*¹⁰ decision: "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws."¹¹ Yet, a judge does pass judgment or should pass judgment on how *just* the law is in any particular case—and that judgment does, or should, strongly influence how broadly or narrowly that judge actually applies the law to the case at hand. In fact, if a judge has a problem with the morality of a certain law that seems to be pertinent to the case at hand, sometimes by means of qualification he or she might effectively avoid applying the law to the case at hand altogether.¹² And, even though a judge in any system of positive law cannot *deduce* a decision of positive law from a transcendent criterion of universal justice, he or she can still subtly employ such a criterion to

⁶ See Sanford Levinson, *Divided Loyalties: The Problem of "Dual Sovereignty" and Constitutional Faith*, 29 *TOURO L. REV.* 241, 242 (2013) (noting the reverence typically given to the United States Constitution).

⁷ *Id.*

⁸ *Id.* at 248.

⁹ *Id.*

¹⁰ 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹¹ *Dred Scott*, 60 U.S. at 405.

¹² See, e.g., *Babylonian Talmud: Tractate Sotah, Folio 47a*; *Babylonian Talmud: Sanhedrin, Folio 71a*; *Talmud- Mas. Makkoth 7a* (exemplifying such legal avoidance).

inform and guide his or her decision in the case at hand.

Again agreeing with Justice Johnson against Chief Justice Taney, Professor Levinson approvingly notes that “the metric by which we judge the Constitution . . . must come from *outside* the Constitution itself.”¹³ The challenge is to employ that metric without performing what Kantians call a “transcendental deduction.”¹⁴ For no system of positive law, whether religious or secular, is going to allow itself to be subordinate to some other system of law, so that it functions as a secondary specification of that higher law. Similarly, think of how sovereign nation-states often refuse to subordinate themselves to the jurisdiction of international bodies like the United Nations or the World Court. Moreover, religious positive law can claim a more cogent ultimacy for itself (at least in the eyes of its adherents) of being the direct revelation of God. As such, it does not claim to be *a* higher law; instead, it claims to be *the highest law*, for which all of God’s creation—including natural justice—are preconditions (but not grounds) for its functioning in the world God has created. Secular positive law, conversely, cannot claim such ultimacy without becoming a substitute theology, something that the infamous German jurist, Carl Schmitt¹⁵—mentioned by Professor Levinson—recognized and approved of. In consideration of Schmitt, think of Nazi jurisprudence with its subordination to the pseudo-theology of Hitler, which Schmitt supported.¹⁶

Positive law only recognizes that its citizens do have ultimate commitments to some higher law and authority, while both avoiding any official endorsement of the higher law (as in the “disestablishment” clause of the First Amendment of the United States Bill of Rights) and avoiding any interference with its subjects paying their ultimate allegiance to the higher law (the Free Exercise Clause of that

¹³ Levinson, *supra* note 6, at 250.

¹⁴ Curtis Brown, *Kant: The Transcendental Deduction*, TRINITY U., <http://www.trinity.edu/cbrown/modern/kant-deduction.html> (last updated Apr. 20, 2009) (defining “transcendental deduction”).

¹⁵ Mary L. Dudziak, *Conference: The Challenge of Carl Schmitt: Human Rights, Humanitarianism, and International Law*, LEGAL HIST. BLOG (June 5, 2009), <http://legalhistoryblog.blogspot.com/2009/06/conference-challenge-of-carl-schmitt.html> (“The German jurist Carl Schmitt . . . has earned the reputation of being one of the most notorious and influential political thinkers of the twentieth century. After rising to prominence during the 1920s, he served as a close adviser to conservative nationalist politicians during the end phase of the Weimar Republic, and afterwards played a prominent role in legitimating the early legal regime of Nazi Germany.”).

¹⁶ *See id.* (summarizing Schmitt’s career and impact on society).

First Amendment). Indeed, when positive law oversteps its bounds and claims metaphysical ultimacy for itself, it usually results in some kind of tyranny or totalitarianism.¹⁷ In fact, it can be argued that recognition of a higher law by citizens of a democratic state prevents that state from attempting to do what is done better elsewhere. Accordingly, consider Mordecai's words to Esther that "relief and deliverance will come to the Jews from a different direction,"¹⁸ which is the only oblique reference to God in the otherwise very secular book of Esther. When that is not done elsewhere, the spiritual vacuum may be filled with pseudo-political theologies, which are both bad politics and bad theology. Yet that does not mean religious people can expect a secular regime to look to their religious law for its own authorization. Only religious people themselves need to find how *their* own religious law authorizes *them* to accept secular law in good faith when they deal with their fellow citizens of a secular civil society.

Getting back to the question of a serious critique of any system of positive law, faithful law-abiding ("*halakhic*") Jews need to ask: (1) How can such critical thinking be done in a way that respects both the ultimacy of the Torah and the validity of universal justice? (2) How can that be done in a way that does not leave these two commitments at the level of an antinomy of *either/or*, but rather takes them both together to be functioning in tandem in a rationally evident and persuasive correlation?

This correlation between universal justice and Jewish law, where neither the validity of the former nor the ultimacy of the latter is sacrificed, was an example Professor Levinson cited in his paper. Let us look at that example, and, if I may be so bold, I shall argue for a different reading of that example than what seems to be Professor Levinson's reading of it. Unlike his reading, I do not take it to be an example of a conflict between two types of positive law: secular and religious. Instead, I take it to be an example where Jewish law can recognize the validity of a universal criterion of justice and then employ it to explain what seems to be an anomaly in Jewish law. Recognizing the validity of this universal criterion of justice independent of its employment by Jewish thinkers may explain an apparent

¹⁷ *See id.* (discussing the influence of Schmitt's ideas as well as his involvement and support of Nazi Germany).

¹⁸ *Esther* 4:14.

anomaly in our positive law, namely, the law we believe God has *posited* or made for us.¹⁹

Professor Levinson stated: “Within Judaism, perhaps one cites the principle *dina de-malkhuta dina*—the law of the land is binding, even if, arguably it violates religious norms”²⁰ He also spoke of “tension between the sovereignty claimed by the state and that perceived to be commanded by God.”²¹ “Commanded by God” no doubt is what is meant by “religious norms,” namely, norms that the members of a *particular* traditional religious community claim God, *their sovereign*, has commanded *them* to observe within *their own* domain, and these norms have been commanded (as what Jews call *mitzvot*) by God by a very particular revelation in *their* sacred history.²² Then he concluded: “God may be sovereign, but, apparently, the sovereignty is shared with earthly political authorities”²³ Instead, it is really a political compromise with religious law that would like to have sole authority in its own domain. However, religious law cannot be the sole authority because it functions within a larger secular polity, and the secular law of “earthly political authorities who are in no way willing to recognize a Divine competitor.”²⁴

Like any such political compromise, though, neither side could be happy with it in principle. From the religious side, the compromise is probably accepted because some sovereignty is better than no sovereignty, which would likely happen if the religious community were to refuse to accept any secular authority in its civil interactions. From the secular side, the compromise that leaves the religious community some sovereignty in its own domain, even pertaining to some civil interactions, is probably accepted because the secular authorities want the good will and cooperation of the members of the religious community. However, good will and cooperation would not be achieved if the religious community is denied any legal autonomy. Hence, recognition of *some* of their legal sovereignty is an ephemeral

¹⁹ See *Mitzvot*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/Judaism/mitzvot.html> (last visited Feb. 17, 2013) (noting that it was God who gave the commandments of the Jewish religion).

²⁰ Levinson, *supra* note 6, at 252-53.

²¹ *Id.* at 252.

²² See *Mitzvot*, *supra* note 19 (describing *mitzvot*).

²³ Levinson, *supra* note 6, at 253. Thus Professor Levinson implied—and he may be correct on historical grounds—that this principle is not really “principled” at all.

²⁴ *Id.* Here, Professor Levinson seems to have in mind a historical analogue to the “church-state” conflicts so prevalent in American jurisprudence—especially in recent times.

concession, one that any serious change of political circumstances could easily overturn. Nevertheless, that is not how some important post-Talmudic Jewish interpreters saw the *principle* of *dina de-malkhuta dina*.²⁵ Indeed, not being a matter of compromise in their eyes, but being a matter of principle, they employed a deeper philosophical principle to ground the legal principle of *dina de-malkhuta dina*.²⁶ As we shall presently see, that principle is one of universal justice. That principled correlation is much more than a merely pragmatic compromise.

The principle, *dina de-malkhuta dina*—best translated as “the law of the kingdom is law”—is invoked four times in the Babylonian Talmud.²⁷ In its original citation, this principle is invoked to justify how Jews living under Jewish civil law in Babylonia (where the Jewish community seems to have had some independent legal jurisdiction) could accept certain real estate transactions conducted according to Babylonian law to be as valid as if they had been conducted according to Jewish law.²⁸ Nevertheless, the legal principle in this context is simply presented without justification, with no basis given for it whether from Scripture, oral tradition, or Rabbinic teleology of the law (that is, from some Rabbinic speculation about the ends or reasons of the law itself). However, in what seems to be a later citation, the principle is used to explain why Jews are justified in using non-Jewish courts for civil matters.²⁹ That in itself is interesting inasmuch as another Talmudic text expressly forbids Jews to use non-Jewish courts for any matter whatsoever.³⁰ The apparent contradiction can only be resolved when it is clear that the Rabbis thought the legal system of Babylonia, a polity in which Jews enjoyed considerable individual and communal rights, to be morally respectable. In contrast, the legal system of imperial Roman rule in Palestine, where Jews were subject to an occupying foreign power under whom they

²⁵ See *Dina De-Malkhuta Dina*, JEWISH VIRTUAL LIBR. http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0005_0_05228.html (last visited Feb. 17, 2013) (defining *dina de-malkhuta dina* as “the halakhic rule that the law of the country is binding, and, in certain cases, is to be preferred to Jewish law”).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Babylonian Talmud: Tractate Baba Bathra, Folio 54b; Babylonian Talmud: Tractate Baba Bathra, Folio 55a.*

²⁹ *Folio 55a, supra note 28; Babylonian Talmud: Tractate Gittin, Folio 10b.*

³⁰ *Babylonian Talmud: Tractate Gittin, Folio 88b; MAIMONIDES: MISHNEH TORAH 202 (Rabbi Eliyahu Touger trans., 2001).*

had few rights if any, whether individual or communal, was really no legal system at all, but an arbitrarily—often brutally—administered territorial conquest. Roman Palestine was not governed by either form of official Roman law, neither by *ius civile* nor by *ius gentium*, but rather by ad hoc administrative decrees.³¹

But what made Babylonian law morally respectable for Jews? (1) Was it only because Jews had a better political position in the Babylonian state? (2) Or, was it because Babylonian law was a coherent system and not just a bunch of ad hoc, often inconsistent, rulings? (3) Or, was it because of something more universal to which Babylonian law seemed to adhere (and to which other systems of law Jews would encounter might also adhere)?

The first option could easily be accepted as a kind of *realpolitik* explanation of the acceptance of the principle of *dina de-malkhuta dina*, which is enhanced by our modern knowledge of the differences between the political situation of the Jews in Roman Palestine and their political situation in Sassanian Babylonia. However, that option has no philosophical or jurisprudential significance whereas the second option does have jurisprudential significance inasmuch as it is based on more than *realpolitik*. Nevertheless, even despotic regimes can have systematic bodies of law; so, systematicity is no guarantee that a legal system will be morally respectable. Thus, even the most systematic of modern theorists, Hans Kelsen, was able to justify the normative validity of any legal system whatsoever that seemed to be based on a fundamental, “immanent” law-making power, what he famously called a *Grundnorm*.³² But it is the third option that gives us reason to see a philosophically attractive grounding for the principle *dina de-malkhuta dina*. That is because it suggests that the principle can be justified by a prior universal standard.

We see this kind of justification in the explanation of this legal principle given by the great eleventh century Bible and Talmud commentator, Rashi (which is the acronym for “Rabbi Schlomo Yitzhaki”).³³ Rashi’s argument, written in virtual Rabbinic shorthand,

³¹ A. ARTHUR SCHILLER, *ROMAN LAW: MECHANISMS OF DEVELOPMENT* 538-39 (1978).

³² David Novak, *Haunted by the Ghost of Weimar: Leo Strauss Critique of Hans Kelsen*, in *THE WEIMAR MOMENT: LIBERALISM, POLITICAL THEOLOGY, AND LAW* 393, 397-400 (Leonard V. Kaplan & Rudy Koshar eds., 2012).

³³ See Dovid Landesman, *Commentaries on the Talmud*, MY JEWISH LEARNING, <http://www.myjewishlearning.com/texts/Rabbinics/Talmud/Gemara/Commentaries.shtml> (last visited Feb. 17, 2013); *Rashi (Rabbi Shlomo Yitzchaki)*, JEWISH VIRTUAL LIBR.,

can be paraphrased as follows: This principle does not apply to Jewish religious matters which have no analogue in non-Jewish systems of law, such as Jewish marriage and divorce.³⁴ But in civil matters, where Noahide (that is, all humankind who are descended from Noah and his sons)³⁵ criteria of justice are essentially similar to Jewish criteria of justice, this principle does apply. And why are these two criteria of justice essentially similar? It is because both Jews and gentiles, as rational human beings, accept the divine mandate that justice be done through the due process of law (what the Talmud calls *dinim*).³⁶ In other words, principled gentile societies accept the fact that their ultimate legitimacy comes from their acceptance of God's command, which in its Jewish manifestation states: "Justice, justice shall you pursue" (Deuteronomy 16:20, following Septuagint and Targumim); and which could be generalized as: "Let justice be done!"³⁷ And, since almost all disputes adjudicated by the courts are matters of "what Aristotle called 'rectifying justice,'" the universally mandated pursuit of justice corresponds to one of the most basic principles of Roman jurisprudence, namely, "give to everybody what he rightly deserves."³⁸ Further, as Maimonides put it, gentiles are expected to know this moral norm by "'rational inclination' (*mipnei hechreh hadaat*)" even outside of revelation.³⁹

As a Canadian citizen, I am proud to say that the preamble to our *Charter of Rights and Freedoms* states at the very beginning: "Whereas Canada is founded upon principles that recognize the su-

<http://www.jewishvirtuallibrary.org/jsource/biography/rashi.html> (last visited Feb. 17, 2013) (providing biographical information about Rashi).

³⁴ See Avraham Grossman, *Rashi*, JEWISH WOMEN'S ARCHIVE: A COMPREHENSIVE HIST. ENCYCLOPEDIA, <http://jwa.org/encyclopedia/article/rashi> (last visited Feb. 17, 2013) (discussing Rashi's views on "marriage as a covenantal act" as opposed to a legal one).

³⁵ *Genesis* 9:9.

³⁶ See Michael J. Broyde, *The Obligation of Jews to Seek Observance of Noahide Laws by Gentiles: A Theoretical Review*, JEWISH L. – ARTICLES, <http://www.jlaw.com/Articles/noach2.html#oblig-laws> (last visited Feb. 17, 2013) ("[T]here certainly is an obligation upon Noahides . . . to create a legal system designed to enforce Noahide law [and] Jews have an obligation to recognize and respect this system . . .").

³⁷ *Shof'tim: Deuteronomy 16:20*; see also Paul Finkelman, "Let Justice Be Done, Though the Heavens May Fall:" *The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 326 (1994) (exemplifying the general maxim of justice "let justice be done, though the heavens may fall").

³⁸ DAVID NOVAK, NATURAL LAW IN JUDAISM 41 n.51 (1998).

³⁹ *Symposium on David Novak's 'The Jewish Social Contract,'* 1 HEBRAIC POL. STUD. 593, 609, Fall 2006, <http://www.hpstudies.org/20/admin/pdfs/1488bf51-482d-4975-bbc6-d5c753ece6bd.pdf>.

premacY of God and the rule of law.”⁴⁰ Even though at times I disagree with certain Canadian legislative and judicial decisions on philosophical grounds, nonetheless, I can still affirm in good faith my loyalty to the Charter as I did when I became a citizen of Canada in 2001. In other words, the preamble to the Charter affords me a current way to actively affirm the Jewish principle of *dina de-malkhuta dina* for the theologically cogent reason that Rashi provided one thousand years ago.

Now that affirmation is because I take the preamble to the Charter literally. Accordingly, I think it is incorrect to read the two phrases “the supremacy of God” and “the rule of law” as two separate or disjunctive statements.⁴¹ For that enables secularists to easily interpret the phrase “rule of law” literally to mean the rule of the human-made law of Canadian legislators and judges, while “supremacy of God” can be quite easily explained away as figurative or anachronistic (that is, it is only a sop to a formerly more religious Canadian citizenry). Instead, I think it is more correct to take both phrases as phrases in apposition, namely, the supremacy of God functions when divinely created justice as the “rule of law” *per se* is the most basic metric by which positive law in Canada can be judged in theory and applied in practice. Yet that recognition is not an official endorsement of religion, since there is no such thing as “religion,” but only “religions.” And *religions* in the West—primarily, Judaism, Christianity, and Islam—are based on different revelations (albeit, at times, overlapping revelations).⁴² But the preamble to the Canadian Charter, like the United States Declaration of Independence’s mention of “Nature’s God” and “Creator,” does not refer to any particular *historical* revelation, as do Judaism, Christianity, and Islam.⁴³

In conclusion, then, I would say that responding to Professor Levinson’s stimulating paper has enabled me to better appreciate how

⁴⁰ THE CONST. ACT [Canada], 1982, Part 1: Canadian Charter of Rights and Freedoms, available at <http://www.canlii.org/en/ca/const/const1982.html#I> (last visited Feb. 17, 2013).

⁴¹ *Id.*

⁴² See JOHN CORRIGAN, FREDERICK MATHEWSON DENNY, CARLOS EIRE, MARTIN S. JAFFEE, *JEWS, CHRISTIANS, MUSLIMS: A COMPARATIVE INTRODUCTION TO MONOTHEISTIC RELIGIONS* 1-2 (2d ed. 2012), available at http://www.pearsonhighered.com/readinghour/religion/assets/Corrigan_0205018254_ch1.pdf (discussing the emphasis Western religion puts on traditions).

⁴³ Compare THE CONST. ACT [Canada], *supra* note 40, and *Declaration of Independence*, available at http://www.archives.gov/exhibits/charters/declaration_transcript.html (both referring to a “God” in the general sense), with *Exodus* 3:6, and Qur’an 41:11.

my being a faithful Jew and being a loyal Canadian citizen are consistent. Precisely, I can see how universal justice functions in and for Jewish law and Canadian law differently, yet not at cross purposes in the same world nor operating in two different worlds. However, were the theologico-political situation to change—God forbid!—and the Canadian people were to actually change the Charter to eliminate this explicit affirmation of God-made universal moral law, I would then have to consider whether or not I could still be a Canadian citizen in good Jewish faith.