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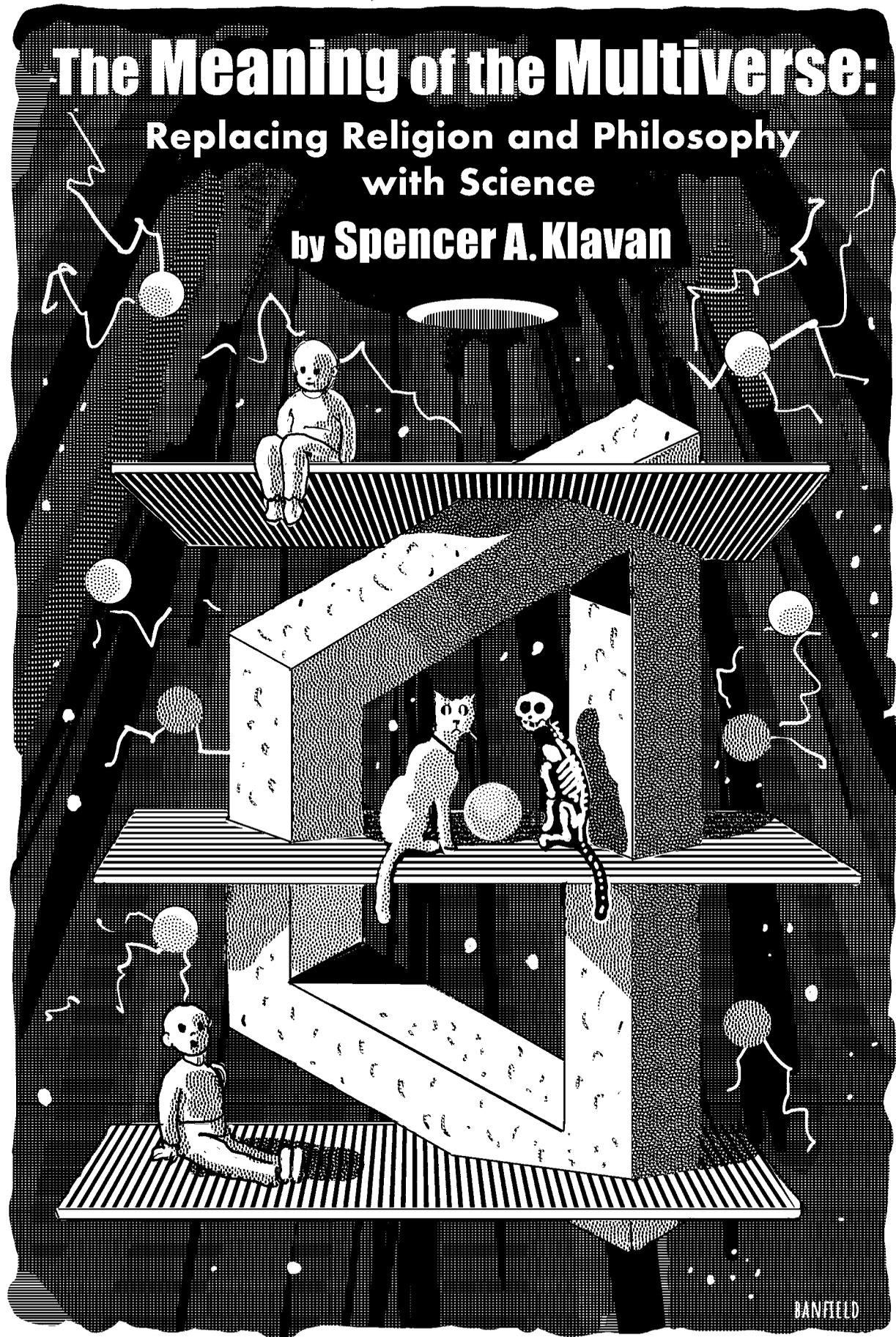
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GOODBYE TO ALL THAT

Against Constitutionalism, by Martin Loughlin.
Harvard University Press, 240 pages, \$39.95

AS PIERRE MANENT HAS OBSERVED, human rights law has become, for many people in Western countries, not merely a substitute for religion but a new religion in itself. Once one thinks about it, the point seems inescapable. Human rights adherents have their own sacred texts, their own mystic doctrines, and their own robed clergy—more often called “judges.”

Martin Loughlin, Professor of Public Law at the London School of Economics, is against all that. He sees it as a sham that empowers a small, educated elite against the rest of society. So I wanted to like this book. But in a mere 200 pages, Loughlin utterly crushed my initial sympathies for his effort.

There are two main problems. The first is that the book does not mount its arguments against constitutionalism in a clear, direct way. Instead, Loughlin offers a meandering survey of what various scholars—mostly contemporary legal scholars, sometimes social scientists, now and then classic writers—have said about this and that. It’s hard to follow what these various testimonies contribute to the case against constitutionalism, and Loughlin does not pause long enough to cross-examine their claims. The book reads less like an impassioned brief than the scattered comments of an opinionated professor in a graduate seminar.

From what he says, for example, I gather that Loughlin believes Carl Schmitt scored more points than Hans Kelsen in their famous 1931 debate on Germany’s Weimar constitution. But he does not notice that neither of them embraced classic doctrines of traditional constitutionalism. And he seems remarkably uninterested in Schmitt’s subsequent transition to “Crown Jurist of the Third Reich”—as if that ideological development were not relevant to a debate about “constitutionalism.”

The second problem with this book is related to the first. Loughlin never makes clear what post-constitutional democracy would look like or what costs or risks it might pose. He starts by insisting that traditional “institutional safeguards to limit government” are no longer relevant, since “we no longer live in a world of limited government.” He ends by protesting that “constitutionalization” of public authority “ends up legitimating a system that is no longer the project of a people and is no longer subject to popular control.” He seeks to establish, he says,

“a political worldview founded on equal liberty in solidarity,” because “constitutionalism...institutes a system of rule that is unlikely to carry popular support, without which only increasing authoritarianism and countervailing reaction will result.”

DOES THIS MEAN HE SYMPATHIZES with Donald Trump’s MAGA movement—or that he opposes it? Astonishingly, he does not say a word about Trump. I first thought that was because the book, while carrying a 2022 publication date, was actually completed years ago and delayed in production. But it has footnotes to very recent court cases (from Europe). Loughlin has nothing to say about the ongoing, embittered U.S. debate about the constitutional status of abortion, nor about same-sex marriage or any other particular social issue that our courts have weighed in on. He is not better on other countries. His very brief, cryptic mention of populist governments in Poland and Hungary only attributes them to popular discontent with systems of market capitalism, imported from the West.

Perhaps Loughlin’s silence implies that he doesn’t want readers to think about right-wing populism as a possible alternative. He seems to imagine that the alternative to constitutionalism is a left-wing democracy, in which everyone gets what they should have. He is for government “subject to popular control” but not interested in what institutions could secure that “control” or what different outcomes to expect from the true version of “popular control.”

So, in a brief discussion of India, he claims constitutionalism has established a system of legally protected rights that only apply in reality to a thin stratum of elites while the rest of society remains in impoverished villages, incapable of exercising meaningful rights of choice. He does not explain how abandoning India’s current framework of constitutional order would help those villagers. He does not say a word about how untrammelled “popular control” would affect relations between India’s Hindu majority and its large Muslim population and its many other minority communities.

Similarly, Loughlin scolds Israel for claiming to be “Jewish and democratic” but leaving “Palestinians” as outsiders under its 2018 Basic Law emphasizing the state’s Jewish heritage. He does not notice that this law was en-

acted by the Knesset majority in reaction to decisions of the Supreme Court of Israel that offended the Jewish majority—in other words, that it was a populist measure. He does not even have the grace to congratulate Israel’s Supreme Court for rejecting for rejecting a constitutional challenge to this law and letting the majority have its way.

LOUGHLIN IS CONCERNED ABOUT INSTITUTIONS—but only to criticize departures from what he takes to be democracy. Toward the end of his book, he sneers at the U.S. Constitution because the Senate gives equal representation to very large and very small states alike and the electoral college allows a candidate with a minority of the votes to become president. He can’t be bothered to discuss whether a system where coastal states dominated the rest of the country would actually be more harmonious or produce better policies. He doesn’t ask whether it might even serve the cause of “popular control” to preserve a system that still has broad support, rather than risk endless manipulations of the constitutional framework by transient majorities constantly maneuvering to entrench their sway in the name of “reform.”

Loughlin is quite right, of course, that “constitutionalism” is often deployed as a slogan, masking deep disagreements about what it does, or should, defend. He is right to raise questions about activist courts and what he calls “cosmopolitan constitutionalism,” as judges borrow “doctrines” from each other in a transnational consortium of the *bien-pensants*. But if he looked up now, he might notice that President Putin has unleashed terrible misery on the world by disdaining any semblance of constitutional constraint on his power—and a majority of Russians may still support his brutal ventures in the name of ethnic “solidarity.”

With all its difficulties, constitutionalism stands for boundaries—above all, a boundary between what may be popular at any one moment and a considered judgment about what is lawful. This seems a particularly bad time to rally “against constitutionalism.”

Jeremy Rabkin is a professor at George Mason University’s Antonin Scalia School of Law. His most recent book (with John Yoo) is Striking Power: How Cyber, Robots, and Space Weapons Change the Rules for War (Encounter Books).

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