

Seeking ‘Common Ground’: A Secular Statement

by BRUCE LEDEWITZ*

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

– *Lee v. Weisman*¹

Introduction

The above quotation comes from Justice Anthony Kennedy’s majority opinion in *Lee v. Weisman*,² the decision that prohibited prayer at public high school graduations.³ In context, Justice Kennedy was considering the constitutionality of “nonsectarian prayer,”⁴ which he apparently defined as prayer that expresses a conviction supporting morality⁵ that transcends human invention. His

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1. *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

2. *Id.*

3. Although *Lee* is widely treated as deciding the issue of prayer at public high school graduations, and although there is language to that effect in the opinion, the facts in *Lee* involved a middle school graduation. *Id.* at 580.

4. *Id.* at 589 (“We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint.”).

5. The distinction between ethics and morality, whether one is the systematic study of the other, is not germane to this paper. Justice Kennedy implied a distinction between them in the quotation above by using two terms, but any distinction he was thinking of did

conclusion was that while government may not suppress such prayer, neither may government itself undertake it, through, in this case, inviting clergy to a graduation ceremony and assisting in the creation of the prayer through guidelines given to the speaker.⁶

My purpose in this paper is to concentrate on Justice Kennedy's reference to morality that transcends human invention in order to clarify just what the Establishment Clause prohibits. The question is, does the Establishment Clause prohibit a government proclamation that there exists an objective morality that transcends human invention?

Of course, Justice Kennedy's opinion in *Lee* was influenced by matters other than the issue of morality, such as the concept of God, the meaning of prayer and the threat of coercion. I will take up each of those in turn. But I will concentrate on morality transcending human invention, which, simply for convenience, I will also refer to as objective morality. I don't intend by this change in terminology to put any rabbits in any hats. The idea has many names. In an upcoming book, I refer to the higher law tradition.⁷ By the term "objective," I just mean transcending human invention.

We should first notice that Justice Kennedy was assuming in this quotation that the nonsectarian prayer in the case had something to do with objective morality. Since both prayers at issue were addressed to God and asked for God's blessing, this is by no means obvious.⁸ Justice Kennedy could have addressed the prayers as

not turn out to matter in the opinion. I am using the term morality here in the conventional sense of norms by which we ought to live.

6. *Lee*, 505 U.S. at 589 ("But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.").

7. BRUCE LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM (forthcoming 2011).

8. Rabbi Leslie Gutterman's Invocation and Benediction were as follows:

INVOCATION

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

assertions about the existence of God, rather than as saying anything about morality as such. The case could have been decided on the basis of God-language.

Second, and crucially for my purposes, Justice Kennedy treated objective morality as an open question. *If* there is objective morality, then a sense of community might be fostered. When I first read this quotation years ago, I remember being shocked that a Supreme Court Justice would so readily treat objective morality as a question. I assumed that for most people, the existence of objective morality is taken for granted.

I think Justice Kennedy treated objective morality as a question because he was assuming that morality that transcends human invention is a religious formulation; indeed in context, the acceptance of such morality is a project that our religions, specifically Judaism and Christianity, are engaged in fostering. That is why Justice Kennedy referred to “prayers which aspire to these ends,” that is, prayer that seeks to promote objective morality, rather than simply prayer that “expresses” such morality. That is why he referred to the “conviction” that there is such morality as something that our faiths share. Apparently, for Justice Kennedy, objective morality is something that religion allows us to believe in, but which remains a mere aspiration.

From the perspective of the Establishment Clause, if the assertion that objective morality exists—is real—is a uniquely religious assertion, then its promotion by government might well be barred by the Constitution. On the other hand, if a commitment to

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

BENEDICTION

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN.

Lee, 505 U.S. at 581–82.

objective morality is something that both believers and nonbelievers share, or at least in principle could share, then it is not clear why government may not promote it, argue for it, teach it, indeed establish it, non-coercively, without violating the Establishment Clause.

In this paper, I hope to show the role that objective morality played in the *Lee* opinion and thereby to suggest that the commitment to objective morality is *not* uniquely religious. Whether there is such morality is a question that all human beings, secular and religious, must address. But I begin in Part I with a different question: how did morality come to be an issue in *Lee*?

I. The Role of Objective Morality in *Lee*

It is certainly a plausible interpretation of the Establishment Clause that it forbids government from endorsing the claim that something like the God of monotheism exists. Since the prayers at issue in *Lee* invoked the God of monotheism, why did Justice Kennedy go beyond that fact in holding that high school graduation prayers instigated by the government are prohibited? Why not prohibit such prayers simply because they are addressed to God?

Before considering that option, which Justice Kennedy could have pursued in his opinion, I must explain what I mean by God. I will argue later in this piece that some assertions that utilize God-language are not religious. So, I have to be very clear here about what I mean by the “God of monotheism,” which by all accounts is a religious term. Jerome Stone defines “naturalism” in the phrase “religious naturalism,” as the assertion that there “seems to be no ontologically distinct and superior realm (such as God, soul or heaven) to ground, explain, or give meaning to this world.”⁹ In terms of belief in the God of monotheism per se, I mean the belief that there is an ontologically distinct singular intelligence or will that grounds, explains and gives meaning to this world. I add intelligence or will despite obvious difficulties with those terms because the biblical account of God seems necessarily to require the capacity for intentional action.

Justice Antonin Scalia has argued for the permissibility of government acknowledgment of the God of monotheism in a genuinely religious sense. The “God of monotheism” is the phrase Justice Scalia used in his dissent in *McCreary County, Kentucky v.*

9. JEROME A. STONE, RELIGIOUS NATURALISM TODAY 1 (2008).

*American Civil Liberties Union of Kentucky*¹⁰ to describe the God to which the American people are entitled to “give . . . thanks and supplication *as a people*, and with respect to our national endeavors.”¹¹ I include singularity and the capacity for intentional action in my definition of God because I agree with Justice Scalia that the God of monotheism must be distinguished from “God or the gods [who] pay no attention to human affairs.”¹²

Mine is not an adequate definition of God, of course. I am aware that to argue that God exists has been said to deny Him.¹³ I am merely attempting here to establish a benchmark with which to measure the reach of the Establishment Clause. The assertion that the God of monotheism is real and acts in some sense in the world is a uniquely religious claim. Although Justice Scalia has argued that government may endorse the God of monotheism, he does not dispute that the claim such a God exists is a religious claim. Indeed he seems to agree that it is the kind of religious claim the Establishment Clause otherwise prohibits government from making. That conclusion follows from Justice Scalia’s assertion that the government *is* prohibited from “specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.”¹⁴ For Justice Scalia, the government may only go so far as to establish the God of monotheism (and even in that instance may not do so in any coercive way).

Justice Scalia’s reasons for making an exception for public belief in, and indeed worship of, the God of monotheism need not detain us here. Essentially, he has said that “[o]ur national tradition”¹⁵ has resolved the issue in favor of the permissibility of government assertions addressed to the God of monotheism. In Justice Scalia’s view, since the founding generation acknowledged and thanked the God of monotheism and since we as a nation have consistently done

10. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 894 n.3 (2005) (Scalia, J., dissenting).

11. *Id.* at 900 (Scalia, J., dissenting).

12. *Id.* at 893 (Scalia, J., dissenting).

13. PAUL TILLICH, *SYSTEMATIC THEOLOGY* 205 (1951) (“God does not exist. He is being itself beyond essence and existence. Therefore to argue that God exists is to deny him.”).

14. *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

15. *McCreary County*, 545 U.S. at 900 (Scalia, J., dissenting).

so since, public ceremonies and symbols honoring and worshipping that God are constitutional.¹⁶

The cases that permit government use of God-language, such as *Marsh v. Chambers*,¹⁷ which upheld legislative prayers against Establishment Clause attack, do not support Justice Scalia's position and he would not claim that they do. These cases do not go so far as to permit the government genuinely to assert that God exists. Such uses of God-language are actually upheld in the case law on the ground that they have no genuine current religious content. They are referred to, for example, as ceremonial deism¹⁸ or as historical formulations.¹⁹ In fact, Justice Sandra Day O'Connor once went so far as to say that such practices would not be permitted if they induced a penitent state of mind.²⁰

Justice Kennedy apparently supports the existing precedent and does not agree with Justice Scalia that government may endorse the God of monotheism. The opinion that most recently espoused Justice Scalia's view, Part I of his dissent in *McCreary County*, was joined by Chief Justice William Rehnquist and Justice Clarence Thomas. Tellingly, Justice Kennedy joined only the rest of this dissent, which did not make the assertion that the God of monotheism may be worshipped in government-sponsored ceremonies.²¹

But, if Justice Kennedy believes that the government may not assert that God exists and may not engage in acknowledgment and worship of that God, and if his position is in turn supported by case law, then why did the *Lee* opinion not simply condemn the prayers at issue in the case for their theocentric content? Why write about objective morality at all?

The answer to that question is that Justice Kennedy was addressing a dispute among the lower court judges in *Lee* concerning whether the Establishment Clause issue in the case should be restricted to the references to God in the prayers at issue. In holding

16. *Id.* at 886–99 (Scalia, J., dissenting).

17. *Marsh v. Chambers*, 463 U.S. 783 (1983).

18. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 692–93 (1984) (O'Connor, J., concurring).

19. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

20. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 40 (2004) (O'Connor, J., concurring) (“Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history.”).

21. *McCreary County*, 545 U.S. at 848.

that the prayers in *Lee* violated the Establishment Clause, District Court Judge Francis Boyle specifically noted that if the word “God” had been left out of the prayers, “the Establishment Clause would not be implicated.”²² Judge Boyle even rewrote the benediction that was given to illustrate what it would have looked like without the references to God.²³

In the Court of Appeals for the First Circuit, Judge Juan Torruella’s majority opinion for the panel limited itself to agreeing with Judge Boyle’s holding, thus deciding only that graduation prayers invoking God violate the Establishment Clause.²⁴ Though Judge Hugh Bownes concurred in the majority opinion, he expressly rejected Judge Boyle’s conclusion that a graduation prayer without the word “God” would be constitutional. That would be “too literal and narrow an interpretation of prayer and what is acceptable under the Constitution.”²⁵ Prayer is what is unconstitutional, whether God is directly mentioned or not.

Judge Levin Campbell dissented and would have allowed the prayers at issue in the case. Nevertheless, he took issue particularly with Judge Bownes concerning a prayer that did not mention God.²⁶

Justice Kennedy noted this disagreement in his opinion.²⁷ It seems, therefore, that Justice Kennedy decided to go beyond the prohibition of God-language in graduation prayers in order to try to address and resolve this controversy in the lower courts. By resolving the issue of graduation prayer even if such prayers do not use the word “God,” Justice Kennedy was giving guidance to the lower courts and was attempting to prevent future disputes over relatively minor differences in language in high school graduation prayers. Henceforth, even graduation prayers that did not mention the word “God,” or refer to any deity, would still be held to violate the Establishment Clause.

22. *Weisman v. Lee*, 728 F. Supp. 68, 74 (D.R.I. 1990).

23. *Id.* at 74 n.10.

24. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990) (“The issue presented for review is whether a benediction invoking a deity delivered by a member of the clergy at an annual public school graduation violates the Establishment Clause of the First Amendment of the Constitution as construed by the Supreme Court under the second prong of the *Lemon* test.”).

25. *Id.* at 1097 (Bownes, J., concurring).

26. *Id.* (Campbell, J., dissenting) (“It is difficult to see why this would violate the Establishment Clause.”).

27. *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

A second ground of decision in *Lee* that would not have implicated objective morality and on which Justice Kennedy could have rested, and did to some extent, was the coercion implied by participation at a high school graduation. The government argued that there was a lack of coercion in the case because high school graduation ceremonies are voluntary. Justice Kennedy rejected this argument with some scorn: “to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.”²⁸ There was coercion at the graduation.

Yet, coercion ultimately did not play a key role in *Lee*, and could not. To see this, consider Justice Kennedy’s response to a potential objection to the holding that graduation prayers are unconstitutional—“the profound belief of adherents to many faiths that there must be a place in the student’s life for precepts of a morality higher even than the law we today enforce.” In response, Justice Kennedy acknowledged that “religious values, religious practices, and religious persons will have some interaction with the public schools and their students.”²⁹ But this would have to happen as a matter of voluntary accommodation. In contrast, in this case, “[t]he sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform.”³⁰ So, coercion becomes an issue only because of the presence of a “religious exercise.” In this case, the prayers were held to constitute a religious exercise. Obviously, then, the foundational question was whether the prayers did in fact constitute a religious exercise.

The significance of the presence of religious exercises is that the Supreme Court is much more sensitive to coercion in the religious context than in the free speech/conscience context. Of course the government may not coerce belief in either context. But the meaning of coercion differs. For example, if *The Star Spangled Banner* was sung at the graduation in *Lee* and if the audience rose for the rendition, all the same elements of coercion would have been present as for the prayers. But the claim that such a practice violates the free speech rights of students would have been rejected out of hand. The protesting student or parent would have been told to simply refuse to sing and refuse to stand. The only reason a different response was

28. *Id.* at 595.

29. *Id.* at 599.

30. *Id.*

given in *Lee* is that the government was engaging in a religious exercise. In fact, it is likely that the prayers at the graduation would have been banned even if they had not been prayed aloud but only projected onto the walls so that there would have been no coercion to participate in their rendition.

Thus, we return to the question, what made what the rabbi had to say a “religious exercise?” We have seen that the obvious answer—the references to God—was not the reason Justice Kennedy presented. Nor did the existence of coercion affect this characterization.

Another possible approach to defining the invocation and benediction as religious exercises would have been for Justice Kennedy to agree with Judge Bownes that “[a]n invocation (literally invoking the name of God over the proceedings) and a benediction (blessing the proceedings) are by their very terms prayers and religious.”³¹ Anything that is called a prayer is necessarily religious.

The problem with this approach was that Judge Bownes was trying to show that the use of the word “God” is not what defines a forbidden religious exercise. He was attempting to come up with a definition of prayer that does not require a reference to God. What Judge Bownes actually believed, however, was that “it is probably impossible to pray without invoking a deity directly or indirectly.”³² And he quoted the Fifth Circuit to like effect: “[P]rayer is . . . an address of entreaty, supplication, praise or thanksgiving directed toward some sacred or divine spirit, being or object.”³³

Thus, this approach—prayer is what refers to God—would have been no help to Justice Kennedy, who we should remember was also trying to define a religious exercise without any reference to God, direct or indirect. The question then remains, what defines a religious exercise?

This is the role of objective morality in the *Lee* opinion—it serves to define a religious exercise. The “conviction that there is an ethic and a morality which transcend human invention” is a religious assertion. And what renders such an assertion a prayer is implied by Justice Kennedy’s use of the word “aspire,” as in “prayers which aspire to these ends.” Justice Kennedy is implying that prayer is

31. *Weisman v. Lee*, 908 F.2d 1090, 1097 (1st Cir. 1990) (Bownes, J., concurring).

32. *Id.* (Bownes, J., concurring).

33. *Id.* (quoting *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982)).

aspirational language that invokes objective morality, whether or not God is invoked.

This understanding of religious exercise also explains why Justice Kennedy responded at the end of his opinion to the objection that the holding in the case prohibits a “place in the student’s life for precepts of [higher] morality.”³⁴ Justice Kennedy really did intend to prohibit the government from teaching objective morality, because he felt that any such effort would inevitably be religious in nature. And he knew that the prohibition against teaching objective morality would bring forth this objection. After *Lee*, there would be no way for government officials to bring precepts of higher morality, normatively, into the public school curriculum except, perhaps as accommodations to the private speech of students. But, of course, private speech is not part of the curriculum of the public school. A school could teach comparative morality—could teach that nothing is absolutely true, but people have believed all these different things—but that is by definition not teaching objective morality.

The final introductory question is why Rabbi Gutterman’s prayers³⁵ were thought by Justice Kennedy to invoke objective morality in the first place. The prayers thanked God for our liberty and democracy. They sought God’s blessing and thanked him for reaching the happy occasion of the graduation, in language reminiscent of the Jewish *Shehecheyanu* prayer.³⁶ All of that might certainly be considered religious and certainly could be thought to be prohibited by the Establishment Clause. But there is not much to suggest anything about morality per se.

Only in one place in the prayers does a universal ethic and morality appear: ““The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.””³⁷ These statements clearly call for objective morality. The rabbi is claiming that justice, mercy and humility are norms for how we are to live. Even if we could agree on a conventional content for these terms, the question of objective morality would be, what renders

34. *Lee*, 505 U.S. at 598.

35. See *supra* note 8 and accompanying text.

36. “Blessed are you, Lord, our God, sovereign of the universe, who has kept us alive, sustained us, and enabled us to reach this season.”

37. *Lee*, 505 U.S. at 582 (quoting Rabbi Leslie Gutterman’s Invocation and Benediction).

these values binding? Why is it better to be just, merciful and humble rather than unjust, cruel and arrogant? Our religions all assert that the former values transcend human invention. These values are presented by our religions as objectively binding on all human beings. But, as far as Justice Kennedy is concerned, for those of us without any religious foundation, that commitment is just their opinion, the “shared conviction” of these different faiths.

We are left with a rather bleak skepticism. According to Justice Kennedy, moral assertions transcending human invention are inherently religious, and aspiration toward that end, inevitably prayer. Thus government is prohibited by the Establishment Clause from voicing or aspiring to such moral ends. No moral common ground is possible without a religious foundation. I doubt Justice Kennedy really believes all this, for it would have profound and troubling implications for what public schools would be permitted to teach. Nevertheless, this is what the *Lee* opinion seems to suggest. What is the basis of this moral skepticism?

II. The Death of God and the End of Objective Morality

My fellow atheists—to put my own cards on the table—often face the criticism in America that “they cannot be good people without belief in God.”³⁸ Strictly speaking, this criticism is not related to the question of objective morality. Even if morality is nothing more than human invention, atheists could of course choose to act in ways that are regarded as traditionally and conventionally “good.” Indeed, it is obviously inaccurate to assert that atheists lie, cheat and steal to a greater extent than do religious believers.

The issue of objective morality is different from the question of behavior. Objective morality has to do with goodness itself. Since the philosopher Friedrich Nietzsche announced the death of God,³⁹ the question for the West has been the existence of an objective and universal moral law. In the words of Gianni Vattimo, “for Nietzsche, ‘God is dead’ means nothing else than the fact that there is no

38. See, e.g., Lauri Lebo, “The Social Cost of Atheism,” Religion Dispatches, June 10, 2010, http://www.religiondispatches.org/dispatches/laurilebo/2783/the_social_cost_of_atheism (“[Survey] [r]espondents “were also asked to provide an example of a social situation where they experienced stigma for being an atheist. A typical answer was being told that they can not [sic] be good people without belief in God. I’ve always found this idea absurd, as if people can’t love and care for others and make ethical decisions without an instruction manual.”).

39. See FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* § 108, at 167, § 125, at 181 (Walter Kaufmann trans., 1974) (1877).

ultimate foundation.”⁴⁰ Consciously or unconsciously, Justice Kennedy was drawing from Nietzsche’s heritage in consigning objective morality to the sphere of religion and then prohibiting the institutions of the secular state from invoking such morality.

The death of God never meant of course that organized religion had disappeared. Thus, recent claims that “God is back” in terms of the numbers and influence of religious believers in the world have nothing to do with the question of objective morality.⁴¹ I doubt Nietzsche would have been surprised by the resurgence of the religious right, for example. He would have considered that phenomenon a shadow of God.⁴²

With exceptions,⁴³ American law seems to have taken Nietzsche to heart and to have abandoned the idea of morality that transcends human invention. Richard Posner put it succinctly: “The natural law project has never recovered from what Nietzsche called the death of God (at the hands of Darwin).”⁴⁴

A spectacular, because candid and dramatic, example of the Nietzsche effect was written in 1979 by Yale Law Professor Arthur Leff.⁴⁵ Leff directly linked Nietzsche to the impossibility of morality beyond human invention: “The so-called death of God turns out not to have been just *His* funeral; it also seems to have effected the total elimination of any coherent, or even more than momentarily convincing, ethical or legal system dependent upon finally authoritative extrasystemic premises.”⁴⁶ To drive home just what that implied, just what the implications of morality founded only upon human invention are, Leff ended his piece with a despairing observation and poem:

40. GIANNI VATTIMO, *AFTER CHRISTIANITY* 3 (Luca D’Isanto trans., 2002).

41. See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD* 27 (2009).

42. NIETZSCHE, *supra* note 39 (“God is Dead; but given the way of men, there may still be caves for thousands of years in which his shadow will be shown. And we—we still have to vanquish his shadow, too.”).

43. One important exception was Charles Black. He criticized “the widespread modern view that only delusion beckons when we conceive of ‘justice’ as having anything remotely like the objective reality which invests the positive institutions of law. We have no warrant, say the followers of this view, for supposing that there exists any ‘justice’ which can be ‘discovered’; ‘justice’ is merely a name for our own reactions.” CHARLES L. BLACK, JR., *THE HUMANE IMAGINATION* 37 (1986).

44. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 14 (1990).

45. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.* 1229 (1979).

46. *Id.* at 1232.

All I can say is this: it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. . . .

As things now stand, everything is up for grabs.

Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up to and died resisting Hitler, Stalin, Amin, and

Pol Pot—and General Custer too—have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.⁴⁷

As Steven Smith has argued in terms of lawyers and legal practice,⁴⁸ despite the death of God, humankind continues to act as if universal and objective norms exist. In 1998, the International Criminal Tribunal for Rwanda issued the world's first conviction for genocide and crimes against humanity against Jean-Paul Akayesu, the mayor of the Rwandan town of Taba.⁴⁹ Recently, the International Criminal Tribunal for the former Yugoslavia convicted Vujadin Popovic and Ljubisa Beara, two security officers for the Bosnian Serb Army, of genocide for their actions in 1995.⁵⁰ It is a little hard to believe that Justice Kennedy would consider the prohibition against genocide a mere human invention or prohibit public schools from teaching that genocide is objectively wrong. But Leff would say in response that we have not yet realized that everything is up for grabs.

Poor Leff. He never did understand that without God, the problem is not that everything is up for grabs, but that nothing is.

47. *Id.* at 1249.

48. Steven D. Smith, *Higher Law Questions: A Prelude to the Symposium*, 36 PEPP. L. REV. 463 (2009).

49. See U.S. Holocaust Mem'l Museum, *Rwanda: The First Conviction for Genocide*, in HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007157> (last visited June 12, 2010).

50. Marlise Simons, *Genocide Verdicts in Srebrenica Killings*, N.Y. TIMES, June 10, 2010, available at <http://www.nytimes.com/2010/06/11/world/europe/11hague.html>.

Without God, by which I mean without the promise of something creative and trustworthy at the heart of reality, humanity is left in the iron cage of whatever-is-at-the-moment. That is why Leff could not offer anything genuinely transformative and was left with his despair, whereas Bob Cover, his God-intoxicated colleague, could.⁵¹

The concept of objective morality plays a role in the culture wars in American public life somewhat similar to the role it played in *Lee*—it is used as a marker in the struggle between religion and nonbelief. Claims about objective morality are used as a weapon and which way the weapon cuts depends entirely on the political context. So, for example, Rick Warren challenges Sam Harris in a *Newsweek* debate in 2007 as follows: “If life is just random chance, then nothing really does matter and there is no morality—it’s survival of the fittest. If survival of the fittest means me killing you to survive, so be it. For years, atheists have said there is no God, but they want to live like God exists. They want to live like their lives have meaning.”⁵²

In this context, Warren is challenging the public acceptability of atheism on the ground that atheism is inherently nihilistic. Harris responds, perhaps disingenuously, “I’m not at all a moral relativist. I think it’s quite common among religious people to believe that atheism entails moral relativism. I think there is an absolute right and wrong. I think honor killing, for example, is unambiguously wrong—you can use the word evil.”⁵³ But presumably Nietzsche would here agree with Warren (although he might have said that Warren is fooling himself in thinking that just because a person asserts that he is bound by God, and thinks that he is bound by God, he really is bound by God).

On the other hand, Steven Gey, in arguing that religious motivations for public policy are inherently undemocratic, contrasts the “comprehensive unity of purpose that affirms an identifiable set of fundamental values” that religion seeks with the “the principles of skepticism and constant ideological evolution, the recognition of which prevents the government from ever enshrining in law any

51. Compare Leff, *supra* note 45, with Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

52. *The God Debate*, NEWSWEEK, Apr. 9, 2007, available at, <http://www.msnbc.msn.com/id/17889148/site/newsweek/print/1/displaymode/1098/>.

53. *Id.* Perhaps Harris was not being disingenuous. See his new book, *THE MORAL LANDSCAPE* (2010), in which Harris argues against moral relativism on the basis of science.

particular set of fundamental values to the exclusion of any other set of values” that form the core of constitutional democracy.⁵⁴

Here, Gey is celebrating the end of objective morality on the grounds of pluralism and is attacking religion’s commitment to objective morality as undemocratic. In this example, Nietzschean post-modernism is said to lead not to nihilism, but to human freedom. Gey clearly agrees with Justice Kennedy that the common ground of objective morality is a religious concept that cannot be promoted by government because of the Establishment Clause.

In his magnum opus, *A Secular Age*, Charles Taylor also wrestles with objective morality in our time. He raises the question whether the endorsement of “universal human rights,” which he identifies rightly as one of the great achievements of modernity, can be understood without the kind of “intrinsically higher demand” that does not “fit our favoured ontology” of naturalism?⁵⁵ Taylor asks what “causes or lies behind” or justifies the sense of “moral assent”—“the phenomenology of universalism, the sense of breaking out of an earlier space and acceding to a higher one, the sense of liberation, even exaltation which accompanies this move”—that we experience as we struggle against prejudice and discrimination? We know that our commitment to increased human solidarity is right, but how can this be so when our best phenomenology does not fit our ontology? Taylor coyly states at this point that he has “hunches” but that they are “theistic.”⁵⁶ Undoubtedly, the reader is meant to conclude that human moral development demonstrates a morality that transcends human invention.

I have objected elsewhere that Taylor “seems to be suggesting that ultimate value requires the existence of God.”⁵⁷ This amounts to pretending that the secular age could in effect be reversed. Indeed in his final chapter, which is called “Conversions,” Taylor describes a number of “conversions (or reconversions) to Christianity.”⁵⁸ I doubt

54. Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005, 1021–22 (2004).

55. CHARLES TAYLOR, *A SECULAR AGE* 608–09 (2007). Taylor associates modern ontology with David Hume rather than Nietzsche, but since he attributes exclusive humanism to both. *Id.* at 247. However, this difference does not alter the point.

56. *Id.* at 609.

57. Bruce Ledewitz, *Charles Taylor and the Future of Secularism*, 3.1 EXPOSITIONS 105, 110 (2009).

58. TAYLOR, *supra* note 55, at 744.

that the secular age can be reversed. Nor do I think such a reversal is necessary to recover objective morality.

Many secularists fear what Taylor seems to hope for—a recovery of traditional supernatural religion. Secularists who support a decision like *Lee* act as if it is very important that the Supreme Court prevent the public schools from teaching students about a man in the sky who does tricks and they want the Supreme Court to keep biology classes from showing pictures of cavemen alongside dinosaurs. The truth is that the theistic worldview that supports that kind of religion is fading, especially among the young. Even if such things were taught, they would not take.

More important than keeping that kind of religion out of the public schools, is the question what will the public schools be permitted to teach young people in the future? The answer to that question cannot just be to prevent “the “precepts of [higher] morality” from being taught, as Justice Kennedy put it.⁵⁹ If objective morality is not taught in the schools, then the implicit morality of our day will take over. That implicit morality is capitalism and nationalism. Ironically, the students whom secularists want to teach that morality is a human invention are going to assume that the market and the nation-state are natural phenomena. Those structures will become for them normative and natural.

Although some people consider atheism to be a radical perspective, aside from its challenge to established religion, it has not been radical at all when it comes to its relationship to power. The New Atheists, such as Christopher Hitchens, Daniel Dennett, and Richard Dawkins, are not known for their commitment to social justice. I am afraid that all an Establishment Clause, as enforced in *Lee*, will achieve is the entrenchment of materialist consumption backed by military force.

What is needed instead is a new age of human discovery, especially in our schools. We must foster a recommitment to serious thinking about the nature of reality and the nature of the human experience. Such an effort would not avoid but would explore moral life. I believe that in such exploration, grounds of objective morality would be discovered. I of course cannot put forth a fully formed common ground for objective morality, either here or anywhere else. But I think we can identify some of the sources from which such common ground might eventually emerge.

59. *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

III. Shards of Common Ground

The position I am attempting to contest is what I think of as the Leff/Justice Kennedy position. "Everything is up for grabs" is treated by them as the secular position. Any nonrelativist approach to morality is considered by them to be religious. I am trying to show that the project of attempting to identify objective morality is not necessarily religious.

"Everything" for Leff refers primarily to morality and the ground of morality. Morality for Leff means something like whether there are convincing reasons why we should live one way rather than another. Leff's "up for grabs" means what Justice Kennedy refers to as a matter of human invention. So, living one way rather than another is nothing more than a matter of human invention, of human choice. The suggestion in both formulations is that human invention is arbitrary and willful, in the sense that something chosen could equally have been chosen otherwise.

This last point, however, is unconvincing. The steam engine is a human invention, but it could not easily be other than it is. There are many constraints on how a steam engine can work. So even if our morality were a human invention, that would not necessarily preclude its objective grounding.

In the same sense, a baseball game may be said to be "up for grabs" before it is played. But the better team is still likely to win.

It may be that there are no absolute barriers to innovation in human ways of life and that therefore everything may be thought of as theoretically up for grabs. Nevertheless, human cultures have always been quite similar in many ways. And today, with a growing system of "globalized democratic capitalism," with all those terms in quotation marks but still a recognizable system, the notion that human beings face an unlimited number of actual choices about how to live, seems exaggerated.

So, even if the reader ultimately concludes that everything is up for grabs and everything is a matter of human invention, it does not necessarily follow that our ways of life are arbitrary and that it is only religion that restricts our choices.

In any event, I believe that there is common ground for human life and that not everything is even potentially up for grabs as a matter of human invention. Let me now introduce what common ground might mean: Are there starting points for all human beings in encountering reality, including the reality of themselves, from which

to try to construct a way of life that is faithful to that reality? I think there are.

My modest attempt at a beginning for such common ground is a long way from what Leff states we cannot have as human beings: “a complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously.”⁶⁰ Surely what Leff is describing was not available even before the death of God. Christians regularly killed each other, after all, over just such disagreements. And the rabbis plainly favored some aspects of the Old Testament over others, placing restrictions on divinely sanctioned capital punishment, for example.⁶¹

What God represented was not the one obvious and particular authoritative answer to the question of human life, but rather authoritativeness itself. We might not be able to agree about the content of God’s will, but believers could agree that His will is binding. His will was not itself a matter of human invention. Therefore, interpretation of that will, while inevitably human judgment and thus “not in heaven” (as the Talmud put it),⁶² could be conceived of, and argued about, as either faithful or unfaithful. An interpretation of divine will could be right or wrong, whereas if our ways of life are purely a matter of human invention, they cannot be thought of as wrong or right. The divine rules were never findable in the sense that Leff implies. They played a different role.

Furthermore, even before the death of God, there was the issue of the absence of God, which was always a concern in Christian civilization.⁶³ We tend to treat those who say they believe in God as if they have easy access to the divine, while nonbelievers have none. But, as the example of Mother Teresa shows us,⁶⁴ the genuine believer may feel so distant from God as to experience despair. Things are not as simple for believers as Justice Kennedy and Leff suggest. Believers

60. LEFF, *supra* note 45, at 1229.

61. See Bruce S. Ledewitz and Scott Staples, *Reflections on the Talmudic and American Death Penalty*, 6 UNIV. FLA. J.L. & PUB. POL’Y 33, 38–41 (1993).

62. This is Rabbi Joshua’s famous response to a heavenly voice opining concerning a legal ruling in the story of the Oven of Aknai, found in the Babylonian Talmud Baba Mezia 59a. For commentary on the story, see Bruce Ledewitz, *The Openness of Talmud*, 41 DUQ. L. REV. 353, 356–59 (2003).

63. See, e.g., RICHARD ELLIOTT FRIEDMAN, *THE DISAPPEARANCE OF GOD* (1995).

64. See David Van Biema, *Mother Teresa’s Crisis of Faith*, TIME, Aug. 23, 2007, available at <http://www.time.com/time/world/article/0,8599,1655415,00.html>.

never had a reliable rulebook and they did not always even have access to the umpire.

So, in not presenting a complete system of the sort Leff calls impossible, I am not sure that the indeterminate situation of the nonbeliever today differs entirely from that of the believer historically. In any event, it is the case that I can only present shards, pieces, of the common ground that I believe humans share, whether they are religious believers or not.

Leff says that right and wrong are not demonstrable. The source of that impossibility is the death of God, but not in the superficial sense of the non-existence of God. Vattimo captures the genuine radicalism of Nietzsche as follows: "Nietzsche could not state a thesis like the nonexistence of God because the claim to its absolute truth would have to be upheld as a metaphysical principle, that is, as the true 'structure' of reality, having the same function as the traditional God of metaphysics."⁶⁵ According to this reading of Nietzsche, we cannot affirm absolute right and wrong because we cannot affirm one true structure of reality.

Already we see that the existing context is not as Leff and Justice Kennedy assume. For them, the secular state should undoubtedly be agnostic about whether God exists. But they would assert that God either exists or He does not. And this is also what most secularists who support separation of church and state would say. The New Atheists, for example, often try to demonstrate that God does not exist in good, traditional, classically metaphysical fashion.⁶⁶

That attempt to prove the nonexistence of God just shows that seeking to understand the true structure of reality is not a solely "religious" position. Many people who believe that God does not exist, and to that extent are not religious, also reject the Nietzschean challenge to traditional metaphysics. But if, instead, we can understand the true structure of reality, as many people assume we can, then we can try to build a moral order that seeks to be faithful to that reality. Such a moral order would not be a merely human invention. And that would be true whether God exists or not.

This is the way—through seeking to understand the true structure of reality—that C.S. Lewis sought to identify objective morality, which he called "objective value."⁶⁷ Objective value, he

65. VATTIMO, *supra* note 40, at 3.

66. See, e.g., RICHARD DAWKINS, *THE GOD DELUSION* (2006).

67. C. S. LEWIS, *THE ABOLITION OF MAN* 12 (1950).

wrote, is “the belief that certain attitudes are really true, and others really false, to the kind of thing the universe is and the kind of things we are.”⁶⁸ Lewis did not restrict this understanding of objective morality to the religious traditions. He referred to this attitude as “the Tao” and he perceived it as present in classic philosophy as well as religion. Lewis contrasted this attitude with the modern temper of relativism in which genuine justice, or even injustice, is impossible in principle.

Lewis came back to objective standards, admittedly in a more religious manner, in *Mere Christianity*.⁶⁹ He began there by noting that when people make claims against each other they usually show that they have an innate sense of right and wrong concerning matters like taking your turn and keeping your promises. In such arguments, people generally appeal to common standards of fairness. Rarely, he notes, does the person challenged respond, “To hell with your standard.” Instead, the other person will attempt to explain just why the general standard of fairness does not apply in this particular case. Lewis concludes, “It looks . . . very much as if both parties had in mind some kind of Law or Rule of fair play or decent behavior or morality . . . about which they really agreed.”⁷⁰ This standard used to be called the Law of Nature and Lewis also calls it the Moral Law.

By no means does this Moral Law correspond to what people actually do. It corresponds to what people ought to do and usually to what they know they ought to do. And human beings “all over the earth” invoke the same basic standard of fairness.⁷¹ Lewis responds specifically to the claim that this is a matter of human invention: This standard of right and wrong “must somehow or other be a real thing—a thing that is really there, not made up by ourselves.”⁷²

Lewis found this objective value by looking at the actions and statements of people, both children and adults. He did not think you could learn as much by looking at the laws of nature as such: “things like gravitation, or heredity, or the laws of chemistry.”⁷³ But there is an emerging science today that is both much more systematic than Lewis could be and looks at human beings at a much earlier age than Lewis was addressing. This new research about “The Moral Life of

68. *Id.*

69. C. S. LEWIS, *MERE CHRISTIANITY* (1958).

70. *Id.* at 3.

71. *Id.* at 7.

72. *Id.* at 16.

73. *Id.* at 4.

Babies” was summarized in a *New York Times Magazine* article in May 2010.⁷⁴ Through close observation of attention that babies give to moral scenarios, scientists have produced a “growing body of evidence suggest[ing] that humans do have a rudimentary moral sense from the very start of life. . . . [Y]ou can see glimmers of moral thought, moral judgment and moral feeling even in the first year of life. Some sense of good and evil seems to be bred in the bone.”⁷⁵ Of course, this is precisely what Lewis would have predicted.

Lewis also looked only at human beings. But more support for his view is now coming from evolutionary studies of animals. Judge Posner noted the decline in natural law thinking is due to Darwin because of the then-prevailing view that the Nature from which we descended was “red in tooth and claw.”⁷⁶ Today, researchers such as Frans B. M. de Waal are showing that moral tendencies in human beings evolved and that our closest relatives also exhibit traits such as empathy and cooperation.⁷⁷ Nature is not so “red.” Again, though Lewis in no way anticipated these discoveries, he would have welcomed them as evidence that the universe really is a certain kind of moral thing and that we are also.

We should think of the Lewis position as comprising two claims. First, the structure of reality can be known. Second, the structure of reality tends to endorse the good. For Lewis, the “ought” can be derived from an “is” because the existence of moral intuition is a fact to be known like any other fact.

I admit that Lewis believed that the existence of God was implied by these two positions. Leff and Justice Kennedy may agree with Lewis about that, which is perhaps why objective morality is thought by them to be religious. But others, myself included, accept the first premise, and even the second, without believing that something like God must exist.

In any event, it is plain that many secularists accept Lewis’ first conclusion. That position—reality can be known—by itself is certainly not religious. In the book *Quantum*, Manjit Kumar describes the fundamental debate in Physics over whether the role of

74. Paul Bloom, “*The Moral Life of Babies*,” N.Y. TIMES, May 9, 2010, at MM44.

75. *Id.* at MM46.

76. POSNER, *supra* note 44, at 14: “It was one thing to speak of ‘natural law’ when nature was conceived to be the expression of divine love or order, and quite another to find universal legal norms in Darwinian nature, red in tooth and claw.”

77. See FRANS B. M. DE WAAL, PRIMATES AND PHILOSOPHERS: HOW MORALITY EVOLVED (Stephen Macedo, et al. eds., 2006).

physics is to describe a reality that objectively exists, or whether instead, the role of physics is to clarify what we can say about reality. For Albert Einstein, God does not play dice and thus there is law and order and an objectively existing reality. For Niels Bohr, on the other hand, unlike objects in the everyday world, there is no quantum reality that exists independently of the observer.⁷⁸

While it is true that Einstein tended to use God-language in reference to the objective world he was trying to describe, he did not mean the ontologically distinct God of the Bible. And even though Bohr in a sense challenged our ability to know the true structure of reality, he should not be thought of as endorsing Nietzsche. Both scientists were seeking to know the structure of reality as well as it could be known. Neither of these two positions should be considered religious as such.

This observation is significant because even if Lewis' second conclusion—that reality tends to endorse the good—is thought of as religious, the first one is not religious in any sense. If one accepts that the true structure of the universe can be known, then objective morality is possible. Any values that comport with the true structure of reality would be objectively grounded. This alone undermines the Leff/Justice Kennedy position that objective morality is inherently religious.

But I would go further and assert that even Lewis' second conclusion is not religious as such. While Lewis assumed that the good could not be the foundation of reality unless God exists, he may have been mistaken. Just as higher levels of matter would not be possible if atoms could not bond, it may be that higher levels of life would not be possible without empathy and cooperation. In other words, we humans may tend to the good because otherwise we could not exist. If that is the case, then reality would tend to the good, but that conclusion would still not be religious.

The rudimentary morality that Lewis refers to is not the only evidence for objective morality. History is a second, and perhaps more convincing, shard of common ground. For it is through history that humanity achieves moral consensus on the matters of right and wrong that Leff considers indemonstrable.

Slavery, which was practiced throughout human history, is the best example both of indemonstrability and historical consensus. Obviously, slavery was endorsed by the Bible and was thought by

78. MANJIT KUMAR, *QUANTUM* 262, 331 (2009).

many to be genuinely defensible.⁷⁹ On the eve of the Civil War, the South defended slavery on its moral merits. This kind of dispute supports Leff's conclusion that right and wrong can be endlessly debated.

But we now know that the South was wrong. I mean that statement literally. We "know" that the defenders of slavery were "wrong," objectively wrong. The unfolding human consensus against slavery demonstrates that moral objectivity. There are no longer public defenders of slavery, and there never will be again, unless some catastrophe causes the lessons of history to be forgotten by future humanity. How can one say that everything is up for grabs or that morality is a human invention, when this kind of human consensus is clear?

There are a few other examples of such historical clarity. The Nazi genocide of the Jews and others is one such example. The fact that one can imagine an unrepentant Nazi is irrelevant. There are all kinds of criminals in the world. The private thoughts of criminals and even their actions do not provide a public challenge to humanity's objective moral consensus. Some things in history become unthinkable to humanity as a whole.

It also does not undermine this position to point out that genocide continues to happen despite the Nazi example. The perpetrators of such actions do not argue that the Nazi genocide was justified, but argue that their situation is different.

I am not here appealing to overall moral progress. We invent new inhumanities all the time. And there are very few instances in which history teaches a lesson as clearly as in the case of slavery.

But the relative paucity of examples in which history teaches objective morality is not that important in terms of refuting the Leff/Justice Kennedy position. For that position requires that *everything* be up for grabs, that *no* moral statement be objective. The reason for such an extreme requirement is that if anything could be shown to be objectively right or wrong, then we could reason from that example and eventually, at least in theory, could reach a more detailed, objectively moral position.

There are several candidates for such moral consensus in the future: the equality of women, the rights of the handicapped, the end of capital punishment, the acceptance of homosexuality. I believe the day will come when all of these will be as accepted as the prohibition

79. See *Leviticus* 25:44–46.

of slavery is today. That day is not yet, of course, and so these positions are as yet indemonstrable. But such moral judgments are subject to history. They are not ultimately matters of human invention.

Morality that transcends human invention is clearest in a form of historical moral judgment in which super-human forces are at work. I have in mind here global warming and the related environmental threats to human welfare. Increasingly, it is difficult to think of the natural world as something for humanity to exploit without limit, as in some sense belonging to humans. Eventually a new environmental ethic will be born and will become humanity's inheritance. This new consensus will not be chosen but will be forced on us. It will not be a matter of human invention. History can be, and often is, sovereign.

Religion, particularly Biblical religion, often takes the form of historical sovereignty in which God is seen to act in history. Most famously, God sets before the Israelites a blessing and a curse, the result of human choice to be visible in terms whether the people prosper in the land or not.⁸⁰

But the fact that God is seen as acting in history does not render attention to history religious. It may be the case that wrongful action reliably leads to national catastrophe. If that is so, it is strong support for objective morality; but recognition of that fact is still not a religious conclusion.

Another shard of common ground is reason. I hesitate to mention reason because the evidence is piling up, if evidence were even needed, that in any account of human behavior, reason plays only a small role.⁸¹ I mention it because reason is so often contrasted with faith that if reason could be shown to support the common ground that could lead to the recognition of objective morality, no one would think of calling that religious.

The obvious place to start in looking at the potential of reason, especially in the American context, is the Declaration of Independence. The Declaration of Independence calls certain truths about humanity "self-evident" and obviously insofar as that is so, objective morality would follow. While there has been much debate about the role of the divine—"their Creator"—in the Declaration of Independence,⁸² the very first truth listed in it is not associated with

80. *Deuteronomy* 30: 1–20.

81. See, e.g., DAN ARIELY, *THE UPSIDE OF IRRATIONALITY* (2010).

82. See, e.g., H. Wayne House, *Influence of the Natural Law Theology of the Declaration of Independence on the Establishment of Personhood in the United States*

the rights with which men are endowed by their creator. The first such self-evident truth is that “all men are created equal.” This statement does not imply a creator as much as it simply acknowledges that humans come into existence. Some type of deserved equal treatment is thought to follow from that truth and thus one has a common ground for the beginning of objective morality.

Of course, the self-evidence of human equality has been disputed—John C. Calhoun in 1848 called it “the most false and dangerous of all political errors”⁸³—but the point I am making is that in asserting this proposition, the framers of the Declaration of Independence, most notably Thomas Jefferson, were engaging in nonreligious argument about objective morality, here political morality. They were not engaging in religious disputation.

Even the Declaration’s propositions about unalienable rights with which men are endowed by their creator are not strictly speaking religious. They are said to be the result of self-evident insight. All human beings, in other words, are held to recognize these truths about rights if they are acting in good faith.

It is a common error to contrast the supposed religious quality of the Declaration of Independence with the so-called godless Constitution. One well-known example of this tendency is the book, *The Godless Constitution*, in which Isaac Kramnick and R. Laurence Moore argue that the Constitution differs from the Declaration of Independence in that the Declaration mentions God, that is, the creator, whereas the Constitution is godless and thus secular.⁸⁴

This position mistakes the role of the creator language in the Declaration of Independence. That language serves to ground rights as transcending positive law. In other words, the reference to the creator serves a higher law/natural law purpose. But it does not do this by establishing or even proposing that a supernatural realm exists. Endowed just means “having these rights without regard to the actions and opinions of men.” In other words our rights are not human inventions.

Despite the absence of creator or God-language, the Constitution shares precisely this commitment to natural rights. That

Constitution, 2 LIBERTY UNIV. L. REV. 725, 746 (2008) (reference to Creator in the Declaration shows “a divine natural law position”).

83. A. E. ELMORE, LINCOLN’S GETTYSBURG ADDRESS: ECHOES OF THE BIBLE AND BOOK OF COMMON PRAYER 156 (2009).

84. ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION* 28 (2d ed. 2005).

is the point of the Ninth Amendment, which states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁸⁵ Although there is controversy in American jurisprudence about whether the Ninth Amendment should be judicially enforceable, there is no question that its purpose is to render explicit the proposition that there are “unalienable rights” that exist independently of positive law, in this case independently of their enumeration in the Bill of Rights. The absence of a word like “God” as the source of these rights does not render the Constitution atheistic any more than the presence of such a word renders the Declaration theistic. These are political documents and their political worldview is the same. The addition of the word “God” or “Creator” to the Ninth Amendment would have changed nothing. Its deletion from the Declaration of Independence would have changed nothing either, in the terms of the question we are looking at here: Does reason lead to a common ground of objective morality?

Coincidentally, as I was working on this section, I received a copy of the *Boston University Law Review* issue containing the symposium held in September 2009 to discuss Ronald Dworkin’s new book, *Justice for Hedgehogs*.⁸⁶ As described by the editors, the point of Dworkin’s book is to defend the unity of value against skepticism and forms of pluralism.⁸⁷

I cannot do justice to the book or to the symposium here. I mention them not because Dworkin would agree with my common ground arguments—he would argue on the contrary that the positions of both C. S. Lewis and Arthur Leff are unintelligible because they derive an ought from an is—but because the undertaking itself reminds us that, in the words of Daniel Star in the symposium, “[r]ational debates between moral realists and moral skeptics”—which is the language in which disputes about objective morality are discussed—are essentially philosophical debates.”⁸⁸ They are not religious disagreements and should not be treated as such.

The final shard of common ground I will mention is our common human situation. We find ourselves already in the world, as Martin

85. U.S. CONST. amend. IX.

86. Symposium, *Justice for Hedgehogs: A Conference on Ronald Dworkin’s Forthcoming Book*, 90 B.U. L. REV. 465–1087 (2010).

87. Sarah J. Kitchell & Joshua M. D. Segal, *Editors’ Forward*, 90 B.U. L. REV. 465 (2010).

88. Daniel Star, *Moral Skepticism for Foxes*, 90 B.U. L. REV. 497, 497 (2010).

Heidegger might say, oriented toward the meaning of it all, oriented toward being. Once, when we were studying Heidegger, I asked my far more learned colleague, Robert Taylor, what Heidegger meant by being, by Sein. He responded, “how significance comes on the scene.”

At first, I took this to refer to the sense of significance that we attribute to our lives. Both for the skeptic Leff, as well as for the realist Lewis, our understanding of our situation is important, indeed crucial. As a character in E. L. Doctorow’s 2000 novel, *City of God*, says, we “live in moral consequence.”⁸⁹ The moral skeptic, the fatalist, the nihilist and the materialist all agree with that. They all share their insights with the rest of us so that we will not be fooled into thinking things are different from the way they really are. And from just this sense of the significance of life, even when life is a disappointment, a kind of common ground is forged in which my fellow human beings are my brothers and sisters sharing my situation.

But I came to see that there was even more to significance. There is an elusive quality in human life, another layer if you will below the surface. Poetry, to which Heidegger often returns, is one form in which this elusive quality is shown, or hinted at. I recently read a review of the poet Anne Carson’s new book, *Nox*, about the death of her brother.⁹⁰ In the book, she reproduces Catullus’s poem No. 101: an elegy delivered at the burial site of his brother:

Many the peoples many the oceans I crossed —
I arrive at these poor, brother, burials
so I could give you the last gift owed to death
and talk (why?) with mute ash.

Carson then writes this about the poem: “No one (even in Latin) can approximate Catullan diction, which at its most sorrowful has an air of deep festivity, like one of those trees that turns all its leaves over, silver, in the wind.”⁹²

“[D]eep festivity”? At a funeral? But that is exactly right. A funeral is a rite. This has nothing to do with belief in God, or with religion in any narrow sense. It has to do with the mysterious, poetic quality of human existence itself, a quality we usually ignore—we live

89. E.L. DOCTOROW, *CITY OF GOD* 256 (2000).

90. Ben Ratliff, *Lamentation*, N.Y. TIMES, June 13, 2010, at BR 13.

91. *Id.*

92. *Id.*

in prose—but which startles us with its vividness at the most unexpected times. This experience of human life is our most intimate common ground. Can we proceed from this common ground to objective morality? Not if we mean by that term, rules to live by. But if we mean by objective morality ways of life that honor the mystery of human life, then I think that we can.

Generally when law attempts to do this, to come into the neighborhood of being, the result is embarrassing. Probably the best known example occurred in the opinions in *Planned Parenthood v. Casey*,⁹³ in which the plurality wrote that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”⁹⁴ and Justice Scalia sneered at the idea. He called it “exalted” in *Casey*⁹⁵ and in *Lawrence v. Texas*, called it the “famed sweet-mystery-of-life passage.”⁹⁶ These were dismissive references.

To be fair, maybe the exchange in *Casey* was an exception. Neither side in that case exhibited much sensitivity. The plurality was obfuscating to avoid talking about the death of the unborn and Justice Scalia would not know the poetry of human life if he ran over it in a pickup truck. But I don’t think *Casey* was exceptional. I think rather that it is the nature of law and lawyers, in America at least, that we do not attend to being.

But whether law does so or not, human beings still share this and other shards of common ground. And to that extent, we may say that Justice Kennedy was mistaken in *Lee* to think that prayer invoking morality transcending human invention is inherently religious and thus barred by the Establishment Clause at a public school. In the next section I will attempt to specify an appropriate relationship among the public schools, the common ground and the Establishment Clause.

IV. Seeking Common Ground in Public School

If Justice Kennedy is wrong about the religious quality of the quest for objective morality, then *Lee* becomes a simple case. The constitutional issue would then rest only on the references to God in

93. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

94. *Id.* at 851 (opinion of O’Connor, Kennedy and Souter, JJ.).

95. *Id.* at 980 (Scalia, J., concurring in judgment in part and dissenting in part).

96. *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

the graduation prayers. It would follow then that if the references to God were eliminated, not by manipulation so that the references remained, albeit indirect, but genuinely, the resulting prayers would be constitutional. I will take up at the end of this paper the question whether religious imagery itself, such as the use of the word "God," should always be prohibited in such circumstances. But certainly without such religious usage, there would be no constitutional violation.

If we took the common ground of objective morality seriously, we could imagine Rabbi Gutterman speaking the following, perfectly constitutional, Benediction:

We come together here tonight from many faiths and from no faiths. We pray to different Gods and to no God. And we all seek the knowledge of the right way to live. I will tell you what my faith teaches me: all that is required of us is to do justice, to love mercy and to walk in humility. That is my prayer for you.

Although the rabbi would be speaking out of one religious tradition, the prayer would not be solely religious. It would be secular as well, part of the search for the right way to live.

But what about the moral skeptic? Wouldn't a Leff leap to his feet and insist that he at least did not seek the right way to live, because there is no such thing. But the constitutional answer to this objection is that if the prayer is not an establishment of religion, then the critic has no constitutional ground to prevent its proclamation by the government. Free speech ensures that Leff will not be forced to affirm this claim about a right way to live, not that he may prevent it from being spoken.

But graduation prayers are obviously not that significant in the overall curriculum of American public schools. If we took the common ground of morality seriously, school boards would do far more in the direction of objective morality than arrange for graduation prayers. They would organize the public school curriculum around the best way to live. What else is education if it is not education in how to live well? There would at least be one course in high school devoted to this topic, which would sample all of humanity's great traditions of wisdom, including of course the religious ones.⁹⁷

97. Stephen Prothero has made a suggestion that appears to be similar. See STEPHEN PROTHERO, *RELIGIOUS LITERACY* 155–84 (2007). But Prothero is suggesting the need

This is the kind of education that America sorely needs in an age of relativism, nihilism, materialism, and hopelessness. Education today has become skills training to serve the machine of consumption. Where, other than public school, will our young people, especially the increasing number outside the religious traditions, learn to ask the question of how to live?

This proposal would mark a change in the current educational landscape. It would be the rare school board today that would be brave enough to organize a curriculum in substantive moral development. For one thing, officials would fear lawsuits pursuant to the Establishment Clause under the influence of *Lee*. For another, school boards would fear violating the teaching of *West Virginia State Board of Education v. Barnette*,⁹⁸ which enjoined enforcement of a State School Board regulation requiring children to salute the American flag. Justice Robert Jackson memorably and properly, under the circumstances of that case, wrote: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁹⁹

I certainly agree with Justice Jackson that no school student can be constitutionally coerced to affirm any proposition. But the public schools teach orthodoxies now, including the very ones, like love of country, to which Justice Jackson was referring. I would simply add another orthodoxy that the public schools could teach—that there are right ways and wrong ways to live and that people can, especially with the benefit of history and study, fruitfully attempt to determine what those are. It is true that school boards might teach a substantive morality that I would find harmful and false. But, if that morality is not simply a front for religion, school boards could probably do that now. Whatever the harm might be from such false teaching, it seems to me that the dangers of nihilism on the one hand, and materialism on the other, are far worse.

for knowledge about religion rather than learning moral wisdom from religion. Nor is my suggestion aimed at advancing pluralist tolerance. While that is a good thing, the point of this paper is that human beings, including students, actually must come to decision about how to live and that not all choices are equally valid. Government cannot teach that the religions are right but government can teach that something is right and also that a number of options are wrong.

98. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 624 (1942).

99. *Id.* at 642.

The curriculum I am proposing would require that school boards self-consciously take control of teaching about morality in the public schools. In the circumstances of a case like *Lee*, that would include giving instructions to graduation speakers about what they might and might not say when giving Invocations and Benedictions. It should be remembered that the unconstitutionality in *Lee* had to do not with any violation of the free speech rights of the rabbi, but that the instructions led to prayers that the Supreme Court found violated the Establishment Clause. The prayers amounted to government speech, which violated the Establishment Clause. The role of the instructions given to the speaker was simply to show clearly that the government was responsible for the content of the speech. Under my proposal as well, the school board would instruct the speaker as to content to avoid violating the Establishment Clause. Of course my assumption is that the interpretation of the Establishment Clause proposed here would be accepted by the Supreme Court.

Under no circumstances should a graduation speaker like the rabbi be thought of as engaging in anything other than some kind of government speech. Such prayer certainly could not be conceptualized as private speech. School boards should not be allowed to hand off responsibility for the content of such prayers to outside speakers. Therefore school boards must be held responsible for the content of speech at an official event such as a graduation ceremony. To that extent at least the Supreme Court was right in *Lee*.

There has been some odd thinking about so-called private speech in public schools. The State of Florida has apparently passed legislation guaranteeing teachers the right, treated in the legislation as a private constitutional right, to practice their religion by leading prayers at school events.¹⁰⁰ But at least most of the time teachers are government employees and their speech on the job is government speech that has nothing to do with their own constitutional rights. The idea that a teacher leading a school assembly or a coach instructing a football team is engaging in private speech is absurd and certainly conflicts with Supreme Court precedent such as *Rust v. Sullivan*.¹⁰¹

100. Lauri Lebo, *Florida Governor Signs Law Defending Educators' Right to Witness*, RELIGION DISPATCHES June 7, 2010, http://www.religiondispatches.org/dispatches/laurilebo/2762/florida_governor_signs_law_defending_educators%E2%80%99_right_to_witness.

101. *Rust v. Sullivan*, 500 U.S. 173 (1991).

The reason that these ideas about private speech go forward is not that they are sensible in their own right; they would not be defended outside the very special context of school prayer (if a public school teacher wore a swastika in the classroom, for example, most people would not regard it as protected private speech). Private speech protections are offered as ways to get around unpopular Establishment Clause holdings. If the interpretation of the Establishment Clause were changed so that some sense of objective morality could more easily be expressed in the public square, these misguided efforts might end.

The issue of the treatment of *student* speech at graduations and elsewhere is more difficult and is beyond my scope here. But even in that context, most speech at school events should be subject to the overriding demands of the school curriculum. That was certainly the tendency of the Supreme Court in *Morse v. Frederick*,¹⁰² where the Supreme Court upheld disciplinary action against a student for advocating drug use off campus, albeit at a school sanctioned event. A school board should be granted at least as much authority to oversee student religious speech at an event such as a graduation at which others will be unwillingly exposed to the content of the student's speech.

V. The Effect of Seeking Common Ground on American Secularism

The public face of atheism in the United States today is unrelenting attacks on religion. This is so in the realm of the social/political where the New Atheists—writers such as Daniel Dennett, Sam Harris, Victor Stenger, and Richard Dawkins—have attacked religious belief as irrational and religious practice as violent and dangerous. The titles of their work show their orientation plainly: *Breaking the Spell*,¹⁰³ *The End of Faith*,¹⁰⁴ *God: The Failed Hypothesis*¹⁰⁵ and *The God Delusion*.¹⁰⁶ The best-known of these works and writers is Christopher Hitchens, whose book, *God is not Great* and its vibrant subtitle—*How Religion Poisons Everything*

102. *Morse v. Frederick*, 551 U.S. 393 (2007).

103. DANIEL C. DENNETT, *BREAKING THE SPELL* (2006).

104. SAM HARRIS, *THE END OF FAITH* (2004).

105. VICTOR J. STENGER, *GOD: THE FAILED HYPOTHESIS* (2007).

106. DAWKINS, *supra* note 66.

arrived with a best-selling bang in 2007 and really established the New Atheism's anti-religion tone.

Legal academic work, on the other hand, is not as harshly anti-religion by any means. In fact, express anti-religion rhetoric is rare—Steven Gey might be the closest to an example.¹⁰⁷ But, as I have suggested elsewhere, impressionistically, many or perhaps most legal academics in the field of church and state support a fairly strict separation of church and state as well as government neutrality toward religion and would, if it were politically feasible, support removing religious imagery and symbols, such as the words “under God” in the Pledge of Allegiance, from the public square.¹⁰⁸

All of this has contributed to the “us-them” quality of the culture wars in the United States. That landscape stretches from hot button political issues, such as gay marriage and abortion, to symbolic expression, such as House Resolution 131, which directed the architect of the Capitol to engrave the Pledge of Allegiance and the National Motto, “In God We Trust,” in the Capitol Visitor Center. The Resolution passed July 9, 2009, by a vote of 410 to 8, with 12 abstentions. The next day, the Senate passed the same resolution by Unanimous Consent.¹⁰⁹

One of the results of this religion divide is that it has been difficult to create and sustain a broad-based progressive political coalition that transcends religious differences. As Bethany Moreton, the author of *To Serve God and Wal-Mart*,¹¹⁰ put it in a recent interview, “How far does the Left think it can get on economic justice if it dismisses people’s religious convictions as mere distractions or false consciousness?”¹¹¹

Another result of the religion/secular divide is a kind of wooden approach to Establishment Clause issues. Sometimes even the smell of religion is enough to bring forth constitutional objections where they could not possibly be appropriate. Perhaps the most extreme example of this tendency occurred in Justice John Paul Stevens’

107. See, e.g., Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1 (2005).

108. See Bruce Ledewitz, *Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?*, 41 ST. MARY’S L.J. 41, 59–62 (2009).

109. See GovTrack, <http://www.govtrack.us/congress/bill.xpd?bill=hc111-131> (last visited June 18, 2010).

110. BETHANY MORETON, *TO SERVE GOD AND WAL-MART* (2009).

111. “*The Faithful Progressive Interview*” (October 20, 2009), FAITHFUL PROGRESSIVE, <http://faithfulprogressive.blogspot.com/search?q=progressive+coalition> (last visited June 18, 2010).

partial concurrence in *Webster v. Reproductive Health Services*,¹¹² in which Justice Stevens stated that there was no “secular purpose” for a legislative declaration that life begins at conception and thus the statutory preamble violated the Establishment Clause,¹¹³ as if the presence of new and unique DNA at conception defining a heretofore unknown human entity could not possibly provide a secular justification for legal protection. Justice Stevens was not even looking at the actual motivations of the relevant state legislators as a justification of his turn to religion.¹¹⁴ Without regard to whether such anti-abortion laws are wise or fair, to call them religious is to exhibit unique hostility toward religion.

In contrast, seeking common ground promises at least the possibility of common starting points that might allow the formation of new political alignments and might promote mutual understanding across the religion/irreligion boundary. We don’t have to live forever with us/them thinking in the realm of church and state.

There is a fine example of what atheism looks like when it acknowledges common ground with religion in terms of the “universally human,” in Andre Comte-Sponville’s marvelous book, *The Little Book of Atheist Spirituality*.¹¹⁵ Comte-Sponville is a well-known French philosopher and atheist, but he was raised as a Christian and remains deeply appreciative of the Judeo-Christian tradition. I cannot cite him as supporting the proposition that the common ground we seek can lead to objective morality, for he specifically states that morality is always relative;¹¹⁶ but his moral commitments are so clear and his condemnation of nihilist post-modernism so strong, that I am not sure that we disagree, despite differing terminology.

In a section entitled “Can We Do Without Religion?”, Comte-Sponville expresses his common ground with Christians directly: “I feel separated from you by only *three days*—those which, according to tradition, separate Good Friday from Easter Sunday.” If pressed, he says, he could acknowledge virtually everything in the Gospels as true, “apart from the good Lord.”¹¹⁷ And he writes movingly of Jesus:

112. *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989).

113. *Id.* at 566 (Stevens, J., concurring in part and dissenting in part).

114. *Id.* (Stevens, J., concurring in part and dissenting in part).

115. ANDRE COMTE-SPONVILLE, *THE LITTLE BOOK OF ATHEIST SPIRITUALITY* 39 (2006).

116. *Id.* at 45.

117. *Id.* at 63.

For Spinoza, Jesus was merely a human being, but an exceptional one—"the greatest of all philosophers," he once called him—the one who best expressed the essence of morality. And what might that be? What Spinoza calls "the spirit of Christ," namely that for free spirits the only law is "justice and charity," the only wisdom is love, and the only virtue is to "do good and live in joy." Why should my atheism prevent me from seeing the greatness of this message?¹¹⁸

To see how this gracious openness to religion can help resolve Establishment Clause issues, consider how Comte-Sponville might respond to a case like *Lee*. Aside from the use of the word "God," to which I will return in another section below, what would he think of prayer on a public occasion? Because he does not fear religion, he is able to consider the human need for ritual. He writes in the context of funerals that they provide "a sorely needed ritual—a ceremony. . . . A human being can't be buried like an animal or burned like a log."¹¹⁹ And not surprisingly, he feels the same way about prayer. He quotes Simone Weil: "Love and prayer are merely the highest form of attention."¹²⁰ His prayer is "addressed to no one and asks for nothing" and he would prefer silence, but he is still open to prayer. Comte-Sponville would not break human solidarity to complain about the rewritten prayer I put into the mouth of the rabbi above.

Certainly Comte-Sponville would have no objection to a high school course studying the greatness of human thought and belief in order to discover the right way to live. He is much too open to think that there is only one specific way to live. But he clearly believes the way to be a human being is to live in honesty and courage, communion and fidelity. I don't find very much difference between Comte-Sponville and C. S. Lewis in their descriptions of basic morality.

The anti-religion attitude of some secularists must end. It cannot be true that the billions of human beings around the planet who are religious believers are devoted to species of irrationality, hatred and violence. Undoubtedly there is greatness in all of humankind's major religious traditions. If atheists were open to that greatness then our differences would not overwhelm our commonalities.

118. *Id.* at 33.

119. *Id.* at 9.

120. *Id.* at 143 (quoting Simon Weil).

Of course the reverse is also true. Comte-Sponville addresses this same message of unity to Christians on behalf of nonbelievers. Speaking again of Jesus, now to the followers of Jesus, he asks, “is it reasonable to lend more importance to the few days that separate us than to the thirty-three preceding years, which—in their human content, at least—bring us together?”¹²¹

There is a modern group of atheists whom I denominate secularists because of their openness to religion.¹²² I use the term secularists partly because some members of this grouping use the term God in describing reality. Comte-Sponville is not one of these. But I would hesitate to use the word atheist for him also, simply because the word has gained such negative connotation. What we can learn from Comte-Sponville is not to be fearful that religion or non-belief will gain some advantage. What we should worry about is how our children are raised, what they believe in, and how well they love.

But now I must return to the world of division and rancor. For the prayers in *Lee* did refer to God. So, to conclude my investigation into the common ground, I must ask how religious imagery relates to such common ground. Are graduation prayers addressed to God constitutional?

VI. Religious Imagery and the Common Ground

We are at an odd point of popular consensus on the matter of prayer at public school events. As the facts in *Lee* show, the school board, undoubtedly accurately representing public opinion on this point, instructed Rabbi Gutterman in effect that while God-language could be used, nothing more sectarian than that should be in the prayers. Ironically, these instructions were probably designed for Christian clergy so that they would not use Christ language in graduation prayers. Yet in *Lee*, it was a rabbi who ran afoul of the Establishment Clause.

In the years since *Lee* was decided, this Judeo-Christian consensus—that only God-language, and nothing more sectarian, is appropriate—has undoubtedly become even more firmly entrenched in our culture. In most places in the country, certainly most places that have significant non-Christian populations, it is probably accepted that prayer at public school events, should be nonsectarian.

121. *Id.* at 65.

122. See Bruce Ledewitz, *The New New Secularism and the End of the Law of Separation of Church and State*, 28 BUFF. PUB. INT. L.J. 1 (2009-2010).

In practice, that usually means praying to God and not ending prayers with the phrase, “through Jesus Christ, our Lord.”¹²³

Non-Christians who have not grown up with Christian prayer may not appreciate just how much of a sacrifice this so-called nonsectarian prayer is for Christians. Theologically speaking, Christians are not supposed to pray in this nonsectarian fashion. That is why Rick Warren made a point of praying in Jesus’ name at President Barack Obama’s inauguration.¹²⁴ On the other hand, as if to make up for this, Warren omitted the word “Christ” and invoked both the Sh’ma—the ultimately traditional Jewish prayer—and the Lord’s Prayer, as Hebrew a prayer as a Christian could find. This was all carefully put together, obviously, by Warren. All this theological maneuvering just proves the point that even a conservative Christian figure feels the pressure to engage in nonsectarian prayer on public occasions.

Why has this tradition of nonsectarian prayer become so widespread? One obvious reason is out of respect for other religions in the Abrahamic tradition, originally the Jews and now also the Muslims, neither of whom see Jesus as the Messiah, the Christ, let alone as Lord.

If American discussion of church/state issues were more respectful and less confrontational, the thoughtful atheist could ask the following question of this nonsectarian consensus: “While I appreciate that the Christian majority has accommodated non-Christians to the extent of often avoiding references to Jesus Christ in prayer on public occasions, I want to point out that the remaining prayers to God, in whom I do not believe, are just as offensive to me as references to the Christ would be to Jews and Muslims. So, I would like to know why my feelings are not similarly taken into account?” This question would not necessarily be a constitutional one, but a matter of the courtesy of citizenship.

There are two kinds of answers to the atheist’s hypothetical question. One is historical and the other theological. One historical

123. I am speaking here of one-time events. When one tradition can be balanced against another, as in daily legislative prayer, people may feel differently. There is also a current challenge to formal nonsectarian restrictions on government employees who are chaplains. See David Watters, *Amendment Would Let Military Chaplains Pray as They Wish*, WASHINGTON POST, May 26, 2010, available at http://newsweek.washingtonpost.com/onfaith/undergod/2010/05/amendment_would_let_military_chaplains_pray_as_they_wish.html.

124. *Pastor Warren Praying ‘In Jesus Name’ for Obama*, WORTHY CHRISTIAN NEWS, Jan. 20, 2009, <http://www.worthynews.com/3996-rick-warrens-inaugural-prayer>.

response is the one favored by Justice Scalia, to the effect that history and tradition have resolved religious references on public occasions in favor of the God form of nonsectarian prayer. But with all due respect to originalists, textualists and traditionalists, that is not how most people think about the Constitution. Historical references cannot turn off the continuing movement of history in this context any more than they could serve to prevent protection of women under Equal Protection. Obviously, our needs as a people change over time and, as our nation becomes more secular, the same kind of response that protected Jews years ago from sectarian Christian religion might be thought now to require protection of atheists in a similar way.

Another form of the history response would be to say that the process of accommodation is ongoing and that eventually God-language will be dropped from prayers on public occasions, either out of judicial pressure or in a fully organic way. After all, the significant presence of nonbelievers in the population is rather new. The Christian majority might simply not have yet fully integrated the feelings of this new group into its thinking.

Actually I am sure that this latter way of looking at things will prove to be true, to some extent. Christians will begin to see the need and appropriateness of accommodating the feelings of secularists.

But I believe that two theological responses to the atheist's question will prove to be more important. The first is the possibility that Jews, Muslims, and Christians may regard themselves as linked and as worshiping the same God, so that accommodations are justified. Atheists, on the other hand, may be regarded differently, to an extent as enemies of God. Atheists may be regarded negatively to a greater extent even than nonmonotheistic believers, such as Buddhists and Hindus. If this is the feeling of a large part of the Christian majority, and if government prayer policies are influenced by this feeling, there is obviously a significant Equal Protection, as well as Establishment Clause, problem.

I hope that a different theological perspective is driving the current nonsectarian consensus. I hope that it rests on the understanding that references to God are theologically distinct. One way that prayer to God is distinct is that there is clearly a sense among believers that to give up references to God on public occasions would be to give up all contact with divine life. Even if nonsectarian prayer is not fully satisfying, it at least does not do that.

But there is another theological point that I believe the Christian majority intuitively feels, which is that all claims about God, and all prayers to

God, are only approximate. Even Comte-Sponville, whose atheism is constitutive of his identity, points out that “[n]o one can say” what God is¹²⁵ and that Einstein was correct to give this answer to the question of his religious beliefs, ““First tell me what you mean by God, and then I’ll tell you if I believe in him.””¹²⁶

This problem of the definition of God, which is not a problem merely of definition, became clear to me when I was reading both Comte-Sponville and Richard Friedman’s book, *The Disappearance of God*, at the same time. These two thinkers are both sophisticated and serious. They know what they are talking about when it comes to religious matters. Nevertheless, Friedman criticizes Stephen Hawking for “picturing a simple, traditional, notion of God: separate from the universe” and for thinking that God had a freedom of choice to create the universe differently or not at all.¹²⁷ Such a sophisticated view of nature but such a simplistic view of God, Friedman concludes. Friedman rejects this view of God.

But this “simplistic” view is precisely the view of God that Comte-Sponville takes, that God is “an eternal, spiritual and transcendent being, both exterior and superior to nature, who consciously and voluntarily created the universe.”¹²⁸ Friedman and Comte-Sponville are just not talking about the same thing when they speak of God.

The relevance of this insight that God-claims are only approximate is that atheists who challenge God-language in public prayers have never been required to identify the meaning of God to which they object. The particular meaning of God, if identified, would probably make a difference. For example, in defining God as carefully as he does, Comte-Sponville is clearly suggesting that there might in fact be definitions of God that he would accept. Just as one example, Jerome Stone identifies an entire tradition of religious naturalists, many of whom use the term God in ways that Comte-Sponville would find congenial.¹²⁹

I am not claiming that the Christian majority is consciously assuming that their God-language is not really offensive to atheists because of the superior theological sophistication that atheists bring

125. COMTE-SPONVILLE, *supra* note 115, at 67.

126. *Id.* at 68.

127. RICHARD ELLIOTT FRIEDMAN, *THE DISAPPEARANCE OF GOD* 241 (1995).

128. COMTE-SPONVILLE, *supra* note 115, at 68.

129. STONE, *supra* note 9.

to religious language. And none of this would matter if the atheist could genuinely say, “I’m not sure what the word “God” means in this or that prayer context, but there is no definition that I could accept for God and therefore precise meaning does not matter. All references to God by the government violate the Establishment Clause.”

But what if there were one definition of God that the atheist does accept, or at least that so many atheists accept that its non-acceptance is no longer seen as a religious matter? There is such an understanding, a nonreligious understanding, of God.

Comte-Sponville quotes Nietzsche as follows:

What does nihilism mean? It means that the higher values have depreciated; that the ends have vanished; that there is no longer any answer to the question, “What’s the use?”¹³⁰

Comte-Sponville required years to transform his atheism into a satisfying response to Nietzsche. But ultimately he feels he succeeded. What if the word “God” always means that the speaker stands with Comte-Sponville on the other side of nihilism?

This would be a different form of civil religion than the type we are used to, but I don’t think the differences are that great. In the Chapter “Civil Religion in America” in the 1970 book *Beyond Belief*, Robert Bellah notes that ultimate sovereignty in America is sometimes attributed to God, as in the national motto, “In God We Trust” as well the “under God” language in the Pledge of Allegiance.¹³¹ Bellah then answers the question, what difference it makes to attribute sovereignty to God:

Though the will of the people as expressed in majority vote is carefully institutionalized as the operative source of political authority, it is deprived of an ultimate significance. The will of the people is not itself the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong. The president’s obligation extends to the higher criterion.¹³²

130. COMTE-SPONVILLE, *supra* note 115, at 203.

131. ROBERT N. BELLAH, *BEYOND BELIEF* 171 (1970).

132. *Id.*

Trust in the real existence of a higher standard of right and wrong is of course both a commitment to objective morality and a rejection of nihilism. This trust is still expressed in God-language in prayer on public occasions today. Those references to God still contain the meaning that Bellah noted. Bellah's observations are all the more significant because he was not writing about the Establishment Clause. He was describing in good sociological fashion what God-language means in context.

Steven Goldberg criticizes ideas along these lines as "Bleached Faith," the title of his recent book.¹³³ This way of thinking, this kind of use of religious imagery, he writes, robs our religious traditions of the genuine meaning of their language. He refers to the kind of public invocation of God that Bellah describes as "the lowest common denominator."¹³⁴

But Goldberg misunderstands the religious traditions. Today, in addition to their particular faith claims, all of our religions always also embody a response to the great challenge of Nietzschean nihilism. There is nothing bleached about using religious language in this way. There is nothing merely ceremonial or merely historical about such use. It is, at least on one level, what this religious language actually does mean. God means in part an answer, or at least the promise of the possibility of an answer, to the question, what's the use?

I am not denying that the speaker in *Lee* may have meant to invoke the ontologically separate God, in which atheists like me do not believe. But if I had asked Rabbi Gutterman whether he did not also mean to stand in trust against the threat of meaninglessness that is present in this age, undoubtedly he would have told me that he did.

Justice O'Connor once wrote that public use of God-language does not violate the Establishment Clause because the word "God" is the broadest word that we have to express something religious—a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system."¹³⁵ But of course the response to that defense to the use of the word "God" would be that all religious expressions by government potentially violate the Establishment Clause.

Justice O'Connor did not go far enough. It is not just that God is the broadest religious expression we have, but that God is the

133. STEVEN GOLDBERG, *BLEACHED FAITH* (2008).

134. *Id.* at 100.

135. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring in judgment).

broadest, and indeed the ultimate, expression of meaning for us today and into the future. God is thus beyond religion. And since meaningfulness is always implied by use of the word “God,” challenges to God-language in public prayer should not lightly assume division where there might be unity. God might end up as an acceptable expression of our common ground, ironically whether God exists or not.

Conclusion

Law professors, especially in the area of church and state, are so strident that I sometimes wonder what they think they are doing when they offer interpretations of the Constitution. It seems sometimes like they are trying to win something. It seems that they are engaging in a kind of zero sum politics in which the success of one party must result in someone else’s failure. If they win, someone loses.

But the Constitution is not a game to be won or lost. It is an expression of community. A successful interpretation of the Constitution is one that fosters community. A failure of constitutional interpretation is one that divides us. Even that self-proclaimed textualist, Justice Scalia, counts public acceptance as a great strength of his asserted constitutional method.¹³⁶

I admit that there are times when constitutional justice requires division and not community. That great consensus builder, Charles Black, once wrote that whites would just have to adapt to *Brown v. Board of Education*.¹³⁷ Perhaps the same thing is true today with regard to issues such as gay marriage.

But that is emphatically not the case with regard to morality and religious imagery in the public square under the Establishment Clause. In this context we still have the opportunity of forging bonds of community around our religious and nonreligious identities. I am asking in this paper only that we attempt to do that before trying to force our fellow citizens into, or out of, their religious or nonreligious commitments.

136. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1000 (Scalia J., concurring in judgment and dissenting in part) (“As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text—the public pretty much left us alone.”).

137. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 429 (1960).