Toward a Meaning-Full Establishment Clause Neutrality

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INTRODUCTION

Because I have done little but write about secularism and religion during the past six years, I may have lost perspective concerning the centrality and intractability of the secular-religious divide in American public life. Why would I imagine that the issue of the words “under God” in the Pledge of Allegiance must be resolved for the sake of the health of the culture? Why would I think that in this issue, and others like it, there is something deep that affects most aspects of our public life and even our more personal lives?

That is why the controversy in June 2011 over the omission of the words “under God” from an NBC-TV feature in its coverage of the U.S. Open—golf, for the uninitiated—was reassuring. I have never actually seen this clip, but it was widely reported that the video featured the Pledge of Allegiance being recited by schoolchildren, intercut with patriotic images. Twice during the segment, the words “under God” were omitted, with the second reference also eliminating the phrase “one Nation.”

The omission sparked an immediate Twitter-induced outcry and NBC responded with an apology by Dan Hicks during its opening coverage:

We began our coverage of this final round just about three hours ago and when we did it was our intent to begin the coverage of this U.S. Open Championship with a feature that captured the patriotism of our national championship being held in our nation’s capital for the third time. Regrettably, a portion of the Pledge of Allegiance that was in that feature was edited out. It was not done to upset anyone and we’d like to apologize to those of you who were offended by it.1

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This apology was notable because it did not address the question many people wanted answered: had NBC intentionally edited out the words “under God” to avoid offending non-theists—both minority religious believers and nonbelievers? If so, NBC was making a statement in the fight over removing the “under God” language from the Pledge.

That is how many people saw the matter. Five days later, on June 24, Family Research Council President Tony Perkins hosted six-term Missouri Congressman Todd Akin on his weekly webcast radio show and asked Akin why NBC would omit that language. Akin’s response got at least as much attention as the original video: "Well, I think NBC has a long record of being very liberal, and at the heart of liberalism really is a hatred for God and the belief that government should replace God.” 2

This charge—that liberals hate God—sparked a great deal of criticism, which led to a sort of apology by Akin:

People, who know me and my family, know that we take our faith and beliefs very seriously. As Christians, we would never question the sincerity of anyone’s personal relationship with God. My statement during my radio interview was directed at the political movement, Liberalism not at any specific individual. If my statement gave a different impression, I offer my apologies.3

More significantly, Akin clarified his comment to indicate that he was aiming at fights over Government religious expression: "I think I can clarify that I was talking about public references, too. I think that clarifies it a little bit.”4

At this point, I asked on Huffington Post, why would anyone now dispute Akin’s claim? I received a lot of responses, both on Huffington Post and elsewhere, but no disagreement with this implied claim: the American left, however it is defined, does believe in the principle that something meant to define American nationhood, like the Pledge, should omit a religious term like God. Politicians cannot yet affirm this


3. Id.


5. Bruce Ledewitz Well, Don’t We Liberals Hate the Public God?, HUFFINGTON POST BLOG (June 29, 2011, 1:15 PM), http://www.huffingtonpost.com/bruce‐ledewitz/well‐dont‐we‐liberals‐hat_b_886759.html.
publicly because there are still so many religious believers who disagree. For similar pragmatic reasons, many liberals agree with Douglas Laycock when he writes that he is "not campaigning to amend the Pledge." Nevertheless, in theory, the liberal position—of both liberal believers and nonbelievers—is that, pursuant to the neutrality doctrine, God has no place in government's expression in the public square.

I draw several conclusions from this episode and its aftermath that explain the importance I attach to my work of reinterpreting government neutrality toward religion. First, the basic Establishment Clause issue is the place of God in the public square. Everything else is a dress rehearsal for that main event. Second, many religious Americans regard any attack on God, successful or not, as much worse than a normal political disagreement, perhaps even as a manifestation of the demonic. Third, a portion of the growing non-believing segment of the population is alienated from religious imagery and disdainful of religious believers.

This situation is poison for politics in particular and community in general. It is not clear to me how we are to live together as a nation if every election at its deepest level turns into a referendum on God. Too many Americans, both left and right, agree with Ronald Dworkin that the Establishment Clause question is, fundamentally, a test of national identity. This is how Dworkin posed the basic Establishment Clause issue in his book *Is Democracy Possible Here?*

> Should we be a religious nation, collectively committed to values of faith and worship, but with tolerance for religious minorities including nonbelievers? Or should we be a nation committed to thoroughly secular government but with tolerance and accommodation for people of religious faith? A religious nation that tolerates nonbelief? Or a secular nation that tolerates religion??

Not only is Dworkin’s question not the kind of question a nation like ours can answer in such either/or terms, but even the attempt to answer it—even the idea that we should answer it—is a political and social disaster.

This article represents an attempted alternative to Dworkin’s formulation of the basic Establishment Clause issue. Since this is a constitutional issue, I hope that the Supreme Court can contribute to re-

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solving our conflict over religion in the public square. In order to do that, the Justices need a constitutional vision of the Establishment Clause that promotes common ground and solidarity among majority believers, minority believers and nonbelievers. That is what I hope the vision of meaningful neutrality contained in this article promotes.

This article proceeds in five parts. First, I explain why I hope the future of the Establishment Clause lies in the realm of government neutrality. Then I proceed in Part II to critique the basic form of neutrality that much of the legal academy has supported until now as its understanding of the Establishment Clause. The flaw in this form of neutrality is its failure to consider public expressions of meaning as a positive good. In Part III, I describe public expressions of meaning that do not utilize traditional religious imagery and argue that these are neutral toward religion. In Part IV, I sharpen my disagreement with mainstream neutrality theory by applying this same approach to some governmental expressions of meaning that do utilize religious imagery, especially including the word God, and try to show that they are also not inconsistent with government neutrality toward religion. Finally, in the Conclusion, using Christopher Lund's article on legislative prayers as a starting point, I try to set forth what a meaningful neutrality would look like.

I. WHY NEUTRALITY IS OUR BEST OPTION

Although Christopher Lund and I are debating the future form of neutrality in this Symposium, the first question that must be asked is the following: why should there be any form of government neutrality in the area of religion? Why not interpret the Constitution as permitting some form of government endorsement and support of religion? Zachary Calo and Samuel Levine are discussing that question here, but I must address it briefly as well. Then again, why not utilize the law of standing to avoid deciding these sorts of issues, as the Supreme Court is increasingly doing? Mark Rahdert and Richard Albert are discussing justiciability, so my contribution here on that topic will be brief as well.

In rejecting religious endorsement, I am not referring to extreme formulations, such as Christian Reconstructionism. Nor do many people propose public subsidies for religious institutions as such, so that is not an issue either. I am referring, instead, to a constitutional interpre-

tation of the Establishment Clause that permits endorsement of the traditional biblical God in public pronouncements such as the Pledge of Allegiance, public displays of the Ten Commandments, and all the rest of the public religiosity that the Supreme Court has either already approved or seems ready to approve. In the academy, these kinds of religious expressions by government are most ably defended by Steven Smith. On the Supreme Court, they are defended by Justice Antonin Scalia.

The distinction between general support of religion in certain forms and government neutrality toward religion in certain forms is not always clear. As Steven Smith points out in his important recent article reinterpreting the school prayer decisions, Justice Potter Stewart in his dissent in the Schempp decision, which outlawed devotional Bible reading in the public schools, “agreed that the Constitution required government neutrality toward religion.” Chief Justice Rehnquist has approved various types of religious expression by government as historical acknowledgments of religion’s role in American life, thus not always challenging neutrality. In addition, Justice O’Connor approved a number of such expressions as ceremonial deism that lacked genuine religious content. Others defend government religious expression under the rubric of religious liberty, such as allowing students in public schools an opportunity to speak freely and pray. Although I find these arguments unsatisfactory, these formulations do not necessarily conflict with a theory of government neutrality consistent with most of these same government religious expressions. Neutrality is potentially a big tent, and a significant segment of public religious expression may be consistent with it.

Nevertheless, there is a distinction between any form of neutrality and a genuinely pro-religion stance. Justice Scalia means something

10. Id. at 961 (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting)).
11. See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 30 (2004) (Rehnquist, C.J., concurring in the judgment). ("All of these events strongly suggest that our national culture allows public recognition of our Nation’s religious history and character.").
12. See id. at 37 (O’Connor J., concurring in the judgment). ("I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of ‘ceremonial deism’ most clearly encompasses such things as the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (‘God save the United States and this honorable Court’).")
very different from any form of neutrality when he votes to uphold government religious expression. For Justice Scalia, the recitation of the Pledge of Allegiance, for example, is a genuine manifestation of public piety toward the divine, which, in his view, does not violate the Establishment Clause: “[T]here is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”13 And this “God” that Justice Scalia invokes is not the Deist God and also is not, if I may extrapolate from Justice Scalia’s dismissive reference to “believers in unconcerned deities,” Paul Tillich’s ground of being14 or any other sophisticated theological understanding of God. This God is the tent revival “God of monotheism,” “in the singular and with a capital G.”15 Government may lead prayers to this God in order to invoke His blessing and benign intervention. Even if attempts like mine to uphold religious imagery within the limits of neutrality are specious, they are not the same as allowing government to lead prayers to God.

Justice Scalia’s explanation for why government is permitted to acknowledge and worship the “single Creator” is, essentially, “historical practices”—that George Washington issued a Thanksgiving Proclamation and so forth.16 This is not the forum to evaluate the historical argument, but I have elsewhere acknowledged that Justice Scalia may have the better of the historical record in this argument.17

The weaknesses of Justice Scalia’s pro-monotheism view, however, despite its historical support, are twofold. First, this historical approach could as readily justify government invocation and acknowledgment of Christianity, as Justice John Paul Stevens argued in Van Orden v. Perry.18 Justice Scalia has always denied this, but when he first did so, in Lee v. Weisman in 1992, he was forced to distinguish between the Establishment Clause “as adopted” on the one hand, and

16. Id. at 885–88 (citing examples).
17. BRUCE LDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM 61 (2011) [hereinafter LDEWITZ, CHURCH, STATE, AND THE CRISIS] (“In the end Justice Scalia may have had more historical evidence on his side.”).
18. Van Orden v. Perry, 545 U.S. 677, 729 (2005) (Stevens., dissenting). (“[T]he history of the Establishment Clause’s original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism.”).
“our constitutional tradition”\textsuperscript{19} on the other, as if developments subsequent to adoption could remove authority possessed by the majority when a constitutional provision was enacted. This is the “living constitution” approach that originalists and textualists like Justice Scalia usually disdain. History does not justify this constitutional restriction on government endorsement of Christianity.

Nor do I think that Justice Scalia’s anti-Christian interpretation really has anything to do with history. The refusal of Justice Scalia to take seriously the claim of Christianity to preference in American history, combined with what I take to be his Holocaust consciousness—in 2004, Justice Scalia reportedly invoked the separation of church and state as providing insufficient protection to the Jews of Europe during WWII\textsuperscript{20}—suggests to me that Justice Scalia is personally and profoundly opposed to any such public preference for Christianity because of the untenable position in which it would place America’s Jews. While I admire this honorable restraint, I do not think the pro-monotheism position can explain this limitation on Christianity in a principled way. Differently put, it ought to be just as unthinkable, or just as permissible, to impose God on nonbelievers as it is to impose Christ on Jews.

The other problem with the pro-monotheism position is that listing historical practices is not a constitutional interpretation, for reasons I have elsewhere explained.\textsuperscript{21} To set forth an actual interpretation of the Establishment Clause, it is necessary for a court to explain what the nonestablishment principle means. Justice Scalia has himself acknowledged that a well-worn historic practice can still be unconstitutional,\textsuperscript{22} as has obviously occurred throughout American constitutional history, with racial segregation as the most obvious example.

What then is the constitutional principle behind the pro-monotheism position? Justice Scalia inadvertently stated what I think is the best interpretation of the nonestablishment principle when he

\begin{itemize}
  \item \textsuperscript{19} 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).
  \item \textsuperscript{20} Thom Hartmann, \textit{Scalia To Synagogue—Jews Are Safer With Christians In Charge}, THOM HARTMANN PROGRAM (Dec. 2, 2004), http://www.thomhartmann.com/articles/2004/12/scalia-synagogue-jews-are-safer-christians-charge. I remember hearing about this episode at the time, but I could only document a reference by the liberal radio talk show host Thom Hartmann, who cites other sources for the story. Justice Scalia spoke in my presence at the Centennial Celebration of Duquesne Law School on September 25, 2011 and he repeated the same point, so I do not believe he would find this characterization unfair.
  \item \textsuperscript{22} See McCreary Co., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 at 892 (Scalia J., dissenting).
\end{itemize}
explained why "governmental endorsement of a particular version of the Decalogue" would be unconstitutional, but that this was not the situation in the McCreary County case. The inclusion of the particular version of the Ten Commandments by the government in that case was not put forward "to take sides in a theological dispute."23

Forbidding government from taking sides in a theological dispute is one of the reasons—along with protection of taxpayer funds—that the Establishment Clause was adopted and indeed why State church establishments were dismantled in the early Nineteenth Century.24 The fact that this principle came so readily forward to Justice Scalia supports this view of our history.

This principle of not taking sides in a theological dispute supports a modern reinterpretation of the American history of public endorsements of God. Endorsements of God have been uncontroversial in American history because, for a long time, they were not considered to be taking sides in a theological dispute. For most of American history just about everybody believed in some form of God. That is why Steven Smith can refer to this widespread traditional view as "ecumenical providentialism."25 Belief in God united almost all religious believers throughout American history.

But with the growth in America of nonmonotheistic faiths and of genuine nonbelief, the endorsement by government of the God of monotheism has become the taking of a side in a hotly contested theological dispute—the existence of God. The existence of God is not accepted by everyone. It is rejected not only by nonbelievers but by pious nonmonotheists. Thus, in principle, and consistently with his approach to the history and text of the Establishment Clause, Justice Scalia should now oppose government-sponsored worship of God.

Another alternative to neutrality is Steven Smith's recent rejection of the neutrality principle in his essay Our Agnostic Constitution.26 Smith does not urge the embrace of religion as the constitutional norm, but argues that while the Constitution is agnostic about God, that is not necessarily the case for American politics or government. Thus, belief in God cannot be made constitutive of the American public community, but it can be affirmed at different layers of government while denied at others. On this reasoning, the recognition of God becomes something

23. Id. at 894, n.4.
25. Smith, supra note 9, at 968.
like our struggle over gay marriage, with some states but not others affirming it and other not, and with some local governments affirming it while the respective State government takes a different (or no) position. In this view, the Constitution would take no position on gay marriage. 27

Smith’s agnostic approach has a great deal to recommend it. If indeed we faced a fundamental identity conflict, as Dworkin suggests, Smith’s approach would be about the best possible understanding we could have.

But I refuse to accept the conflict over God as inevitable and beyond compromise. I see this conflict as a misunderstanding that is as damaging to secularism as it is to relations between believers and nonbelievers.

Smith’s analogy to gay marriage illustrates the potential damage that I fear. As a nation, we are going to fight about gay marriage for many years. While that is not great news, compromises like civil union will happen and conservative politicians will need gay political contributions and the usual fudging will occur. The debate will be divisive but will eventually be resolved. I cannot see a debate about God proceeding in any kind of similarly healthy way. That God/no God debate would be much harder to resolve.

Of course Smith might respond that although my neutrality proposal purports to encourage common ground and harmony, that result is no more likely to occur under my proposal than his. Go ahead, he might say, and tell nonbelievers that they share common ground in the use of religious symbols until the cows come home; your saying it will not change the hostility on the ground. Perhaps that will prove true. But only some form of neutrality holds out any hope for finding common ground between believers and nonbelievers.

For all the above reasons, the principle that government must be neutral with respect to religion in general and monotheism in particular is the best interpretation of the Establishment Clause for our time and place. But of course, that is only the starting point of an examination of what the Clause should be taken to mean. As I will explain below, the forms of neutrality that are commonly proposed are quite flawed and will not lead America to a future of political and social health.

27. *Id.* at 151–53.
Recently, instead of resolving the doctrinal impasse over neutrality, the Supreme Court has turned to standing doctrine to dismiss Establishment Clause cases. The court restricted taxpayer standing in *Hein v. Freedom From Religion Foundation*\textsuperscript{28} and *Arizona Christian School Tuition Organization v. Winn*\textsuperscript{29} and parental standing in *Elk Grove Unified School Dist. v. Newdow*\textsuperscript{30}. Further, in a concurrence joined by Justice Thomas in *Salazar v. Buono*\textsuperscript{31}, Justice Scalia raised the specter of additional standing restrictions by merely ”assuming that being ‘deeply offended’ by a religious display (and taking steps to avoid seeing it) constitutes a cognizable injury. . . .”\textsuperscript{32}

Ordinarily we might applaud the Court for ducking, and continuing to duck, the Pledge of Allegiance issue. In a different context, an Alex Bickel might praise the Court for refusing to inflame national divisions over the Pledge when the Court itself is deeply divided concerning symbolic government use of religious imagery and has nothing helpful to offer the people.\textsuperscript{33} And Steven Smith similarly believes that the nonlitigation of the “quasi-constitutional” status of both the religious and the secular positions prior to the school prayer decisions was preferable to the struggles over judicial enforcement that we see now.\textsuperscript{34}

But the religion context is not the usual situation in which the Court’s reluctance to decide an issue might lessen an issue’s political divisiveness. It was the Supreme Court, unanimously on this point, that originally promised government neutrality between religion and irreligion in *Everson v. Bd. of Education* in 1947\textsuperscript{35} and the Court has not retreated formally from that commitment. Certainly the role of religion in the public square and the degree of permissible government support of religious institutions might from the beginning have been left to democratic adjustment. Nothing in the Constitution expressly promised neutrality and the wall of separation image is, of course, not in the text.

Having promised neutrality, however, in broad terms in a series of cases, the Court is not now free to walk away through the manipulation

\textsuperscript{28} 551 U.S. 587, 592 (2007).
\textsuperscript{29} 131 S.Ct. 1436, 1439 (2011).
\textsuperscript{30} 542 US 1 (2004).
\textsuperscript{31} 130 S.Ct. 1803, 1810 (2010).
\textsuperscript{32} \textit{Id.} at 1826–27 (Scalia, J., concurring in the judgment).
\textsuperscript{34} Smith, supra note 9, at 987.
\textsuperscript{35} 330 U.S. 1 (1947).
of standing doctrine. A minority, but still substantial, portion of the American people believe that the current Pledge of Allegiance is unconstitutional because the Court itself has implied that it is. At the same time, an even greater number of citizens agree that the Pledge violates current Establishment Clause doctrine, but they want that doctrine changed. The Supreme Court is responsible, in large part, for creating these political and social tensions by endorsing a substantive constitutional vision that supports one side in the struggle over the Pledge. If a majority of the Court now feel that the Pledge is in fact constitutional, their imprimatur on that position would lessen, rather than enhance, national divisions. If on the other hand, the Pledge as currently worded really is unconstitutional, the Court’s turn to standing will not improve matters. If political realities preclude striking down the Pledge, the Justices could at least try to affirm the Pledge on the narrowest substantive grounds. Either way, the turn to standing is irresponsible.

II. A CRITIQUE OF THE CURRENT NEUTRALITY DOCTRINES OF SILENCE AND OMISSION

What is meant by government neutrality in the realm of religion? I noted above my understanding of the core government neutrality principle that underlay the disestablishment movement in the eighteenth and early nineteenth centuries—that the government may not take sides in a theological dispute. But that is only one possible approach to neutrality.

The best known, and most influential, version of neutrality in the American legal academy is Douglas Laycock’s substantive neutrality: government must “minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.” Or, more succinctly put, neutrality is “the separation of government power from the religious choices and

36. Justice Thomas even said this in Elk Grove, though he wanted the doctrine changed. 542 U.S. 1, 45 (2004) (Thomas, J., concurring in the judgment) (calling the Court of Appeals’ decision that the Pledge of Allegiance policy violates the Establishment Clause mistaken, but based “on a persuasive reading of our precedent”).

37. Douglas Laycock urged that course. See Laycock, Reviews of a Lifetime, supra note 6, at 964.

commitments of the people.” 39 Laycock distinguishes substantive neutrality from formal neutrality, which is a form of neutrality that usually would not allow the government to take religion into account in any way. 40 As we shall see below, the most important difference between these two versions of neutrality has to do with the permissibility of exemptions for religious believers from certain generally applicable laws, such as allowing wine for sacramental purposes during Prohibition. Under formal neutrality, such exemptions are presumptively violations of the Establishment Clause because they refer to religion as a category.

Both these forms of neutrality suffer from the same flaw. They are like ineffective diet advice. They counsel only what may not be done in the public square, but not what may be done. Neutrality theory currently is about silence and omission in the public square. Neutrality says the government cannot promote religion, but says nothing about what can be promoted. Neutrality theorists have little interest in explaining to the majority that want prayer on public occasions what they are permitted to do short of prayer. 41 This is the reason that moments of silence at public events are so popular. They, at least, are reliably constitutional. 42 Any other possibility is a constitutional minefield.

I think the reason for this omission to consider permitted forms of communal expression is the relentless individualism of neutrality theory. The focus is almost entirely on religious liberty. And liberty in the context of religious neutrality is taken to mean the choice by citizens of what they wish to do as individuals by way of religion. The point of substantive neutrality is to prevent the government from interfering with that free, individual choice, 43 not to free the majority to engage in meaningful public life.

It is thus often left to pro-religion voices to consider the possibilities of communal expression. Communal expression is what Justice

39. Douglas Laycock, The Many Meanings of Separation, 70 U. CHI. L. REV. 1667, 1700 (2003) (technically this is separation, but it is the “honorable” type of separation, which, for Laycock, is the same as neutrality).

40. Laycock, Neutrality Toward Religion, supra note 38, at 999.

41. Contrast this with Justice Kennedy’s concurrence in Parents Involved in Co. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment), in which Justice Kennedy tried to set forth alternative ways in which “[s]chool boards may pursue the goal of bringing together students of diverse backgrounds and races” without violating equal protection.”

42. See Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down silent prayer in public school but indicating that moments of silence are constitutional).

43. Laycock, Neutrality Toward Religion, supra note 38, at 1002. (“I mean that religion is to be left as wholly to private choice as anything can be.”).
Scalia has tried to defend with reference to the nature of religion. For example, in his dissent in *Lee v. Weisman*, Justice Scalia referred to prayer as an activity performed by a people:

The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one’s room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the “protection of divine Providence,” as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the “Great Lord and Ruler of Nations.” One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.44

Justice Scalia made a similar point in his dissent in *McCreary County* about the need to be able to give “God thanks and supplication as a people, and with respect to our national endeavors.”45

Although Justice Scalia understands the importance of communal expression, his vision of it is restrictive. Of course, the context in which Justice Scalia was writing was the permissibility of public prayer, which no doubt is part of the reason for Justice Scalia’s narrow focus. Nevertheless, the model that emerges from his description of a clash between neutrality and religion is that of a believing majority that wants to pray to, and thank, God on public occasions, on the one hand, and dissenters, on the other, whether believers or nonbelievers, who want to prevent such religious activity. This formulation implies that the sole imaginable mode of deep communal expression is religious. Why should that be? Is it not possible that there are other, nonreligious modes of communal expression that the majority would also be willing to utilize? Neither neutrality theory nor Justice Scalia tell us anything about these potential alternatives.

Religious prayer is just one possibility in a symbol-rich public square. At a conference this summer of The Institute on Religion in an

Age of Science, we sang the following hymn at chapel every day: “We the heirs of many ages/with the wise to guide our way/honor all earth’s seers and sages/and the science of our day.”

Now, could that hymn be constitutionally sung at a high school graduation? How about at school every day? Most neutrality theorists must squirm at this question, because this hymn feels religious. But of course the hymn has no traditionally religious content whatever.

The potential constitutional problem is that this hymn sparks reverence. Justice O’Connor, a noted neutrality proponent and the author of the endorsement test, voted to uphold the “under God” language in the Pledge of Allegiance case, Elk Grove, when the majority dismissed the case for lack of standing. But Justice O’Connor wrote that she would uphold this language essentially because she deemed the language merely ceremonial. It was part of her commitment to ceremonial deism. If, however, public references to God were actually intended to induce a “penitent state of mind,” Justice O’Connor maintained that they would violate the Establishment Clause.

My little hymn, conversely, is not religious in any traditional sense. It praises science. Yet it is intended to create a reverent spirit, which is like a penitent state of mind. Is government inculcation of reverence thus unconstitutional? It cannot be, if we are to have a healthy society. That hymn would seem to be a perfect expression of reverence for learning at a high school graduation.

Neutrality theory has not considered all this. Laycock’s substantive neutrality emerged to resolve a particular dispute: when could government exempt religion from generally applicable laws without violating the neutrality requirement? For a long time, there was a tension between the command of the Free Exercise Clause and the prohibition of the Establishment Clause. Neutrality theory evolved to resolve that problem, which it did successfully. There was no reason

48. Id. at 40.
49. Laycock, Neutrality Toward Religion, supra note 38, at 999–1006. See also Mark W. Cordes, Religion as Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty, 38 SW. L. REV. 235, 274, n.343 (2008) (“Scholars have at times drawn a distinction between formal neutrality, which would prohibit any distinct treatment of religion, and substantive neutrality, which permits special accommodations for religion so as to avoid coercive pressure on religious conduct.”).
50. Even when, in 1990, Emp’t Div. v. Smith, 494 U.S. 872, 878–79 (1990), eliminated this tension between the clauses by holding that government need never exempt religion from generally applicable laws, neutrality theorists argued that majorities should still choose to do so and indeed that they should bind themselves to do so through laws like the Religious Freedom Resto-
in this context of exemptions to consider public expressions of meaning.

It is a serious mistake for neutrality proponents to avoid consideration of public expressions of meaning. It is not only religion that is a communal rather than an individual activity. That is true of political/social life in general. As Robert Bellah has observed of this society, “The question is whether you can have a society without anything important in common.”51 Bellah thinks that is impossible. Neutrality theory should engage this communal level to promote shared values.

It may be that neutrality theorists are beginning to recognize the need for positive, public expressions of meaning and the need for more than just silence and omission in the public square. In his most recent statement about these issues, Laycock addresses the problem of what he calls “bland and generic endorsements” such as the national motto.52 After first suggesting that these expressions are often de minimis, Laycock says that this escape hatch is less and less convincing as the nonbelieving population grows. In any event, constitutional concern about the “under God” in the Pledge apparently cannot be so readily dismissed because of the way the Pledge is utilized in public schools and so forth. So, what to do about the Pledge?

One starting point would be to ask what “under God” means, other than as a presumably unconstitutional—as Laycock sees it—acknowledgement of the one Creator God. Laycock takes seriously the interpretation suggested by Thomas Berg that the Pledge implies that government is not unlimited but is subject to a higher authority.53 Michael McConnell once argued that this was why Edmond Burke supported an established church—to demonstrate the subservience of government to higher authority.54

Laycock notes the suggestion by Christopher Eisgruber and Lawrence Sager to substitute “one Nation, under law” for “one Nation un-
der God.”55 This formula would allow religious believers to hear the Pledge as endorsing natural law, which really would speak to some of the need that the phrase “under God” expresses.

Laycock argues that this proposal would not satisfy religious believers, especially because, unlike a silent starting point, the change to “under law” would remove God from the Pledge, which would be taken as an affront by some people who might otherwise like the “under law” formulation. This is a good point but is not fatal to the suggestion. At some future time, when religious belief is not so dominant, the “under law” formulation could serve as a compromise of sorts.

The linkage of law to natural law does impart a depth to neutrality theory that has been missing. In my recent book I refer to a related term, “higher law secularism,”56 as precisely what secularism needs to correct tendencies to relativism and reflexive opposition to religion. I would prefer, however, a more pointed formulation in the Pledge that stated “one Nation under a higher law.”

What is the difference between these two formulations—under law versus under a higher law—and why is the difference important? Because we tend to think that references to God in the public square are generic and bland, as Laycock does, we look for bland substitutes, when we look for substitutes at all. The phrase “under law” is just such a bland substitute for “under God.”

But what if these public assertions are not bland but are in fact revolutionary? That was the case with the word Creator as the source of rights—as opposed to the King or Parliament—in the Declaration of Independence. Similarly, if the point of a nation under God is that there are objective, binding norms in the world, whether or not there is a God, then a reformulated Pledge should say so. Leaving the matter ambiguous, as in “one Nation, under law,” which might promise procedural protection against arbitrary power but would not necessarily shield the citizen from a wayward majority, does not make the claim for objective limits on government. The formulation “under law” is insufficient to assert that rights are real.

It is easy to anticipate the reaction to a proposal that “one Nation under a higher law” be substituted for “one Nation under God.” Many religious believers would object on the ground that they reject neutral-

55. Laycock, Reviews of a Lifetime, supra note 6, at 961.
56. See generally LEDEWITZ, CHURCH, STATE, AND THE CRISIS, supra note 17.
ity itself. Such persons would agree that the current language praises the traditional God and they would want that to continue.

But what about those persons who support neutrality? What would be their reaction to the higher law proposal?

I can state with confidence that many would oppose the new formula on constitutional grounds. I can assert this confidently because, as I have discussed elsewhere, a similar issue arose in the lower courts during the Lee v. Weisman litigation. The issue in that case was whether removing the word God from a public high school graduation ceremony prayer would cure any constitutional violation. The federal judges involved disagreed.

While Justice Kennedy’s majority opinion did not expressly address this issue, I tried to show that he did so by implication. He cast the assertion of the existence of an “ethic and a morality which transcend human invention,” as the very claim that renders prayer religious and unconstitutional. And that is precisely the objection that would be made if a formula for the Pledge of Allegiance were suggested that made the claim that there is a higher law beyond human choice. This illustrates the problem that current neutrality theory has with expressions of meaning in the public square.

I will return to this issue of the possible content of communal expression within the limits of neutrality in the next section. Let me conclude here by saying that this exercise of imagining a rewrite of the Pledge of Allegiance is helpful in pointing to a needed change in neutrality theory. For even considering rewriting the Pledge acknowledges that people may feel the need for communal expressions of meaning, even if those expressions turn out to be bland and generic. Simply removing the words “under God,” even if it could be done, would not serve this public need. Something would be needed as a substitute.

I asserted above that people feel the need for communal expressions of meaning. But can this public need be met without the symbols of traditional religion? In other words, what would be the nature of secular public expressions of meaning? Would such expressions really not be religious? These are the topics I address in the next section.

58. Id.
III. A MEANING-FULL SECULAR NEUTRALITY WITHOUT RELIGIOUS IMAGERY

What is the task of neutrality theory? Negatively speaking, most neutrality theorists would probably say it is to keep government-sponsored religion out of the public square. What about positively? The positive task of neutrality theory is to set forth the possibilities for robust expressions of public meaning that do not violate the Establishment Clause.

Are all substantive moral claims necessarily religious? There is, for example, an account of politics that regards political life as nothing more than the private pursuit of self-interest and individual conceptions of the good. Mark Lilla sometimes sounds like this and Richard Posner does too. But I doubt that any neutrality theorist would claim, as a direct implication of the Establishment Clause, that this is the only kind of political theory that survives the separation of church and state. If that is the case, then substantive moral claims are not necessarily religious, and government should be permitted to make such claims, at least if the government does not use religious images to do so.

What secular reason would government have for wanting to make substantive moral claims? In the past few years, I have claimed in various writings that American culture is falling into relativism and that government, and other institutions, ought to be reclaiming the ground of moral objectivity through government expression in the public square. In a recent column, excerpted in the newsmagazine The Week, New York Times columnist David Brooks describes this descent into relativism:

If it feels right to me, then it is. That, said David Brooks, pretty much sums up the moral philosophy of most young Americans, who have grown up unmoored from any cultural or religious framework for knowing right from wrong. In a depressing new book, Lost in Translation, a group of sociologists documents how people in their late teens and early 20’s have come to view moral choices as “just a matter of individual taste,” and seem perplexed when asked to make judgments about behavior that earlier generations would clearly la-

60. While Posner may have changed his tune recently, the following is a fair summary of his longtime orientation: “man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self-interest.’” RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 3 (2d ed. 1977). Posner describes our actual democracy, as opposed to the democracy we might prefer to have, a “democracy of interests.” RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 165 (Harvard Univ. Press ed. 2003).
bel as wrong. Cheating on tests? Infidelity? Drunken driving? In interviews, young people say that decisions about such behavior are “up to the individual.” There is virtually no sense of any overarching value system or obligation to society or to others. “I guess what makes something right is how I feel about,” is a typical refrain. For this, we can only blame schools, institutions, and families. From blind deference to churches and authority, our society has swung to the other extreme and now morality is purely “something that emerges in the privacy of your own heart.”

The question is not whether Brooks and I are right in this observation, but whether government is free to agree with us and to try to do something about it by way of teaching and other forms of persuasion. Can the government assert that certain moral norms are true? Can the government assert that, even without being able to specify which moral claims are true, there is such a thing as an objective moral claim independent of human choice? What form could such moral claims take without reference to religious doctrine?

There have been some tentative efforts in the Establishment Clause caselaw to support a secular, meaning‐full public square that suggest positive answers to these questions. Consider two well‐known references to public expressions of meaning by neutrality oriented Justices—Justices O’Connor and Brennan—in the Pawtucket Rhode Island creche case, Lynch v. Donnelly.62 In his dissent, Justice Brennan distinguished the crèche in the case from presumably constitutional manifestations of what he called “ceremonial deism”:

While I remain uncertain about these questions, I would suggest that such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, in Dean Rostow’s apt phrase, as a form a “ceremonial deism,” protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non‐religious phrases.

We see here two different kinds of secular justifications of religious imagery. First, these images are said no longer to be genuinely religious, a point I will dispute in the next section. The other point is that these religious symbols serve certain secular purposes that oth-

63. Id. at 716–17 (Brennan, J., dissenting).
erwise could not be fully served. These purposes include—the word “such” suggests that Justice Brennan thought there were other secular needs like these—solemnizing public occasions and inspiring national commitment.

Justice O’Connor’s swing concurrence treated the crèche as comparable with other public religious symbols previously upheld and for this reason Justice O’Connor voted to uphold the crèche. But as far as the national motto and other such religious manifestations were concerned, her approach was quite similar to that of Justice Brennan:

Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.64

Like Justice Brennan, Justice O’Connor referred to solemnization, confidence in the future and promoting recognition of what is worthy in society. Are these norms secular?

Solemnization of a public event is a purely formal matter and thus in principle quite secular. A musical fanfare would do as well. We are just used to beginning important events with prayer invocations.

The other categories referred to by the Justices, however, are not formal, but normatively substantive. Inspiring confidence in the future, inspiring the citizenry to meet national challenges and encouraging recognition for the good or excellent share two characteristics. They are communal, not individualistic. And they presume the objectivity of values—that it is rational to claim that something is worthy of appreciation.

Justice Brennan’s commitment to encouraging meeting a national challenge is similar to confidence in the future. The fundamental basis of this commitment is the moral shape of history, what Martin Luther King, Jr., called the “arc of the moral universe”—that it is long, “but it bends toward justice.”65

As the Martin Luther King, Jr. quote shows, it is not difficult to find language that promotes these ends without any expressly religious content. For that matter, the source of the King quote is said to be a paraphrase of the great Unitarian minister Theodore Parker, and the original is just as devoid of formal religious references:

64. Id. at 693 (O’Connor, J., concurring).
I do not pretend to understand the moral universe; the arc is a long one, my eye reaches but little ways; I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. And from what I see I am sure it bends towards justice.66

The presence of language like this in the public square is crucial to our public lives together. I believe that it is the positive role of neutrality theory to explain why this is so and how it does not violate the Establishment Clause.

The question that haunts this assertion is whether a deep political orientation like this, one that relies on robust moral commitments, is really secular. The answer to that question cannot rest merely on the presence or absence of reliance on supernatural or revealed sources. John Rawls did not define “public reason” as excluding only religion. Public reason excluded direct reliance on any comprehensive doctrine.67 Public reason sought to arrive at a consensus to regulate the basic structure of society without appealing to any one metaphysical source. Thus, public reason might be conceived as excluding the kinds of political appeals that Martin Luther King and Theodore Parker are making. Some theorists may argue that for purposes of the Establishment Clause, government has no business endorsing any such comprehensive doctrine. From this perspective, a Pledge of Allegiance that referred to “one Nation subject to the demands of the moral universe” would be just as objectionable as “one Nation under God.”

In 2006, Robert George tried to turn this objection on its head by arguing that the natural law tradition, and by extension any comprehensive doctrine that purports to rely on reason, comports with the Rawlsian notion of public reason, even though he acknowledged that Rawls would have denied this.68 George was not writing about the Establishment Clause, but his argument can easily be applied to it. From his point of view, the boundary between impermissible endorsement of religion and permissible government political claims is marked strictly by reference to the supernatural and the revealed. Even teachings generally regarded as religious would be allowable if they were based on human observation and reason. Oddly, this might mean that

66. THEODORE PARKER, OF JUSTICE AND THE CONSCIENCE, IN TEN SERMONS OF RELIGION 48 (Boston, Crosby, Nichols & Co. 1853).
the government could endorse Confucianism as the national faith without violating the Establishment Clause.

Without going to that extreme, George's view would allow the government to make fundamental moral claims without violating the Establishment Clause. It would also allow the government to endorse a theory of history. The government could deny, for example, that history is a tale told by an idiot, signifying nothing. So, the national motto could constitutionally be phrased as "reality is trustworthy" instead of In God We Trust.

These moral and historical endorsements would extend not just to creedal formulations, like the Pledge of Allegiance and the national motto, but could also be taught in public school classrooms. Public schools could teach courses in right and wrong.

While all this may sound religious, it is firmly rooted in traditions usually regarded as secular. The tradition of fundamental rights that says, for example, that torture is wrong, does so in Kantian terms of human dignity rather than those of religion. 69 Similarly, science teaches us a great deal about right and wrong, or at least right and wrong for people. Sam Harris, the noted New Atheist, argues this specifically in a recent book. 70

Admittedly all this seems to mix the secular and the religious so that it is not easy to say where the secular begins and the religious ends. That is not new. C.S. Lewis wrote that the great divide in human thought was not between religion and secular thinking, but between relativist and objective accounts of the world. He wrote of the tradition of objective values:

This conception in all its forms, Platonic, Aristotelian, Stoic, Christian, and Oriental alike, I shall henceforth refer to for brevity simply as 'the Tao.' ... It is the doctrine of objective value, 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. 71

The philosopher of science Hillary Putnam made a parallel nonreligious argument to uphold the objectivity of mathematical truth without committing himself to the existence of any kind of mathematical entity:

Everything about the success of mathematics, and the deep dependence of much contemporary science, including physics, but not only physics, on mathematics, supports taking mathematical theorems as objective truths. . .72

Putnam’s point is not, or not simply, that the success of mathematics vindicates it pragmatically, but that such success supports the claim of objective truth. In other words, mathematics works because it is somehow connected to reality.

And we can say the same thing about cheating on tests, infidelity and drunken driving, which David Brooks referred to above. No society will work well that regards such actions as matters of taste. These behaviors are objectively wrong. Perhaps even more important, the wrongness of these behaviors supports the proposition that moral claims in general can be rationally regarded as right or wrong.

If that is the case, then, quite apart from religion, government ought to be viewed as able to make arguments about right and wrong as objective. Making such an argument in the public square would be an example of a public expression of meaning. Unless we are of the view that only forms of relativism and Rawls-like formal, process oriented political commitments are secular, we must allow the substantive claim by government that human beings are a certain kind of being and should be treated in a certain way.

So, what I mean by a meaning-full neutrality is a C.S. Lewis type view of public life that is open to, and indeed relishes, a comprehensive understanding of human flourishing and states its claims about these matters expressly in public creeds and in pedagogical commitments. That public activity would include spending taxpayer money in support of such substantive moral and historical claims and subsidizing groups that promote such claims.

Obviously, such government activity would exclude many citizens in the sense that they would disagree with the claims being made by the government and would be offended by the implied criticism of their views of morality and history. Relativists, for example, would feel themselves to be outsiders, not fully members of the political community, in Justice O’Connor’s formulation.

This undeniable fact reminds us that the Establishment Clause, whatever else it might mean, does not prohibit the government from offending people. The Clause should be understood as prohibiting offense, but only when that offense is sparked by an establishment of

religion. Most other government claims are permissible pursuant to the doctrine of government speech, whether citizens agree with the government’s message or not. The remedy is at the ballot-box.

A people is entitled to a creed. Whether or not such creedal community is the only kind of political community that is possible, such community is certainly not forbidden by the Establishment Clause. Any political creed denies that we live together only as separate individuals. It insists that there is such a thing as a common good that is different from the sum of all private goods. It defines a communal life. It must be neutral with regard to religion, but it can be filled with specific, determinate meaning.

There is yet one more aspect to a meaning-full neutrality beyond the assertions of substantive moral and political claims: the expression of genuine piety. Here we come the closest to unconstitutional endorsement of religion. Nevertheless, expressions of such intangible meaning are also a part of healthy political life.

Justice O’Connor expressed wariness of just such government expression in the public square. She was willing to uphold the “under God” language in the Pledge of Allegiance only because it was not, in her view, a prayer: not “a serious invocation of God or as an expression of individual submission to divine authority.”

And Justice O’Connor was quite sweeping in her negative description of forbidden prayer and worship: “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.” Justice O’Connor really meant “any statement,” even one without express religious imagery, because she then added that “the reasonable observer” would be able to judge whether any statement represented a forbidden prayer: “any statement can be imbued by a speaker or listener with the qualities of prayer.” Thus any statement might be unconstitutional, even one without traditional religious reference.

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73. See generally Ledewitz, Government Speech, supra note 21, at 84–88 (describing government speech doctrine). Equal Protection is another potential limit on government speech, but it is beyond my topic here.


75. Id. at 39.

76. Id. at 39–41.
This is what I meant earlier by the problem of reverence. For Justice O'Connor there is such a thing as a constitutionally forbidden religious comportment. The presence of such a comportment in the public square is problematic whatever the content of expression. Thus, for example, the holiday of Thanksgiving might be upheld because its original attitude of thankfulness to God has now expanded to a kind of generalized gratitude. Gratitude, after all, is not purely religious. The atheist writer Ronald Aronson has said that gratitude should be an essential component of secular life: “Giving thanks... has been central to religion, and secular culture needs to be enriched with an equivalent.”

Yet in describing the Thanksgiving holiday in the Allegheny County crèche case, Justice O'Connor referred to Thanksgiving not as a matter of gratitude but as a matter of patriotism: “the celebration of Thanksgiving as a public holiday, despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs.”

But surely Aronson is more right than O'Connor about what is necessary for a flourishing public life. Aronson refers to culture, not to personal expression, and not to the life of the nation-state. A secular civilization needs reverence and piety also.

Although invoking divine aid presumably refers to a supernatural being capable of intervening in the world and is thus prohibited by any form of neutrality, the same cannot be said of the rest of the O'Connor formula—a penitent state of mind or a spiritual communion.

The point of penitence is “regret for one’s wrongdoing or sinning.” And that notion of sin as a function of revelation is undoubtedly one reason it makes Justice O'Connor nervous. But just as embedded in penitence is regret for violating objective standards of right and wrong. It is not necessary that such norms be grounded in God or in any religious tradition. The core meaning is a standard beyond human invention to which our conduct can be compared to show that we are falling short. Penitence is a challenge to human pretentions of omnipotence, but it need not be religious in any traditional sense.

The widespread saying, “I am spiritual but not religious” should remind us that there is a hunger for something beyond daily materiali-
ty. I cannot define what spiritual life is, but it seems to me that the Establishment Clause should not be read to prohibit all attempts to invoke a sense of the spiritual in the public square.

Recently, the film Journey of the Universe sought to convey "wonder" at the story of that journey. As the cosmologist Brianne Swinme puts it at the end of the film, as we confront the crisis of the destructive impact of human civilization on our planet, "wonder will save us."

The film is filled with religiously inspired music. And it plainly aims at the creation of a spiritual communion. It is no accident that the co-author of the film, Evelyn Tucker, is a senior lecturer and research scholar at the Yale School of Forestry and Environmental Studies and Yale Divinity School. She is co-founder and co-director of the Forum on Religion and Ecology at Yale and author of Worldly Wonder: Religions Enter Their Ecological Phase. The religious feel of the film is undeniable and intentional. Yet surely it is not a violation of the Establishment Clause to show this film at a public school.

I admit I am being a little unfair to Justice O'Connor. After all, the Pledge of Allegiance contains a very traditional and powerful image: the word God. Just as clearly, this reference to God was sincerely meant by many people to invoke the aid of a supernatural being. Justice O'Connor was merely attempting to explain that this reference does not contain sufficient religious piety to violate the Establishment Clause. She did not necessarily mean that all forms of piety are unconstitutional.

But I raise the issue of reverence to prevent an unthinking linkage of superficiality and materialism with secular life. Neutrality theory must be clear that it is the establishment of religion that is forbidden, not the establishment of deep longing for meaning.

Thus far, we have considered a robust communal life of expression without recourse to traditional religious images. In the next section, I consider the harder question: whether the use by government of religious imagery to express this communal life is necessarily a violation of government neutrality?

IV. A MEANING-FULL SECULAR NEUTRALITY WITH RELIGIOUS IMAGERY

The prior section about meaning without traditionally religious expression is not as challenging to neutrality as the suggestion in this Section that there might be secular meaning to classic religious symbols, like God. This proposal threatens the entire structure of neutrality
by opening up the possibility of acceptance of some government speech using religious imagery.

Actually, it is an exaggeration to state that this suggestion is considered challenging. It is actually considered ludicrous. In my experience, the idea that "one Nation under God" might be anything but religious is often met by catcalls from neutrality proponents. Steven Shiffrin undoubtedly speaks for many when he calls such arguments "simply insulting."  

An anonymous critic captured this spirit of disdain in responding to an argument I made along these lines in the American Constitution Society Book Talk blog:

So your solution to the problem is to change the meaning of the word God? Or at least, to change the meaning of it for those people who care that a constitutional violation would be taking place unless the meaning of the word changed? And this is accomplished how? Buying your book is no doubt the first step, but if you were to give a preview, do we call up all the dictionary publishers and tell them to change their entries?

Actually what I proposed in Church, State, and the Crisis in American Secularism is something like what John Dewey concluded, which is that the symbol "God" has many meanings, some of which have nothing to do with a supernatural creator of the universe. Here is how I put it in the book:

It should not be forgotten that John Dewey, a foundational American secular figure, never gave up the use of the word "God," though in his mature thinking he did not believe in the traditional God of monothesim. In A Common Faith in 1934 Dewey refers to God as "a unification of ideal values that is essentially imaginative in origin." By "imaginative," Dewey does not mean unreal. He adds, so there is no mistake, "the reality of ideal ends as ideals is vouched for by their undeniable power in action."

I will not rehearse here all the sources I cite in the book who have used God language in non-supernatural ways, as in "the ultimate mystery of existence itself" or the creativity in the universe or the ground of beings or other formulations of process theology and reli-

82. Ledewitz, Church, State, and the Crisis, supra note 17, at 132.
83. MICHAEL HAMPSON, GOD WITHOUT GOD: WESTERN SPIRITUALITY WITHOUT THE WRATHFUL KING 8 (John Hunt Publ'g 2008).
84. STUART A. KAUFFMAN, REINVENTING THE SACRED 6 (Basic Books 2008).
85. TILLICH, supra note 14.
86. See, e.g., ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 23 (Free Press 1979).
igious naturalism. My suggestions for reinterpretation are not neologisms; they are not a private language.

Nor are these suggestions mere tactics for resolving Establishment Clause issues. Robert Bellah described similar meanings for God language in the public square years ago and he was not addressing any constitutional issue.

Furthermore, it does not do violence to the orthodox meaning of religious terms when they are used in these ways. When Dewey refers to the power of the absolute, the religious believer does not object and say that God is not the power of the absolute. Rather, the believer says that God is more than the power of the absolute and that to that extent Dewey is mistaken and too limited. Similarly, when Stuart Kauffman writes that God is "the very creativity in the universe," the religious believer does not say God is not the creativity of the universe but that God is the source of that creativity and is something more than that creativity.

So, why has there been, so far, such a complete rejection, of reinterpretting God language, and other religious formulations, along non-religious lines? There are a number of understandable reasons.

To start with, people forget that religious terms need not lose their religious content when nonreligious meaning is added. Justice Brennan, dissenting in *Lynch*, characterized the Court's upholding of Sunday closing laws in *McGowan v. Maryland* as embodying that principle: "our cases recognize that while a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for the government to pursue the practice when it is continued today solely for secular reasons." Thus, the ban on Sunday activities originated in Christian practice with regard to the Sabbath, but over time the justification shifted to the desire for a society-wide day of rest. In principle, one could say the same about government's use of religious imagery—that these images begin with a purely religious meaning and then they evolved to encompass secular meaning as well.

87. See, e.g., JEROME A. STONE, RELIGIOUS NATURALISM TODAY (State Univ. of N.Y. Press 2008).
89. KAUFMAN, supra note 84, at 6.
90. Compare JOSEPH CARDINAL RATZINGER, TRUTH AND TOLERANCE: CHRISTIAN BELIEF AND WORLD RELIGIONS 230 (Henry Taylor trans., Ignatius Press 2004). (Pope Benedict: "[T]he three questions, concerning truth and good and God, are but one single question.").
But notice that Justice Brennan wrote that Sunday closing laws were now maintained "solely" for secular reasons. Surely he was aware that many Christians regarded the Sunday closing laws as continuing to embody a religious justification. Thus, Brennan must have meant that the official, proffered *justification* for the closing laws had become secular, not that the closings had lost all religious salience for the citizenry in general.

The failure to acknowledge the distinction between official justification and popular understanding led Brennan to a serious misstatement with regard to what he called “ceremonial deism.” Brennan probably felt that the national motto and the Pledge of Allegiance were unconstitutional when he wrote his dissent in *Lynch* in 1984. That is presumably why he wrote he was uncertain about their constitutionality. But if they could be upheld, he stated that it was because they had lost “through rote repetition any significant religious content.”92

Clearly, this observation is false for many millions of Americans. These references to God may be merely “vestiges” of a once more robust religious worldview, as Steven Smith says,93 but they undoubtedly retain religious meaning for many believers.

This fact of continuing religious meaning is part of the reason that opponents of the presence of God language in the public square object to the proposed reinterpretation of religious imagery into secular categories. These opponents recognize that these religious terms represent fully functioning religious claims. The reinterpretation project is therefore viewed as disingenuous.

But, like the Sunday closing laws, religious imagery can retain its religious meaning for the believer and still be constitutional, as long as it also contains a secular component. In other words, if the government can plausibly maintain a secular meaning for a word like God, there should not be a violation of neutrality because religious believers understand the word God differently, just as the religious desire for Sunday closing laws did not remove a parallel secular justification.

Another objection to the reinterpretation approach, similar to that of my anonymous critic above, is the claim that religious terms and images don’t have the secular meanings I attribute to them. “God” does not mean the creativity in the universe. The word can only mean a su-

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92. *Id.* at 716.
93. Smith, supra note 9, at 1019.
pernatural being and thus can only contain a religious referent.94 A Ten Commandments display cannot mean that justice is real but can only refer to a supernatural covenant on Sinai, and so forth.

This objection reflects either genuine ignorance or is an inartful articulation of a different problem. If the former, then eventually people will learn about the rich history of mixed religious/secular meanings that I adverted to above. Nonbelievers do use religious terms, in fact all the time, for metaphorical resonance. Government could do the same.

But I think the objection is not to the improper use of a word. I think the problem is, as Laycock bluntly put it, the “lie.” Referring to the claim by the government in the McCreary County Ten Commandments case, Laycock wrote that “the claim that the Commandments were displayed for their secular legal significance and not for religious reasons was undoubtedly a lie, and it was based on an absurd reading of legal history.”95 The objection is not so much that secular meanings for religious images are not possible, but that they do not truly reflect the government’s purpose. The government is actually attempting to endorse the existence of, and invoke blessings from, the God of the Bible.

If the government’s proffered secular justification is plausible, this kind of subjective untruthfulness is irrelevant to either law or politics. The meaning of government expression in the public square is social, not subjective. Thus the government’s official explanation is the one that, over time, will become the public meaning of the government’s action. The lie, if it is such, will become the truth.

Let me make these claims more concrete. In the July 6, 2011 issue of the New York Times magazine, David Segal wrote a story about Vince Gilligan, the creator of the AMC series, “Breaking Bad.”96 This series is notorious for raising moral questions about the behavior of its main character, Walter White, a fatally ill former chemistry teacher turned crystal meth producer. As Segal put it, “Gilligan and his writers have posed some large questions about good and evil, questions with implications for every kind of malefactor you can imagine, from Ponzi

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94. Or, as one critic put it, “God means God.” Ledewitz, Church, State, and the Crisis, supra note 17, at 227.
schemers to terrorists. Questions like: Do we live in a world where terrible people go unpunished for their misdeeds? Or do the wicked ultimately suffer for their sins?”

It turns out that Gilligan sees these moral issues as arising out of the very real possibility—Gilligan calls himself an agnostic—that there is no God: “if there is no such thing as cosmic justice, what is the point of being good? That’s the one thing that no one has ever explained to me. Why shouldn’t I go rob a bank, especially if I’m smart enough to get away with it? What’s stopping me?”

Now imagine that the government is concerned that an increasingly nonbelieving society will fall prey to the sort of nihilism that Gilligan is expressing. So the government adopts slogans like the national motto and the Pledge of Allegiance to help combat that possibility. And the government explains that it is trying to get the idea across that there is such a thing as cosmic justice—that there are bad consequences in life for bad behavior and that people will not flourish if they behave badly.

But the government insists that it does not mean that there is a God in the traditionally supernatural, monotheistic sense. The image of God was chosen for this purpose because that image communicates the message of cosmic justice better than any other. The government freely admits that many religious believers hear in the God formula the existence of a Creator, but as long as those believers also hear the message of cosmic justice, which they do, the government considers the religious meaning to be a helpful and immediate reminder of the government’s secular message. Even nonbelievers, like Gilligan above, hear in the word God the promise of cosmic justice. The government insists that it is taking no position on the claim by believers that God brings cosmic justice. As far as the government is concerned, cosmic justice happens because of the nature of matter and the necessity in evolutionary terms of human cooperation.

What if some government officials, on whose behalf these arguments are being made in court, have been lying? They really do want to see public school students believe in God and they think these mottos will assist that goal.

The subjective motivation of individual government officials does not alter the social reality of the secular explanation in my example at all. Certainly, the government’s concern about nihilism is not belied by the desire of some officials to inculcate traditional monotheism. Indeed in all likelihood, that part of the explanation is not a lie. There is a gen-
une concern about nihilism by these government officials. Nor is it untrue that the word God can be a stand-in for the notion of cosmic justice. Once the government explains the content of the message it is propounding, that explanation stands on its own, regardless of whether some, or even all the relevant, government officials think that belief in the traditional supernatural God is necessary to combat nihilism. Establishment of religion is always a social act, not a private and secret one.

The plausibility test is the key to my proposal about the permissible use of religious imagery. If the government's secular explanation of its message is not plausible, then endorsement of the religious content will be the message that the public receives. If a crèche is prominently displayed by itself, and no other holidays are so honored, as in the Allegheny County case, it will be obvious that Christmas is uniquely being endorsed and it won't matter that the government claims that Christmas stands for the renewal of hope. That government claim will not be plausible.

The problem heretofore with several of the Justices' explanations of the permissibility of invocations of God is that these explanations sometimes suggested that references to God only acknowledged religion's historical contributions to America, when it is obvious that these religious expressions have a continuing substantive religious content. Similarly, Justices have sometimes argued that these religious expressions have a kind of bland meaning—"confidence in the future" for example, as discussed above—when everyone can tell that the word God asserts something important, even crucial. But once the power of symbols such as God is acknowledged, the government's secular justification will no longer seem so alien and laughable.

Since neutrality is a core constitutional norm, the Supreme Court will have to force the government to explain its actions in an open and timely way. Like government justifications in areas of fundamental rights and suspect classifications, post-hoc justifications should not be considered adequate. The point is the expression of social meaning, which requires express formulation.

97. See, e.g., Chief Justice Rehnquist concurring in the judgment in Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26 (2004) (referring to the "under God" language in the Pledge of Allegiance to "patriotic invocations of God and official acknowledgments of religion's role in our Nation's history").

98. Cf. Zablocke v. Redhail, 434 U.S. 374, 383 (1978) ("Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here
The Court allowed the government in the *Grove City Utah* case to avoid explaining its intended message in a free speech, Ten Commandments display context. That silence may have been sufficient to survive a public forum challenge, but an Establishment Clause challenge should require a plain and express secular response by the government.

Some opponents of government religious expression will argue at this point that my reinterpretation proposal amounts to giving up their commitment to neutrality, as if I were saying that they should just “get over” their objections to God language in the public square. They also will point out that the use of God language by the government, even with a secular explanation, may have the effect of strengthening belief in God in this society.

The giving-up objection assumes the matter in question—that government is establishing religion. If government is not communicating a religious message, even though some believers are hearing one, then there is no violation of neutrality. This could still feel like giving in, but I hope instead that the government’s plausible assertion that there is a secular government message embedded in the use of religious imagery changes the way God language in the public square is understood.

The other argument is that any use of the word God will inevitably strengthen religious belief among Americans. Reciting the Pledge of Allegiance in school every day will remind students that there are traditional religions in America and will keep a cultural space open for these religions among the young. In other words, the government will, through the use of religious imagery, be substantively aiding traditional religious belief.

This might be the case, but I have to admit it does not bother me. The incidental, even predictable, advancement of religion is not an Establishment Clause concern. Great art with religious themes may also bring students to God, but studying such art is not unconstitutional.

Some religious believers will have a different objection. They will claim that government’s use of religious imagery for secular purposes is an insult. This objection was described by the late professor Steven

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Goldberg in his book, *Bleached Faith*.100 This kind of government use is said to deprive religion of its genuine power and to demean its holy message. "For God so loved the world..." is not the same as some general government assertion about the objectivity of values.

My response to this is that, as the example of "cosmic justice" above shows, there is not a chasm between the secular meaning of religious imagery and its sectarian meaning. There is a reason why Vince Gilligan linked the possible absence of God to the possible absence of cosmic justice. God is a proper stand-in for cosmic justice because God has something to do with justice in traditional religious understanding.

I am not suggesting false or inappropriate uses of religious imagery to convey secular meanings. These secular meanings are, and always have been, a part of the purely religious meaning of the image. That is why nonbelievers have used these religious images.

A final and more general objection to the whole project of reinterpreting neutrality is to ask, why bother to do all this? The Supreme Court as currently constituted is going to uphold all the same government uses of religious imagery that I propose upholding, so why try to come up with a new interpretation of neutrality?

There are three reasons why a new interpretation is needed. First, while the Court seems currently settled on upholding most so-called nonsectarian religious imagery used by government, as well as upholding public displays such as Ten Commandments monuments and crosses at public cemeteries, there is no agreement even among the five Justices—or maybe six if one counts Justice Stephen Breyer—who compose this majority as to why such religious imagery is constitutional. These actual and potential rulings are not stable in the way they would be if doctrine in the field were settled. Once Justice Anthony Kennedy leaves the Court—and he will be 76 years old in July 2012—the results in Establishment Clause cases could radically change. Accordingly, some kind of new doctrine is needed.

Of the obvious choices discussed in this Symposium—neutrality, a pro-religion stance, or some kind of justiciability limit (a related possibility would be to de-constitutionalize the field, as Steven Smith suggests)—neutrality in its current state seems politically unworkable because, as Laycock argues, government neutrality should result in the

general invalidation of government use of religious imagery, such as
the national motto or the Pledge of Allegiance.\textsuperscript{101} But a nominee to the
Supreme Court who seemed likely to invalidate the Pledge of Allegiance
would not be confirmed by the Senate. Nor would the Court act
lightly in that way, in any event. Thus, in the long run, either neutrality
theory must change or neutrality will cease to be a practical option in
the courts.

The second reason to reinterpret neutrality theory to suggest the
acceptability of government use of religious imagery in certain circum‐
stances, is to reduce political strife in American public life. If the constit‐
tutional theory to which large numbers of Americans are devoted
counsels that the Pledge of Allegiance is unconstitutional, and the
courts do nothing about it, then the matter must be pressed politically.
That would result in years of religiously polarizing elections.

On the other hand, a new interpretation of neutrality that showed
that the Pledge of Allegiance and other instances of God-language are
constitutional, would reduce the political temperature and lessen the
rancor behind the culture wars. If a new approach to neutrality were
accepted, there would be no reason to fight to remove God language
from the public square. Of course, any such interpretation of neutrality
would have to be convincing to nonbelievers.

Finally, and in my view the most important reason to reinterpret
neutrality, is that a religion-friendly neutrality would assist secularism
in moving away from reflexive opposition to anything that partakes of
religion. There are secular communities in America in which the per‐
ennial questions of human life—for example Kant's three questions:
what can I know, what should I do and what can I hope for?—or the
more general forms of the question—what is all this about, why am I
here?—are not even on the table for discussion. This is what David
Brooks was pointing to above. The searching and longing behind such
deep questions seem to have been replaced in much of American secu‐
larism by a kind of easygoing materialism, which only masks a deeper
despair.\textsuperscript{102}

Humankind’s religious traditions have been the repository of our
deepest thinking about what it means to live a human life. My neutrality
proposal might be considered a way of bringing secularism back into
the orbit of religion without sacrificing a scientific worldview. In other

\textsuperscript{101.} See Laycock, Reviews of a Lifetime, supra note 6, at 961.
\textsuperscript{102.} This is the “Crisis in American Secularism” I develop in CHURCH, STATE, AND THE CRISIS,
supra note 17.
words, a meaning-full neutrality might be a way of saving secularism from itself.

**CONCLUSION: Marsh—and Lee**

This brings me to a brief consideration of Christopher Lund's important recent article on the hidden costs of legislative prayer in order to flesh out the implications of a meaning-full neutrality. Let me say at the outset that Chris succeeds in his stated goal. Some persons who consider themselves committed to neutrality foolishly counsel acceptance of religious expression in the public square on the ground that opposing such imagery would have political consequences worse than the consequences of allowing religious imagery. They ask, in effect, what harm can a little religion do? Chris painstakingly shows in his article precisely how harmful such governmentally sponsored religious expression can be.

That said, Chris's article also demonstrates the weakness in neutrality theory that I discuss above. Specifically, the article does not acknowledge any value of, or need for, communal expression in a democratic community. It does not provide a path to such communal expression in the context of a substitute for legislative prayer that would not use religious imagery. And, the article does not consider what secular values legislative prayer might serve, even though it uses religious imagery.

All of these omissions spring from an undue emphasis on individualism in neutrality theory. To see this, consider Chris's overall criticism of prayers before legislative sessions. What exactly is wrong with such prayers? It is not so much that such prayers reflect an establishment of religion, though of course that is the article's position. The more serious problem with such prayers, and by extension all tendencies to allow government to speak religiously, is that the prayers constitute "a genuine threat to religious liberty." And Chris spends the rest of the article demonstrating how this occurs.

The threat is that "someone's religious liberty will inevitably be lost" when government speaks religiously. Government must pick who may express religion and who may not. Government can do this either by censoring the religious expression itself—as in telling the Christian that she may not mention Jesus—or by discriminating in the selection

103. Lund, supra note 8.
104. Id. at 974.
of the religious speaker. Either way, this is a zero-sum game—some persons will not be permitted to pray. Thus, Chris concludes, *Marsh* should be overturned and no legislative prayer permitted: "[t]he only way to really protect religious liberty, it seems, is by not having legislative prayer at all." 105

But there would still be a zero-sum game, even if *Marsh* were overruled. As Chris would acknowledge, the liberty of the majority to engage in prayer prior to legislative sessions would be sacrificed if *Marsh* were overruled. So how can Chris suggest that overruling *Marsh* is the way to protect religious liberty?

The reason that liberty seems protected when prayer is prohibited is that current neutrality theory recognizes religious liberty only when individuals are acting. Conversely, when the majority is acting as a majority—and not just as the largest group of individuals—there is no liberty interest to be lost. In fact, when the majority acts in accordance with its religious beliefs, there is not only no protected religious liberty interest, there is asserted to be a forbidden religious establishment.

The imbalance of this neutrality approach would be more apparent if the situation were described differently. What if there were a small, but not insignificant, group of Americans whose religion taught that when government is conducted without seeking divine wisdom, society falls into chaos? And what if, at the same time, the vast majority of Americans were completely secular?

Under these circumstances, what would happen if this minority asked that occasionally they be allowed to conduct a ceremony of welcoming divine wisdom before a session of the legislature? This feels completely different from *Marsh*, does it not? This feels like a proposed exercise in religious liberty. And I imagine that many people who oppose Marsh would not oppose granting this request on occasion.

But how does this imagined situation differ importantly from our actual situation? Shouldn’t believers be permitted to indulge their beliefs even if they are the majority?

One way to reset the one-sidedness of analysis of legislative prayer is to compare two different contexts, rather than just examining the fallout from one. Let’s compare the regime that *Marsh* has led to with the practices that have evolved since *Lee v. Weisman* banned prayer at public high school graduations. In a way, *Marsh* and *Lee* represent mir-

105. *Id.* at 977.
ror images of how to deal with religion at important public events. I presume that something like Lee is what Chris would like to see instead of Marsh to resolve the issue of legislative prayer.

It should be noted at the outset, that there is much less litigation over Lee than there has been over Marsh. The history of relatively little public high school litigation, versus the cases that have unfolded around legislative prayer, will seem at first glance a great advantage to banning prayer. But there are secret costs to banning graduation prayer also. In the school districts that strictly adhere to Lee, we may assume that moments of silence have been substituted for prayer. That is what was supposed to occur, for example, this past May, in the town of Bastrop, Louisiana, which had scheduled a traditional prayer for a public high school graduation. Then a local atheist student, Damon Fowler, emailed the superintendent of schools, pointing out the unconstitutionality of this traditional prayer under current law—presumably referring to Lee. The prayer was then dropped.

The school board chose to offer instead a moment of silence at the beginning of the graduation ceremony. Undoubtedly this was done on advice of counsel and likely because a moment of silence was the permissible fallback position to prayer in Wallace v. Jaffree in 1985.

Now this substitution, which probably goes on in many school districts, represents a real cost. In the context of a ceremony like a high school graduation, a moment of silence is the antithesis of what the community had been looking for in desiring public prayer. The people who wanted prayer were looking for a communal expression with some content. Without for the moment considering what is and is not constitutional, we should at least grant that a moment of silence is not that kind of communal act.

Chris admits, though reluctantly, that prayer at public events does potentially serve secular purposes: “formally opening the session, solemnizing the proceedings, and unifying the attendees.” If so, these secular purposes are largely lost in a regime of moments of silence.

But I think prayer expresses a great deal more than that. It expresses hope and confidence in the future, as even Justices O’Connor...
and Brennan seemed to grant to ceremonial deism. More importantly in the context of a high school graduation, prayer is meant to inspire the graduates and the audience to serve noble and enriching purposes with their lives: to appreciate what is worthy in life. Just consider that actual prayers that were deemed unconstitutional in *Lee* itself.109 Those prayers certainly sought to inspire worthy lives.

It might be objected that secular expressions could be created to serve these needs instead of religious prayer. But that possibility actually illustrates part of my point. Of course secular language could be developed to do that. Neutrality theory, however, has not considered this task to be important. There is nothing about this need in Chris’s article, for example.

There are two other costs from *Lee*. First, banning prayer at high school graduations has undoubtedly spawned forms of civil disobedience. Some school boards have probably continued prayer despite *Lee*, as the Board intended to do in Bastrop. In addition, some students have probably taken the task of prayer on, themselves.

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109. 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.

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.

The latter is what ultimately occurred in Batrop. When graduating senior Lacie Mae Mattice stood up to lead the planned moment of silence, she invited the audience to join her instead in the recitation of the Lord’s Prayer.

Once something like this occurs, it is too late for a lawsuit. Anyway, Mattice’s act was not unconstitutional since it happened in direct contravention of the school board’s directive. And what could school officials have done once Mattice began her protest? How many professing Christian students dragged off graduation stages would it take before a revolution was sparked in this country—a revolution that would at least manifest in a constitutional amendment protecting public prayer?

The other form of response to Lee has been an explosion of so-called private speech, which both Chris and I would probably usually find to be government speech and government action. I have heard Jesus praised by students who were chosen to speak at graduation because of non-religious accomplishments, such as becoming class president. These students were presumably not told anything by school officials about religion in terms of their remarks.

A large-scale example of such private speech occurred in the spring of 2011, in a town outside Pittsburgh. A friend of mine with his daughter attended a completely Christian ceremony—called a baccalaureate—held the weekend of the public high school graduation, apparently without any material school board support. About half of the graduating students and their families attended.

I can hear some neutrality theorists praising this outcome. That is just what they wanted, for the Christians in the community to have their own religious ceremony and leave the official government graduation ceremony to a purely secular form.

But this is lightly said only because current neutrality theory has not been pressed to its logical conclusion. Neutrality theory has always shamelessly, and without acknowledgment, borrowed from a more religious past.

Imagine that next year, the school board in that town sends out this announcement: We have concluded that all the pomp and ceremony of high school graduation is the relic of a religious past. The important secular goal of graduation is just that—preparation for college and/or a career. So we are just going to mail out diplomas. We understand that Christians in our school community are going to organize a private ceremony to express hope, faith and love in regard to our grad-
uates. They are welcome to do this if they wish. We have nothing to do with that.

This school board response would not be the same as that of communities that closed their municipal swimming pools to avoid the desegregation command of Brown.110 Those communities were refusing to obey a constitutional command. My hypothetical school board would believe it was serving a constitutional value: neutrality. But it would be a neutrality empty of meaning. Most families, even secular ones, would be very disappointed. What we need, instead, is a meaning-full neutrality. We need more expression in the public square, not less.

So what would I suggest instead? Like Chris, I would like to see Marsh rewritten. But I would like to see Lee rewritten as well. In both instances, I would like to see the Supreme Court uphold the principle of neutrality, but a different neutrality than is currently understood.

I would like to see an opinion in which the Justices state that, while government may not endorse religion it may promote many different kinds of expressions of meaning. That could include the reverence of the hymn to science I described above. That could include sectarian prayers of the sort prayed by Rick Warren at President Obama’s Inauguration, in which Warren ended by invoking “the One who changed my life – Yeshua, Esa, Jesus.” That could include portions of the Humanist Manifesto of 1933.

The more expressions of meaning, the better. Neutrality means that government may not endorse religion. But neutrality should not prevent the government from endorsing the tradition of meaning that opposes relativism and nihilism, of which our religions are an important part. Government can do that by utilizing different aspects of that great tradition, as long as it does not limit itself to the religious aspects.

That kind of prayer opinion could be issued without any historical exceptions for religious prayer or politically inspired surrenders to the expression of religious truth. There need be no embarrassment at the presence of the divine in the great texts of American political life. Under this understanding, the Declaration of Independence and Lincoln’s Second Inaugural Address could be read without apology.

Let ministers and rabbis and Imams speak at graduation. And scientists. And poets. The more different kinds of people speak, the less likely it is that religion as such is being endorsed.

What is needed to accomplish this is a new and broader interpretation of the neutrality required by the Establishment Clause. This new neutrality would emphasize the common ground that majority believers, minority believers and many nonbelievers share. It would aim at a public square filled with expressions of meaning.

Undoubtedly, each such expression would risk offending some people. But the public square as a whole would reflect the basic commitments of most Americans to the objectivity of values, the reality of justice and the necessity for reverence and gratitude. Certainly, there are Americans who would object to such an array. But their objections would not be to the establishment of religion. The meaning-full public square contains religious expressions, among others, but it does not endorse religion. Therefore, while there would not be unanimous agreement with the content in such a public square, there would be no violation of the Establishment Clause.