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The Five Days in June When Values Died in American Law

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THE FIVE DAYS IN JUNE WHEN VALUES DIED IN AMERICAN LAW

Bruce Ledewitz*

I. Introduction .................................................................115
II. The Setting and the Cases.................................................117
III. The Context of the Death of Values in American
    Culture and Among Law Professors.............................124
IV. The Reflection of the Death of Values in Constitutional
    Interpretation of Rights...............................................135
V. The Reflection of the Death of Values in the Struggle
    over Religious Exemptions.........................................149
VI. Coping with the Death of Values ....................................154
    A. The Death of Values is Only Apparent.......................154
    B. Consensus, Tradition, and Originalism......................155
    C. Individual, Sovereign Choice..................................159
VII. The Dark Side of Coping with the Death of Values...........161
    A. The Justification of Immorality ..............................162
    B. The Collapse of All Morality ................................163
    C. The Illegitimacy of Constitutional Government ............164
    D. The Loss of Democracy ........................................167
VIII. The Death of Law School and the Death of Values ..........172

I. INTRODUCTION

There was a particular five day period when one could see that values had died in American law.1 Those five days were June 24 to June

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1. There is an ambiguity in the title of this Article that I could not overcome. Despite the title, I don’t mean that values died in American Law in June 1992, only that the death of values that had already occurred became fully manifest during this five day period. As to when the death of values actually occurred, I can only say sometime between the highly normative opinions in Brown v. Board of Education, 347 U.S. 483 (1954) and Bolling v. Sharpe, 347 U.S. 497 (1954) and the five
During those five days, the United States Supreme Court decided *Lee v. Weisman* and *Planned Parenthood v. Casey*. Every Justice on the Court joined either Justice Anthony Kennedy’s majority opinion in *Lee* or Justice Antonin Scalia’s dissent in *Casey*. In these two opinions, all of the Justices ultimately agreed that normative judgments are just human constructions. Future Justices of the Supreme Court thereafter abdicated authority to set objective standards over a wide range of issues, ultimately resulting in a regime of constitutional law dominated by what I call here the death of values in American Law.

Isn’t this surprising? Avant garde law professors and postmodern thinkers may make arguments about the non-foundational nature of reality. But do we expect Supreme Court Justices to talk this way?

Consider the statement by the late Richard Rorty that “non-theists make better citizens of democratic societies than theists” because non-theists believe “that agreement among human beings is the source of all norms.” Are we then to consider all nine Justices on the United States Supreme Court to be functional atheists as of June 1992? If so, have we law professors told this to our students? Have we acknowledged, in the classroom, the arrival of nihilism?

These judicial statements are emblematic of where American law and society stand today. Once the reality of nihilism is acknowledged, its presence can be widely seen. The rest of this Article sets a wide frame to do that. Part II of this Article provides the setting and the cases giving rise to the death of values. Part III of this Article describes how the death of values manifests in American culture generally and among law

days in June 1992 that I reference in this Article. *Brown* and *Bolling* reflected a strong, self-confident, postwar American commitment to the good. Even the noted legal positivist, Robert Bork, referred to *Brown* as “the greatest moral achievement of our constitutional law” in his opening statement at the confirmation hearing for his nomination to the Supreme Court. See *Bork Confirmation Battle*, CQPRESS 722 (April 13, 2005), available at http://www.cqpress.com/incontext/SupremeCourt/bork_confirmation.htm. And *Bolling*, which applied Equal Protection principles to Congressional racial segregation action without any justification in Constitutional text or history, rested entirely upon the Court’s moral intuition: “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” *Bolling* 347 U.S. at 500.


3. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). It was Justice Scalia in dissent in *Casey* who used the phrase “five days” in referring to *Casey* and *Lee* and the jurisprudential implications of the two cases, thus leading me to use that image and that lens through which to examine American law. See excerpt from *Casey*, infra Part II.

4. Technically, Justice Scalia concurred in the judgment in part and dissented in part.

professors. Part IV of the Article reflects the death of values in the pattern of normative interpretation of rights in constitutional law. Part V does the same with regard to the law of religious exemptions. In Parts VI and VII, I examine how law copes with the death of values and the darker implications of such coping strategies. Finally, Part VIII identifies the death of values as a key component of the decline, numerical and otherwise, in American law schools.

This wide-ranging Article is an acknowledgment of nihilism, not a criticism. It was inevitable that even the heart of law would embrace the subjectivity of values. So, I am not putting forward a theory of objective values with which to confront the Justices. That is not needed or even possible.

What is shocking is not that we have fallen into nihilism, but that we accept our plight without qualm or worry. Therefore, what is needed jurisprudentially is a new start in which the weight of the death of values is felt. That much we owe to Nietzsche, who felt that weight. As Martin Heidegger teaches us, “What is most inescapable and most difficult in this overcoming [of nihilism] is the knowledge of nihilism.”6

II. THE SETTING AND THE CASES

The first statement of the death of values in these cases was Justice Anthony Kennedy’s majority opinion in *Lee v. Weisman*,7 handed down on June 24, 1992. The majority opinion was joined by Justices Blackmun, Stevens, O’Connor, and Souter. The majority struck down graduation prayers at public schools.

There are two major themes in Justice Kennedy’s majority opinion—the coercion said to be present because of the importance of graduation in the life of the student and the involvement of the public school officials in giving a pamphlet to Rabbi Leslie Gutterman for the preparation of nonsectarian prayer.

The school officials argued that a nonsectarian prayer—one that would be “acceptable to most persons”8—should be constitutional because, unlike a prayer identifiable with a particular religion—a reference to Jesus Christ, for example—a nonsectarian prayer would not create problems of religious division. But Justice Kennedy found that the very effort to encourage nonsectarianism involved the government in the

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8. Id. at 589.
forbidden activity of writing prayers.\(^9\)

Of more concern to us here than the holding is the meaning that Justice Kennedy associated with nonsectarian prayers. Such prayers could not be the work of government because they would assert the reality of moral and ethical values:

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.\(^10\)

This passage had nothing to do with the particular prayers offered by Rabbi Gutterman at the graduation in question. Those prayers raised no clearly moral claims.\(^11\) Rather, this passage views the claim that

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9. Id. at 588.
10. Id.
11. These were the actual prayers:

INVOCA TION
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.

Lee, 505 U.S. at 581-82.
morality transcends human choice as religious in nature, thus raising concerns about the establishment of religion.

This is the death of values in American law. If religion involves claims about the independence of morality from the opinions of human beings—an activity government may not “undertake”—then secular instruments like law must not involve claims of moral objectivity. A law like ours, which is necessarily based on secular sources, cannot make the claim that values “transcend[] human invention.”

Actually, I am overstating Justice Kennedy’s commitment to the objectivity of values even in the religious traditions. According to Kennedy’s majority opinion in *Lee*, nonsectarian prayer only expresses “the shared conviction” that there is objective morality. Nonsectarian prayer only “aspires[s]” to be that expression. In the view of the majority in *Lee*, morality consists of claims that humans make that are not resolvable by any method but some form of human choice.

The same view of moral claims animates Justice Scalia’s dissent in *Planned Parenthood v. Casey*, issued five days after Justice Kennedy’s majority opinion in *Lee*, on June 29, 1992. The context in *Casey* was the political pressure the Supreme Court was experiencing as public demonstrations and letter-writing campaigns were staged to influence the Justices’ decision to uphold or strike down *Roe v. Wade*.12

A number of the Justices were apparently upset by these public political activities. But Justice Scalia went beyond criticizing these political tactics as inappropriate. In his dissent, Justice Scalia laid the blame for these political expressions at the feet of the majority of the Justices, who were upholding the right to choose abortion in *Casey*. He attributed the political pressure to the failure of these Justices to limit their analysis of the abortion issue to purely legal materials and methods:

What makes all this relevant to the bothersome application of “political pressure” against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations

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and benedictions at public high school graduation ceremonies, *Lee v. Weisman* . . . if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people’s attitude towards us can be expected to be *(ought to be)* quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the “liberties” protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents’ most favored and most disfavored alleged constitutional rights, and seek the nominee’s commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidently committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.  

To paraphrase Justice Scalia, only if lawyers’ work is technical and objective will people turn to lawyers to do it. If the people knew that legal interpretations are just value judgments, they would want to make those judgments for themselves.

“Value judgments” are what you have if you are not doing lawyers’ work, that is, if you do not have objective standards of some kind. Objective standards for Justice Scalia are things that can be counted and measured—“facts” that have some kind of physical reality—like the number of repetitions of high school graduation prayers throughout American history or the number of states that prohibited abortion before the Supreme Court decided *Roe*.

Even though they disagreed about the outcome in these two cases, Justices Kennedy and Scalia did not disagree about ontology—that is, they did not disagree about what is real. Claims of right and wrong, good and bad, true and false, and beautiful and ugly are matters of human opinion. Since Chief Justice Rehnquist and Justices White and Thomas joined Justice Scalia’s dissent in *Casey*, all nine Justices joined one or the other of these opinions in June 1992, expressing a skeptical view of moral reality.

Now let us turn to the opposite sides of each of these opinions to see whether values were still living there. Values do not live in the dissent in *Lee*. That dissent, also by Justice Scalia, was joined by Chief

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Justice Rehnquist and Justices White and Thomas, as his *Casey* dissent would be five days later. Justice Scalia in his *Lee* dissent emphasized that “the Establishment Clause must be construed in light of ‘[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage’ [and] ‘the meaning of the Clause is to be determined by reference to historical practices and understandings.’”

Justice Scalia then directly contrasted his emphasis on history with what he called the majority’s philosophy: “Today’s opinion shows more forcefully than volumes of argumentation why our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.”

The term “philosophical predilections” here functions the same way that the phrase “value judgments” does in Justice Scalia’s dissent in *Casey*. Justice Scalia alleges that the value judgments of the majority in each case constitute subjectivism. But, then, why is not Justice Scalia’s commitment to historical practices also a mere value judgment or philosophical predilection? The acid of nihilism eats away everything.

In contrast to *Lee*, there was no total majority opinion in *Casey*, opposite Justice Scalia’s dissent. But the crucial passage in the lead opinion in *Casey* for purposes of confronting Justice Scalia’s view of value judgments, did represent the majority view of Justices O’Connor, Kennedy, Souter, Stevens, and Blackmun. This passage in the lead opinion, however, did not contest the subjective aspect of value choice but instead radically enhanced the claim of subjectivism.

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Value judgments are thus entirely subjective and personal for a majority of the Justices in *Casey*. Like appeals to historical practices to interpret the Constitution, this hyper individualism functions to avoid all claims of truth. There is, instead of truth, “one’s own concept.” But, in contrast to the language cited above, there was a point in the lead opinion in *Casey*, a point at which it was joined by Justices Stevens and Blackmun, in which something like a claim to truth was made. This part

15. *Id.* at 632.
of the opinion discussed the concept of stare decisis, the doctrine concerning overruling past decisions, on the way to upholding most of the right to abortion first announced in *Roe*. A majority of Justices stated that sometimes the Supreme Court is justified in overruling a past case but claimed that such reasons did not apply to *Roe*.

A majority of Justices in *Casey* described one of the celebrated examples of justified overruling of a case—*Brown v. Board of Education*, which overruled *Plessy v. Ferguson*. *Brown* was premised on a new understanding of the facts concerning the social meaning and effect of separate but equal treatment based on race. By 1954, it was understood that segregation was a badge of inferiority, which the majority in *Plessy* had denied. But a majority of Justices in *Casey* were not content with this explanation because it would have suggested that perhaps the *Plessy* Court had made only a kind of empirical mistake in upholding racial segregation in 1896. So, citing the famous dissent by Justice John Marshall Harlan in *Plessy*, the majority also wrote that “we think *Plessy* was wrong the day it was decided.”

What did this assertion mean? In his dissent in *Plessy*, Justice Harlan had contested the facts. He wrote that “[e]very one knows” that the purpose of segregation was to keep blacks away from whites and not the other way around. There was nothing equal about separate but equal.

But Justice Harlan also wrote that “[o]ur Constitution is color-blind,” and called the majority decision “the wrong this day done,” thus suggesting that the dispute in question was far deeper than any sociological disagreement. His dissent amounted to a moral condemnation of government imposed segregation. When *Plessy* was finally overruled, the Court in *Brown* declared that “[s]eparate educational facilities are inherently unequal,” and it is that sense of the *injustice* of government distributing benefits based on race that rendered *Plessy* wrong from the beginning.

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18.  163 U.S. 537 (1896).
20.  163 U.S. at 557 (Harlan, J., dissenting).
21.  *Id.* at 559.
22.  *Id.* at 562.
24.  Justice Harlan denied that the “injustice” of segregation necessarily rendered it unconstitutional, (“However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the constitution of the United States.”), but it is difficult to read his dissent, with its final condemnation of the wrong done by the majority, and take this declaration seriously. *Plessy*, 163 U.S. at 553.
Lawyers say things like “this case was wrongly decided” all the time, and it is not clear exactly what is meant. When lawyers say that, we don’t mean that Plessy was wrong in the sense of using the wrong method of interpreting the Constitution. It was not wrong, in other words, for any technical reason that lawyers have special expertise about. In fact, the outcome in Plessy was quite defensible on textual and historical grounds since school segregation was enacted by the same Congress that passed the Fourteenth Amendment.26

Plessy was wrong the day it was decided because the system of racial apartheid that it permitted was unjust. Plessy was morally wrong. Because it was morally wrong—so very morally wrong—it could never have been a proper interpretation of our Constitution. That is the meaning of the “wrong” condemned by a majority of Justices in Casey.

But how could a majority of Justices in Casey be so sure of a moral commitment like that after the death of values? It would appear that this statement about Plessy is at odds with the view elsewhere expressed in the opinions discussed above that value judgments are matters of human construction.

I do not believe that there is a genuine commitment here to the objectivity of values. What allows a value judgment about Plessy, as opposed to most other matters, is simply historical consensus. The problem with value judgments is that, because they are subjective, disputes about them cannot be resolved. On the other hand, if everyone agrees today that Plessy was morally wrong, the Justices are willing to say so as well—however inconsistent that may be theoretically.

In response to the assertion by a majority of Justices in Casey about Plessy, Justice Scalia’s dissent in Casey, did not, of course, suggest that the value judgment about the wrongness of Plessy was something subjective or something to be voted on. He simply agreed to Plessy’s erroneous character without realizing—or not wishing publicly to consider—that Plessy could easily have been justified based on the sort of textualism, originalism, and tradition methods that Justice Scalia often serves up as interpretation.27

So, yes, the Justices could assert with confidence that \textit{Plessy} was wrong, but only because they were actually asserting that the American people \textit{believe} that to be the case. Perhaps they would have liked to assert more. But nothing suggests that they were asserting more.

Having shown the arrival of the death of values in law, the question arises whether this phenomenon is a purely legal one. Of course, it is not. The death of values practically defines American culture today.

\section*{III. The Context of the Death of Values in American Culture and Among Law Professors}

The death of values in law is a reflection of the phenomenon that Nietzsche saw but could not overcome. Nietzsche’s death of God\footnote{Nietzsche’s famous madman scene announcing the death of God can be found at \textsc{Friedrich Nietzsche}, \textit{The Gay Science} 167, 181 (Walter Kaufmann trans., 1974) (1874). For my earlier treatment of the implications of nihilism in law, see Bruce Ledewitz, \textit{Seeking ‘Common Ground:’ A Secular Statement}, \textit{38 Hastings Const. L.Q.} 49, 90 (2010).} is not about a declining percentage of people attending places of organized religious worship. Atheism could be rampant in churchgoers too.

Nor is atheism really the right word to describe the death of God. The death of God referred not just to the Supreme Being of Christianity, but to the metaphysical world of ideals—what people used to call the Good, the True, and the Beautiful. And by dead, Nietzsche was not taking a position about their existence, but about their potency. As Heidegger wrote in an essay about Nietzsche,\footnote{Martin Heidegger, \textit{The Word of Nietzsche: “God is Dead” in The Question Concerning Technology and Other Essays} 53 (William Lovitt trans., 1977).} the pronouncement “God is dead” means that this ideal world “is without effective power.”\footnote{\textit{Id.} at 61.} We can no longer build a civilization on these foundations. And that means we cannot maintain one either. The right word for this is nihilism.

In nihilism, the certainty that some things are good or true or beautiful died as well as God. It could no longer be assumed that one thing was more significant than another or, indeed, that there was any such thing as significance. There was no obvious answer to the question: Why bother? Here is how Andre Comte-Sponville describes nihilism in \textit{The Little Book of Atheist Spirituality}: “What does nihilism mean? It means that the higher values have depreciated; that the ends have vanished; that there is no longer any answer to the question, ‘What’s the use?’”\footnote{Andre Comte-Sponville, \textit{The Little Book of Atheist Spirituality} 203 (Nancy Huston trans., 2006).}
Once the concept of a binding norm was lost, it was no longer possible to assert with confidence that one action was inherently better than another. Of course, a means to an end could still be judged as to its effectiveness. But no end could be judged except as to its effectiveness as a means to another, equally arbitrary, end. Reason itself, therefore, became merely an instrument. As Charles Taylor writes in *A Secular Age*, from the perspective of this ontology, any sense that we have of an intrinsically higher demand, any phenomenology of universalism, must be some form of delusion.\textsuperscript{32}

There is real harm to people in this valueless world. The sense we have that it does not ultimately matter what we do is described by Stephen Buhner in *The Lost Language of Plants* as “[t]he wound that comes from believing we are alone amid dead uncaring nature.”\textsuperscript{33}

The death of values has become widespread in popular culture. One example will suffice to show the cultural spread of nihilism, an example from a source that can serve as a barometer of this society’s consciousness, especially among the educated elite. In episode 3 of the 2014 *Cosmos* series, Neil deGrasse Tyson, the narrator of the series, asserts that before the rise of science, humans associated the arrival of comets with momentous events, usually bad ones. A comet, in other words, was a sign from some god. As Tyson put it, “They took it personally. Can we blame them?”\textsuperscript{34}

Tyson was suggesting that ancient humans were mistaken. He calls this mistake a matter of “false pattern recognition.” And there is a reason for an error like this. Tyson says of human beings, “We hunger for significance. For signs that our personal existence is of special meaning to the universe. To that end, we are all too eager to deceive ourselves and others. To discern a sacred image in a grilled cheese sandwich.”

This last comment was an off-the-cuff joke at religion’s expense. But Tyson’s underlying claim has nothing to do with religion per se. It is quite clear to Tyson, as it is quite clear to many educated people, that our personal existence has no special significance for the universe. There is no ultimate sense in which who we are and what we do matters. Nor does anything else matter, from the cry of a child to the death of a star. It might matter to the child or to any intelligent beings blown up along

\textsuperscript{32} CHARLES TAYLOR, A SECULAR AGE 609 (2007).

\textsuperscript{33} STEPHEN HARROD BUHNER, THE LOST LANGUAGE OF PLANTS: THE ECOLOGICAL IMPORTANCE OF PLANT MEDICINES TO LIFE ON EARTH 22 (2002).

\textsuperscript{34} Cosmos: A Spacetime Odyssey: When Knowledge Conquered Fear, (Fox Network television broadcast Mar. 23, 2014). I took this quote, and the ones that follow, from replaying the *Cosmos* series on demand. The reader is welcome to verify the quotes.
with the star, but nothing matters objectively, inherently, and ultimately. This is another way of saying that values are subjective.

Like the Justices in the prior section, Tyson does not always assert that the universe is without meaning. In the last episode of the *Cosmos* series, Tyson ends by declaring that human beings do science “because it matters what’s true.” Does Tyson, then, believe that truth means something special to the universe? Or, would he just like to believe that?

We also learn in the last episode of the series why Tyson is so anxious to claim that humans are not of special significance to the universe. In that last episode, Tyson reframed Carl Sagan’s famous “pale blue dot” monologue from the first *Cosmos* series. Sagan asked NASA to take one last picture of Earth as the *Voyager 1* spacecraft passed Neptune. Then, in the original *Cosmos* series, and repeated in the last episode of the new series, the viewer watches as Earth fades to what Sagan calls the “pale blue dot.” The following is part of Sagan’s original commentary, played anew, as we watch:

> Our posturings, our imagined self-importance, the delusion that we have some privileged position in the Universe, are challenged by this point of pale light. Our planet is a lonely speck in the great enveloping cosmic dark. In our obscurity, in all this vastness, there is no hint that help will come from elsewhere to save us from ourselves.

When Sagan says humans are not special, he is hoping that human evil will thereby be lessened. Unfortunately, Sagan is tragically mistaken in this hope. Humans do not kill each other because they believe God loves them especially. Humans kill each other because of our fear that we are nothing. Nietzsche shared Sagan and Tyson’s view that we are not special. Sagan’s “pale blue dot” is not an antidote to nihilism. It is its birthplace.

Sagan must never have read how Nietzsche also described our cosmic insignificance. If he had, Sagan would have experienced the deep, disturbing chill of nihilism. Sagan would have heard his own words with a far different resonance:

> In some remote corner of the universe, poured out and glittering in innumerable solar systems, there once was a star on which clever animals invented knowledge. That was the highest and most mendacious minute of ‘world history’—yet only a minute. After nature had drawn

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Aside from my few examples, it is not hard to see that the death of values infects American life generally. Nihilism can be seen in all kinds of social pathologies, from the decline in marriage to the decline in work. New York Times columnist David Brooks calls these changes “declining social capital.”37 Others talk about the lack of social discipline. According to the popular magazine Sports Illustrated, “approximately 10 million American children have experienced parental incarceration at some point in their lives.”38 Even some sources of economic inequality can be seen here. At one time, there might have been embarrassment for a CEO in taking a large salary while the income of workers stagnated. Such embarrassment has lost its motivating power. There is one place where nihilism is especially visible and especially harmful. In American politics everyone can see nihilism’s acid at work in our partisan divisions. Despite the death of values, people still want things and struggle to obtain them. This leads to inevitable conflicts and, since there are no common norms and commitments through which to evaluate these conflicts and resolve them by pronouncing a binding judgment, political life becomes endless fighting.

Yet, not everything is dark. There is another consequence of the death of values that does not manifest in strife. As norms have collapsed in America, a tolerance has grown that would have been unthinkable fifty years ago. This tolerance is behind the rapid acceptance of gay marriage, for example. It is part of the reason for the real decline in racism in this society. Jesus said that we should not judge, 39 and young people today really do seem to practice that. “Whatever,” they say. But even this result is fundamentally just more nihilistic acid. Is tolerance all that gay people have a right to expect? Frederick Douglass once demanded on behalf of people of color, not benevolence, sympathy or pity, but “simply justice.”40 What about justice for gay couples? That is the proper foundation for gay marriage rather than tolerance. There are voices now in the gay community that are challenging

tolerance as the foundation for gay rights very much along these lines, most notably Suzanna Walters, in her new book, *The Tolerance Trap.*

The proper response to the claim by some religious practitioners that homosexual love is immoral is not to say, “That is only your opinion.” The proper response is to say, “You are mistaken, and here is why.” This distinction is why Austin Dacey, in his book, *The Secular Conscience,* urged his fellow secularists not to abandon moral claims. But, in the reign of the death of values, this is easier said than done.

Law professors are part of this culture and also manifest its nihilism. We law professors in our writing and teaching bring the culture of nihilism into the law.

To see the effect of the death of values among law professors, consider a 2008 symposium that was held at Pepperdine University to discuss the concept of higher law. At one time, the existence of higher law would have been taken for granted. It was part of the ideal world that Nietzsche saw had ended. At a later point in legal development, there would have been a debate over higher law, with positivists asserting that there is no such thing and advocating that law be evaluated according to ends that can be measured, such as economic efficiency or even forms of morality. But, revealingly, some of these positivists, like H. L. A. Hart, were careful not to deny that objective morality existed, whatever that might have meant to them. Hart fully defended the commitment that there could be a moral obligation to disobey an unjust law.

By 2008, however, the context had changed. The title of the 2008 symposium was, “Is There a Higher Law? Does It Matter?” This title represents a new stage, in which it can credibly be asserted that even if higher law exists in some sense, it might not matter. Now, we cannot be confident that anything matters. In fact, the symposium might just as well have been entitled, “Does Anything Matter?”

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42. The Supreme Court also was unable ultimately to speak the language of morality about gay marriage. See the discussion of *Obergefell v. Hodges,* infra Part IV.


44. Hart defended Austin and Bentham from the criticism that the separation of law and morals, which they and he propounded, would lead to general obedience to immoral law, by attributing to them the view that “if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience.” H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 617 (1958).

The spirit of the death of values was caught earlier in law, by Art Leff, in the chilling poem with which he ended his 1979 law review article, *Unspeakable Ethics, Unnatural Law*:

All I can say is this: it looks as if we are all we have. Given what we know about ourselves, and each other, this is an extraordinarily unpapetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us “good,” and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us could law be unnatural, and therefore unchallengeable. As things stand now, everything is up for grabs. Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up and died resisting Adolph Hitler, Joseph Stalin, Idi Amin, and Pol Pot—and General Custer too—have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.46

Of course, in this section, I am not describing anything unique to law professors. Leff’s last line—God help us—carries an uncanny echo to a late saying of Heidegger in his 1966 interview in the German newsweekly *Der Spiegel*—an interview I doubt Leff had read—that “[o]nly a god can still save us.”47

A few years after Leff’s poem came out, in 1984, William Singer, on behalf of the Critical Legal Studies movement, launched his critique of legal theory’s claims to objectivity, rationality and neutrality in the shadow of nihilism, but with a great deal of hope in a pragmatic law that would free us to embrace “passionate moral and political


commitments.”48 A mere sixteen years later, Bush v. Gore,49 a case in which liberal Justices embraced conservative positions and conservative Justices embraced liberal positions, all in the service of partisan politics,50 thoroughly vindicated everything Singer had advocated. After Bush v. Gore, no one would seriously claim that law is objective, rational, and neutral.

Singer was wrong, however, in his expectations of what would follow. In hindsight, it turns out that nihilism is not the easily managed insight that Singer had imagined. When nihilism really takes hold, when law embraces it, those passionate moral and political commitments become vicious, unending and unyielding, rendering human solidarity and dialogue unattainable. We see this in American political divisions, as mentioned above. But law itself now mimics politics in its endless controversies. Under nihilism, strife is inevitable because there is no standard—no norm—that could supply a nonarbitrary starting point in the search for values that could ground law, and by extension, ground our public life together.51

A recent example of law professor nihilism is the reaction to the method of statutory interpretation utilized in Chief Justice Roberts’ opinion in King v. Burwell, the end-of-the-term case that upheld Affordable Care Act subsidies on federal insurance exchanges in the face of statutory language limiting subsidies to “an exchange established by the State.”52 The majority opinion held that this apparent meaning would contradict the purpose of the Affordable Care Act and therefore

49. 531 U.S. 98 (2000).
50. Speaking only of the majority Justices, but I believe applicable to a certain extent as well to the dissents, Alan Dershowitz called the decision “the single most corrupt” in Supreme Court history on the basis of the partisan nature of the holdings and result. ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 174 (2001). Rick Garnett has reminded me, however, that the charge of shape-shifting in pursuit of predetermined and partisan result does not apply to the concurrence by Chief Justice Rehnquist, joined by Justices Scalia and Thomas. The emphasis in the concurrence on Art. II, §1, cl. 2 as granting authority to legislatures, as opposed to state courts is just the kind of strict textual reading that those three Justices might uphold in any case.
51. In one of those “what goes around, comes around” moments, I heard the same Professor Singer on a panel at the 2015 Annual Meeting of the AALS on January 3, 2015, speak favorably of “better law” analysis, the pursuit of justice and conflicts rules in his current role as one of the nation’s leading experts in conflicts of laws. Of course, these are heavily normative concepts whose metaphysical weight is increasingly undermined by the death of values that Professor Singer once welcomed.
In a short opinion piece, John McGinnis defended Chief Justice Roberts against the charge that his majority opinion represented an unprincipled commitment to upholding the Affordable Care Act—as the Chief Justice had done once before on what some considered a strained interpretation of the taxing power. McGinnis argued that the Chief Justice was using a well-established method of statutory interpretation and was not writing a merely result-oriented opinion.

Nevertheless, McGinnis argued that Chief Justice Roberts was wrong in his conclusion for two reasons. First, the Affordable Care Act is a veritable kitchen soup of purposes and a mess of process. It is impossible to assign such a poorly drafted statute a well-defined purpose. Chief Justice Roberts even acknowledged this problem in the *King* opinion.

But the more fundamental reason that Chief Justice Roberts was wrong is that—and here McGinnis was relying on the work of Mark Movsesian—it is inappropriate in general to rely on purpose when interpreting a statute. As opposed to a contract representing the intentions of two persons, “[F]ederal legislation is a product of legislators plus the president. It’s hard to distill an overriding intent or purpose from such a collection of wills, particularly in complex statutory schemes.” Therefore, the judge should rely wholly on the objective meaning of statutory language.

To understand the depth of this challenge to collective rationality, note that both Movsesian and Justice Scalia, who makes a similar argument concerning statutory interpretation in his book, *A Matter of Interpretation*, rely heavily on *Church of the Holy Trinity v. United States*, in which the Supreme Court refused to apply the expansive language of a federal statute banning the importation of foreign labor to the contract of an Anglican Church and a priest. Both Movsesian and

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53. *Id.* at 2491.
56. “The Affordable Care Act contains more than a few examples of inartful drafting.” *King*, 135 S. Ct. at 2492.
60. 143 U.S. 457 (1892).
Justice Scalia argue that the Justices in that case were substituting their personal preferences for the objective meaning of the statutory language.

But even if one grants that this is what occurred in *Holy Trinity*, why is that one example supposed to be so persuasive? After all, there are many examples of reasonable judicial interpretations that seem to further the purposes of statutes straightforwardly and noncontroversially. Why is one counter example so important?

The answer lies in the word “wills” in McGinnis’ piece above. The problem with the statutory interpretation method of purpose is not that occasionally a judge will make a mistake, but that every use of the method ends up applying the policy preference of the judge because there is no such thing as a collective purpose. There is only individual will, which by its nature cannot be collective.

That is why this challenge to *King v. Burwell* illustrates the death of values—it is a recapitulation of the nihilism of Margaret Thatcher, who once insisted that “there is no such thing as society. There are individual men and women, and there are families.” Individual will is the ultimate reality. Large numbers of people cannot share a purpose.

Put that way, these criticisms of purpose seems absurd. Of course people join together to further great enterprises like the abolition of slavery or the fight against fascism. And, of course, overall evaluations are possible, such as “social security achieved its goal of ensuring that the elderly would not be destitute.”

But, no. McGinnis accurately reflects the cynicism of public choice theory and the general skepticism with regard to rationality as anything other than means-end. He is reflecting the death of values. And the immediate responses that I raise above are just the residue of an earlier moral age.

Although this challenge to statutory interpretation is usually voiced by conservatives, I believe its premises are quite widespread. Only satisfaction with certain judicial results from the application of legislative purpose—as in *King* itself—keeps law professors on the left from agreeing with McGinnis.

Is there any alternative view in the legal academy? It might be

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61.  McGinnis, supra note 54.

62.  Epitaph for the eighties? “there is no such thing as society”, THE SUNDAY TIMES, Oct. 31, 1987, http://briandeer.com/social/thatcher-society.htm. Other than sentimentality, I don’t know why Thatcher stopped with families as collective entities. Justice Brennan was willing once to say that there are no families, only the association of individuals: “[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.” *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Unfortunately, the tidal wave of divorce renders this a self-fulfilling prophecy.
argued that one major voice among law professors contested the death of values. Shortly before his death, in writing about religion, Ronald Dworkin argued strongly that values are objective. Ronald Dworkin’s last book, Religion Without God, demonstrates his long-standing commitment that religion is not a matter of belief in God and is a broader category than American law has generally viewed it. He writes: “Religion is a deep, distinct, and comprehensive worldview: it holds that inherent, objective value permeates everything, that the universe and its creatures are awe-inspiring, that human life has purpose and the universe order.”

But unlike Justice Kennedy’s opinion in Lee, above, Dworkin argues that religion is for all of us, not just for believers in God. For Dworkin, the belief that a God underwrites objective value “presupposes a prior commitment to the independent reality of that value. That commitment is available to nonbelievers as well.” Thus, for the nonbeliever as well as for the believer, values “are as real as trees or pain.”

Here could be a response to Art Leff’s poem. Look to the stars, Dworkin would say to Leff. They neither spin nor reap, yet they are arrayed in loveliness. How can you say, among all this beauty and order, that everything is up for grabs? So, is the death of values solved? Can we turn to Dworkin’s assurance to address the death of values?

Unfortunately, the answer is no. Dworkin was convinced, following David Hume, that an ought—a norm, or for our purposes, a value—cannot be deduced from an is. Yet, Dworkin’s entire book is actually a demonstration of deriving an ought from an is. The universe is objectively inspiring of awe. Therefore we ought to feel awe. Dworkin does not acknowledge this. All he says is that we can experience awe.

Contrary to Dworkin, a universe that is objectively awe-inspiring—as a fact—thereby contains the norm that Dworkin insists we cannot get to. As C.S. Lewis put this very point, the norm is that the universe is, in fact, deserving of awe. What Dworkin does not see is that the

63. RONALD DWORKIN, RELIGION WITHOUT GOD (2013).
64. Id. at 1.
65. Id. at 2.
66. Id. at 13. These concepts of objective values might be in some tension with Dworkin’s criticism of objective value as a "noumenal metaphysical fact" in Dworkin’s book Law’s Empire, but that matter is beyond my scope here. RONALD DWORKIN, LAW’S EMPIRE 81 (1986).
67. DWORKIN, supra note 63, at 26-27.
68. “Until quite modern times all teachers and even all men believed the universe to be such that certain emotional reactions on our part could be either congruous or incongruous to it—believed, in fact, that objects did not merely receive, but could merit, our approval or disapproval,
objectivity of values he propounds depends on deriving an ought from an is. That is the necessary foundation of objective values.

It was because Hume did not endorse Dworkin’s kind of value objectivity that Hume held that an ought could not be derived from an is. Hume held that the mere fact that God exists is not a reason to worship and obey Him. But Hume would not, and could not, have said that the existence of a God who is objectively deserving of awe and reverence is not a reason to grant Him awe and reverence. It precisely would be such a reason. Dworkin’s would-be ontology of objective values is at war with his skeptical epistemology. The declared inability to derive an ought from an is, actually is the death of values.

The state of affairs I am describing generally in our culture is dissatisfying to people. Postmodern thought does not, because it cannot, abolish the human thirst for real and lasting justice. Even a postmodern legal theorist like Helen Stacey knows this: “The deep longing for justice that comes from within our present epistemology remains the central concern to any legal analysis of events that is framed by a postmodern approach.” But, postmodern thought, which subscribes to and celebrates the death of values, cannot satisfy that thirst.

Postmodernism asserts that freedom, which, in the absence of objective morality, becomes its dominant value, can serve as the basis of society even without truth. It is said with some pride that we have “subvert[ed] the concept of truth and . . . replace[d] it with the concept of freedom.” But this has led us to fruitful pursuit of neither freedom nor truth because the only authentic human freedom is the freedom to be free for truth, whether this is the truth of God, the truth of Being or the truth of reality itself. Freedom, isolated from a goal inherently worthwhile, is just will and drift. This drift is the posture of the death of values.

Thus far, we may conclude that values in American law did indeed die in June 1992, as a part of a larger undermining of values in the culture and among the legal academy. But, what of it? What impact did the death of values have in law, and what impact does it continue to have? In the rest of this Article, I will show how the death of values grounds American constitutional development. Indeed, the death of values our reverence, or our contempt.” C.S. Lewis, THE ABDUCTION OF MAN; OR, REFLECTIONS ON EDUCATION WITH SPECIAL REFERENCE TO THE TEACHING OF ENGLISH IN THE UPPER FORMS OF SCHOOLS 9 (1947).

70. Id.
values may be the hidden fulcrum of American constitutional law.

IV. THE REFLECTION OF THE DEATH OF VALUES IN CONSTITUTIONAL INTERPRETATION OF RIGHTS

The effect of the death of values may be seen in continuing difficulties in the interpretation of rights. We are not like the Framers of the Constitution. They believed that rights were real, while we do not. Because of this difference, it is difficult for us be faithful to the project of the Framers in creating constitutional government.

This difference between the founding generation and legal interpreters today is most obvious in our view of the Ninth Amendment, which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Ninth Amendment could only have been written by persons who lived in a value-filled universe in which rights were not a matter of opinion, not a gift from government, and not grounded even in popular sovereignty. The Framers would not have agreed with the criticism by Robert Bork that the Ninth Amendment is like an inkblot that would allow judges to “make up constitutional rights,” 71 nor with the assertion by Chief Justice William Rehnquist that if the Bill of Rights were repealed, Americans would not have those rights. 72 For the Framers, rights were not made up. And rights were not dependent on attaining written form in any document.

This conclusion is not lessened in any way by suggestions that the Ninth Amendment was intended to reinforce the limited enumeration of federal powers 73 or to protect rights already set forth in state constitutions from federal interference 74 or that the rights protected in the Ninth Amendment corresponded to common law rights. 75 These

75. See Andrew King, Comment, What the Supreme Court Isn’t Saying About Federalism, the Ninth Amendment, and Medical Marijuana, 59 ARK. L. REV. 755, 764 (2006) (“Under
claims may be true, but they would not be exhaustive. They would not be exhaustive because, in the view of the Framers, any right not yet established in a state constitution or recognized at common law would still be protected by the Ninth Amendment. The Framers did not have to artificially narrow the potential application of the Ninth Amendment because they were not haunted by moral skepticism.

Because we don’t today believe in rights the way the Framers did, we either have to treat the Ninth Amendment as if it referred to the existence of ghosts and therefore ignore it, to use John Hart Ely’s famous example, or give the Amendment the sort of democratic procedural and anti-discrimination meaning that Ely ultimately gave it. The consequence of our skepticism is that we would assume that anyone invoking the Ninth Amendment to ground a substantive right must be utilizing a subjective value judgment because we believe there is no other kind of value judgment that can be made.

But the Ninth Amendment is too easy a case. The implication of the death of values in its interpretation is almost too obvious to mention.

The overall effect of the death of values on the interpretation of rights is to suppress substantive normative judgments in favor of procedural and equality norms even when the text of the Constitution seems to require substantive interpretation. I will illustrate this tendency in a short comparison between the Supreme Court’s interpretations of procedural due process and free speech—both a kind of procedural norm—and the failure of the Court to interpret the substantive constitutional concepts of cruelty and life, in the Eighth Amendment and the Due Process Clauses, respectively.

The promise of procedural due process has a solid textual foundation in the Constitution. The Fifth Amendment applies to the actions of the federal government and provides as follows: “[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .” The Fourteenth Amendment, which applies to State

Blackstone’s tutelage, a colonial American understood that natural rights were an inextricable part of the common law, “the birthright of the people of England.” The Framers expressed this understanding when they wrote the Bill of Rights and the Ninth Amendment.

76. To this effect, Daniel A. Farber rightly quotes a supporter of the Constitution at the Pennsylvania ratification convention—“our rights are not yet all known”—in an online excerpt from his book, Retained by the People: The ‘Silent’ Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have (2007), http://www.alternet.org/story/50404/the_%27silent%27_ninth_amendment_gives_americans_rights_they_don%27t_know_they_have.

and local government, provides similarly, “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”

The interpretation by the Justices of procedural due process—the question whether a person receives a hearing before losing welfare benefits, for example—has been extremely free-wheeling in terms of history and text. The Justices do not worry about what the Framers thought due process might require, or what the Framers thought due process applied to, or what the public meaning of “due process” was when the texts were adopted, or even what the history of procedural due process was after the adoption of the Fifth and Fourteenth Amendments. Neither text, nor history, nor tradition have had much, if any, influence.

Instead of all that kind of analysis, which forms the major part of constitutional interpretation when substantive constitutional provisions are at issue, the Justices have adopted an interpretive approach that has nothing to do with text and history. First, the Justices ask whether the government benefit of which the claimant is being deprived constitutes a liberty or property interest.78 Then, once the Justices conclude that liberty or property is involved, they openly balance the weight of the private interest against the weight of the government’s interest, in light of the risk of a decision-making error without the proposed procedural innovation.79

In terms of free speech, the right at stake is not entirely procedural. The First Amendment, which, despite its wording, has been applied to state and local government as well, provides that “Congress shall make no law . . . abridging the freedom of speech . . . .” Justice Louis Brandeis, for example, certainly believed that freedom of speech was more than an instrumental value. Brandeis wrote in his concurrence in *Whitney v. California* that freedom of speech constitutes a “means indispensable to the discovery and spread of political truth.”80 But he also wrote that:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty.81

This would appear to be a substantive vision of free speech as

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78.  See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).
81.  Id.
constitutive of a good life.

Perhaps the two approaches to free speech—instrumental as a path to truth and substantive as a way to live—are not all that different. Justice Oliver Wendell Holmes, whose encomium to “the competition of the market” as “the best test of truth” in his dissent in *Abrams v. United States* is as close as we have to an official ideology of free speech, joined Justice Brandeis’ *Whitney* concurrence after all.

Nevertheless, when I call free speech procedural, I mean that the Justices do not themselves make any judgments about truth. Even though free speech may constitute a substantive aspect of a fulfilling human life, the judicial interpretation of free speech does not reach any such substantive claim. As Justice Lewis Powell put it in *Gertz v. Robert Welch, Inc.*: “Under the First Amendment there is no such thing as a false idea.” The Justices see their job in applying the constitutional norm of freedom of speech as keeping the lines of communication open so that, in good Holmesian fashion, all ideas will be present so that others—the people, in democratic terms—can decide what to believe and how to live.

This vision of free speech accords very well with the death of values because the Justices never proclaim that any idea is true or false. The only basis for excluding speech from constitutional protection becomes something like an immediate threat of specific criminal action or demonstrable harm in the preparation of the speech, as in child pornography. No idea, even the advocacy of genocide or the denial of the holocaust, can be punished as simply untrue.

This free speech interpretive approach is almost as devoid of text, history, and tradition as is the analysis of procedural due process. One example of this absence is *Citizens United v. FEC*, which held that corporate political speech is constitutionally protected. Despite some preliminary skirmishing between Justice Scalia’s concurrence and Justice Stevens’ dissent over the Framers’ view of corporate speech, Justice Scalia’s conclusion that the “First Amendment is written in terms of ‘speech,’ not speakers” is not really a textual or historical argument at all. The reason that corporate speech is protected is the Court’s own understanding of the meaning of free speech, and the protection of

82. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
84. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) for the classic formulation of this test.
87. *Id.* at 392 (Scalia, J., concurring).
corporate speech would not be reversed even if it could be shown conclusively that the Framers disagreed with that perspective.88 Justice Scalia put the matter as follows, in dissent, the first time the Court upheld political spending limits on corporations:

The Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the “fairness” of political debate.89

This “absolutely central truth of the First Amendment” is obviously not thought by Justice Scalia to be a value judgment that must be voted on. This general commitment by the Justices decides free speech issues rather than text, or history, or tradition.

Another example of the theory of free speech independent of text, history, or tradition was the treatment of laws punishing the burning of the American flag. In a pair of controversial cases striking down laws that punished burning the American flag in protest demonstrations,90 it was of no interest whatever to the majorities of the Justices that the flag might have received legal protections historically. The Justices believe they know, inherently, what free speech means. Despite Justice Scalia’s criticism of the concept in his dissent in Lee above, that meaning of free speech is “a philosophical predilection[].”

I don’t mean to suggest that the Justices believe they are violating the intentions of the Framers of the First Amendment in any of the free speech cases. Rather, the Justices proceed in their interpretations from a very strong theoretical commitment as to the meaning of free speech, and that meaning is practically irrefutably presumed to be shared by the Framers.91

88. This is not mere surmise on my part. Justice Scalia’s disdain for arguments raising the Framers’ view of free speech was on display in Brown v. Entm’t Merchants Ass’n, 131 S. Ct. 2729 (2011), in which he wrote the majority opinion invalidating a California statute prohibiting the sale or rental of violent video games to minors. Justice Thomas argued in dissent that the “founding generation . . . believed parents to have complete authority over their minor children and expected parents to direct the development of those children.” Id. at 2758 (Thomas, J., dissenting). Therefore, minors do not have the right of free speech. Justice Scalia did not refute this historical argument but mainly countered that such an interpretation would allow the government to forbid minors from attending political rallies or church without parental permission. Id. at 2736, n. 3. Thus, for Justice Scalia, the theory of free speech trumps originalism.


91. I am not trying to show in this section that history is irrelevant to constitutional development outside the realms of substantive normative judgments, only that history and other
Now, contrast the treatment of procedural due process and the treatment of free speech with two substantive questions in constitutional law—what is a cruel punishment and whose life is protected by the Constitution? On these questions, there turns out to be little or no independent judgment by the Justices, who depend on various objective indicia to decide these issues.

Unlike the unenumerated rights under the Ninth Amendment, these terms—"cruel . . . punishments" and "persons"—are in the Constitution, in the same way that "due process" and "free speech" are in the Constitution. Since that is so, there is no obvious reason for any difference in approaches to their interpretation. Yet, these substantive values are interpreted very differently.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." My focus here is on cruel and unusual punishments. This language could have been interpreted as a term of art, meaning that it might have had no effect at all other than eliminating some of the more extreme forms of ancient common law sanctions that had already fallen out of use, or were in the course of doing so, in America prior to the adoption of the Bill of Rights—sanctions such as branding, mutilation, and the use of the pillory and the stocks.92

But the prohibition against cruel and unusual punishments did not turn out to be restricted to such historical practices. In 1958, in Trop v. Dulles,93 the punishment of deprivation of citizenship of a native-born American citizen for wartime desertion was struck down. There was no majority opinion in the case. Chief Justice Earl Warren, speaking for four Justices, appealed to "the dignity of man" and "the principle of civilized treatment."94 He added that the meaning of the Amendment is not static and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Because of the utterly defenseless position of the expatriate—who has lost "the right to

92. On the other hand, as Justice Brennan pointed out in Furman v. Georgia, whipping and earcropping were still "quite common" when the Eighth Amendment was adopted. 408 U.S. 238, 263 (1972) (Brennan, J., concurring).
94. Id. at 99.
have rights”—and because “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime,” expatriation is forbidden. Warren added that the death penalty could not stand as an “index of the constitutional limit on punishment” such that nothing less than death could be unconstitutional. The death penalty is a special case because of its historical sanction and widespread use.

Trop could have ushered in a judicial examination of the concept of human dignity and its relation to cruelty, but it did not do so. Part of the reason for that is the word “unusual” as a limiting term. For example, in Harmelin v. Michigan, in 1991, the Court upheld mandatory prison sentences, partly on the ground that “[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.”

But even apart from the word unusual, the Justices simply would not give any serious content to the meaning of cruelty. This reluctance became clear when the Justices came to consider the constitutionality of the death penalty per se, in Furman v. Georgia in 1972 and Gregg v. Georgia in 1976. In Furman, all American death penalties were held unconstitutional, though there was no majority opinion. Justices Potter Stewart and Byron White voted to strike down the death penalty as currently imposed because of the vagaries in the death penalty system and the infrequency of its imposition. Justice Stewart captured this feeling with the observation that:

>[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

When reformed death penalty statutes came before the Court four years later, a guided discretion statute was upheld in Gregg, while new mandatory death penalty statutes were struck down. As long as

95. 501 U.S. 957, 994 (1991) (this portion of the lead opinion represented the Opinion of the Court).
96. 408 U.S. 238 (1972).
98. Id. at 399-10 (Stewart, J., concurring).
99. Guided discretion statutes were upheld the same day that Gregg was decided, in Florida—Proffitt v. Florida, 428 U.S. 242 (1976)—and Texas—Jurek v. Texas, 428 U.S. 262 (1976).
sentencing juries and judges could consider mitigating factors in individual cases, the death penalty was held not to be cruel per se, since it comported with contemporary public opinion and served the traditional social purposes of retribution and deterrence. According to Justice Stewart’s lead opinion in *Gregg*, human dignity is satisfied by traditional punishments with the caveat that “the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.”

But since the unconstitutional common law penalties had, of course, themselves been inflicted in good faith in the sense that the authorities believed that they served legitimate penological functions, Stewart’s approach was actually not an interpretation of the meaning of human dignity. Something renders those punishments unconstitutionally cruel even though they served penological purposes, but we are not told what that is.

In the twenty-first century, the Supreme Court would decide more specific cruel and unusual challenges to the death penalty and related challenges to penalties imposed on juveniles. In a series of cases, the Justices held that the death penalty could not be imposed on persons with mental retardation, that the death penalty could not be imposed on persons under the age of 18 at the time of the crime, that the death penalty could not be imposed for non-homicide crimes against individuals, that a sentence of life imprisonment without possibility of parole (LWOP) could not be imposed on a juvenile for a non-homicide crime, and that a mandatory LWOP sentence could not be imposed on a juvenile even for a homicide.

These cases rested generally on a purported lack of proportionality viewed through objective indicators of *Trop’s* “evolving standards of decency,” such as the small number of states that impose certain penalties and the infrequency with which the penalties are carried out, that are said to show a national consensus against the practice in question.

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101. *Gregg*, 428 U.S. at 183 (plurality opinion).
102. All Justice Brennan could say in his concurrence in *Furman* is that “[n]o one, of course, now contends that . . . branding and earcropping, which were common punishments when the Bill of Rights was adopted” are still constitutional. *Furman*, 92 S.Ct. at 2249. (Brennan, J., concurring).
108. See *Id.* at 2463, 2470.
Although these majority opinions relied heavily on objective factors and precedent, Justice Kennedy was careful to point out in Kennedy v. Louisiana that the Justices’ “own judgment” on the acceptability of the death penalty must also be brought to bear.\footnote{554 U.S. at 434 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)).} But that judgment was limited to such matters as excessiveness and arbitrariness, which are not only objective but quasi-procedural. Nowhere in this case-law is there any thoughtful discussion of what constitutes the cruelty that violates the dignity of man. In that sense, everything about these cases is based on the objective factors of a supposed national consensus.

It remained for the dissenters in these Eighth Amendment cases to point out that there is in fact no national consensus supporting these decisions, that they actually must thus rely on substantive moral judgments, and that these moral judgments are not justifiable since there is no such thing as a defense of a moral judgment. The opening of Justice Thomas’ dissent in Graham is representative:

The Court holds today that it is “grossly disproportionate” and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide.

Although the text of the Constitution is silent regarding the permissibility of this sentencing practice, and although it would not have offended the standards that prevailed at the founding, the Court insists that the standards of American society have evolved such that the Constitution now requires its prohibition.

The news of this evolution will, I think, come as a surprise to the American people. Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile non-homicide cases, and those judges and juries have decided to use it in the very worst cases they have encountered.

The Court does not conclude that life without parole itself is a cruel and unusual punishment. It instead rejects the judgments of those legislatures, judges, and juries regarding what the Court describes as the “moral” question of whether this sentence can ever be “proportionate” when applied to the category of offenders at issue here.

I am unwilling to assume that we, as members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and
nothing in Article III gives us that authority.\footnote{Graham, 560 U.S. at 97 (Thomas, J., dissenting).}

Justice Thomas, who has no trouble believing that majorities of voters might be willing to censure free speech unconstitutionally, cannot fathom that those same voters might be willing to treat unpopular criminals in a cruel fashion. Thus, for Justice Thomas, free speech is permitted to upend totally settled practices, such as the regulation of corporate political speech, whereas in the realm of substantive morality, legislatures must be accorded determinative weight.

Undoubtedly, the Justices in the majority in \textit{Graham} agreed with Justice Thomas’ ontological premise, which is why objective factors loom so large in the majority opinion. Under the death of values, no one is “any more capable of making” a moral judgment than is anyone else, and all moral opinions are entitled to equal weight. It follows that no such judgment can actually be right or wrong, and so Justice Thomas need not even attempt to show that the majority’s judgment is mistaken. All this is so even though the prohibition against cruel punishments is specifically given into the care of the judiciary.

A second example of the failure of substantive judgment is the status of unborn children. The Due Process Clauses referred to above as protecting liberty and property in procedural cases, also protects “life.” But not all lives are protected; in each Amendment, only the life of a “person” is protected.\footnote{The Fifth Amendment provides that “[n]o person shall . . . be deprived of life . . . without due process of law . . . .” The Fourteenth Amendment provides “nor shall any State deprive any person of life . . . without due process of law . . . .”}

While it is often argued that due process is not a substantive protection, but only a procedural one, everyone agrees that this is not so with regard to the protection of life. A legislative decision that actually puts the lives of citizens at risk requires extraordinary justification. So, a draft in wartime is constitutional only because of the legislative judgment that the nation is at serious risk. But a law that allowed one citizen to kill another without the second person’s consent would undoubtedly be unconstitutional as a violation of the constitutional protection of life.

This principle formed a background question when \textit{Roe v. Wade} was argued before the Justices. If an unborn child is a person for purposes of due process, then it is, as Justice Stewart put it, “almost an impossible case” to argue for a constitutional right to choose abortion.\footnote{Transcript of oral argument of Roe v. Wade 41 (December 13, 1971), http://assets.soomo.org/ag/transcripts/roe-v-wade.pdf.}

\begin{footnotes}
\item 110. \textit{Graham}, 560 U.S. at 97 (Thomas, J., dissenting).
\item 111. The Fifth Amendment provides that “[n]o person shall . . . be deprived of life . . . without due process of law . . . .” The Fourteenth Amendment provides “nor shall any State deprive any person of life . . . without due process of law . . . .”
\end{footnotes}
In fact, as Justice Stewart also pointed out during oral argument, if the fetus is a person, then a liberal abortion law—he used the law of New York State as an example—is “grossly unconstitutional” because it does not protect the lives of the unborn sufficiently.

As Michael McConnell has written, the question of who is a person under the Constitution should have been unavoidable in Roe and had to have been answered as a substantive political judgment:

Society has no choice but to decide to whom it will extend protection. It is not helpful to call this decision “private,” for there is no more inherently political question than the definition of the political community.113

Justice Blackmun’s Opinion for the Court in Roe conceded this point:

The appellee . . . argue[s] that the fetus is a “person” within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.114

But, instead of answering this question by either accepting or confronting these “well-known facts of fetal development,” Justice Blackmun sidestepped the question in a fashion familiar from the interpretive strategies of textualism and originalism. Justice Blackmun argued in effect that the Framers of the Fourteenth Amendment did not intend the word “person” to reach the unborn and that the public meaning of the word at that time would not have included the unborn.115 And when Texas argued that, even apart from the question of personhood, the State should be permitted to protect the human life of the unborn child if it chose to do so, Justice Blackmun contended that the “difficult question of when life begins” could not be answered with any certainty.116

The majority opinion in Roe is thus not, as it is often described, a decision dependent on the non-enumerated right of privacy. The right of a woman to choose a surgical procedure is certainly a form of liberty

115. Id. at 157-59.
116. Id. at 159 (“When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”).
that was appropriate to protect given the prior case law. But the determinative question in Roe was the State’s purported justification for denying that right. And that justification failed because no substantive moral judgment about the status of the unborn child could be justified.

So, the right to choose an abortion is premised on moral skepticism and, more generally, on skepticism about truth itself. That is what allowed the Justices to hide from the question of whether an unborn child is a human being. The law of abortion is a function of the same death of values that devalues “value judgments” in general.

The widespread acceptance of the death of values among the Justices explains why there are no pro-life votes on the Supreme Court today. Not one Justice is willing to hold that unborn life is human life and that the fetus is a person for purposes of constitutional protection. Even for judicial opponents of Roe, there is no willingness to make the moral judgment that the fetus is a human being. Thus, while disagreeing about whether Roe should be overturned, left and right agree on the death of values.

Given the significance of the result, the question naturally arises whether Obergefell v. Hodges, the recent case that constitutionalized gay marriage, represented a renaissance in value-laden decision-making. One certainly would have expected that, given the prevailing echoes of the highly normative civil rights cases that surrounded the litigation—Brown, Bolling v. Sharpe, and Loving v. Virginia. And, if Justice Kennedy, the author of the majority opinions in both Lee and Obergefell,

117. Justice Stevens made the point in Casey in 1992: “no Member of the Court has ever questioned this fundamental proposition” [that] “as a matter of federal constitutional law, a developing organism that is not yet a ‘person’ does not have what is sometimes described as a ‘right to life.’” Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 913 (1992) (Stevens, J., concurring and dissenting in part). And this remains true to this day. No Justice on the Court has ever supported personhood for the unborn.


119. See e.g., Brief of Amici Curiae Campaign for Southern Equality and Equality Federation in Support of Petitioners, 2015 WL 1048449 (“In the context of the lives of the politically powerless—including gay Americans—this Court has a proud tradition of exercising its Constitutional authority when a controlling majority ‘identifies persons by a single trait and then denies them the possibility of protection across the board.’ Indeed, in the past, when political majorities disregarded the constitutional rights of political minorities, this Court has intervened to protect them.”) (internal citations omitted). See also, Stuart Gaffney, The Anticipation Builds, MARRIAGE EQUALITY USA (Jan. 9, 2015), http://www.marriageequality.org/anticipation_builds (noting Justice Kennedy’s comment during oral argument in Obergefell to the effect that “approximately the same amount of time has elapsed between the Supreme Court’s landmark LGBT rights decision in Lawrence and the current cases as had elapsed between Brown v. Board of Education and Loving, two of the Court’s landmark race discrimination cases.”).

120. 388 U.S. 1 (1967). For the normative underpinnings of the civil rights cases, see note 1, supra.
had written a normatively oriented opinion, then one might question the prior analysis of the Lee opinion, or at least acknowledge that Lee is not the whole story.

Obergefell deserves more than the few words I can give it here, but it is not difficult to show the amoral structure of the majority opinion even without extended analysis. The heart of the opinion is at the end of the due process discussion where Justice Kennedy states that the case does not involve a new right but only the application of the previously established fundamental right to marry, based on history and tradition. Perhaps sensing how hollow that might sound, given the revolutionary change the case announces, Justice Kennedy adds that rights come not only from “ancient sources,” but also from a “better informed understanding”—more modern?—of how constitutional imperatives define liberty. None of this is grounded in anything beyond human consensus, hinted at in the opinion by the invocation of the phrase “cultural and political developments” to indicate growing societal acceptance of gay people. Justice Kennedy is obviously very sympathetic to the rights of gay persons. But he avoids any suggestion of natural rights or any normative commitments beyond human foundations.

The problem for Justice Kennedy was that there obviously is not a full consensus in America about gay rights in general or gay marriage in particular. Many Americans still hold that gay marriage is unnatural and gay relationships immoral.

The only way, really, to respond when there is such a disagreement is to admit it and to forthrightly assert that the counterview is morally wrong. That is how, famously, Charles Black responded to the criticism by Herbert Wechsler that Brown was not neutral but represented a value choice by the Court—today we might say that Brown was not supported by originalist principles but rested on a value judgment. Black denied that the freedom of association of some whites, on the one hand, and equality in the context of discrimination, on the other, were of equal weight. But that was not Justice Kennedy’s response.


122. Charles Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 429 (1960). Cass Sunstein is right that Black asserted to some degree an interpretation of equal protection as historical that originalism does not support. But Sunstein is projecting his own nihilism when he accuses Black of “a form of self-delusion, a claim of necessity that masks normative judgment of Black’s own.” Cass R. Sunstein, Black on Brown, 90 Va. L. Rev. 1649, 1661 (2004). I’m confident that Black understood that he was expressing a normative commitment. Unlike Sunstein, however, Black would not have understood that commitment as his “own.” Black
What Justice Kennedy did instead was what Justice Blackmun did in *Roe*—having established a right in precedent, thus avoiding any discussion of the genesis of the right, he put the burden of proof to limit it on opponents of the extension of the right. While Justice Kennedy was very careful not to describe opposition to gay marriage as irrational, he did characterize the views that gay marriage violates the inherent nature of marriage and/or is morally wrong as merely subjective—opponents base their conclusions on “religious or philosophical premises,” 123 “neither they nor their beliefs are disregarded here,” 124 they have “sincere, personal opposition.” But, in contrast, when such opinion “becomes enacted law,” the consequence is to “demean[] or stigmatize[]” same sex couples.

It seems to me that this contrast of personal views and enacted law is meant to suggest that the mere opinions of opponents of gay marriage cannot counter the fundamental right to marriage already established. Opponents cannot point to any objective sense in which same sex couples are different from many heterosexual couples who, biologically, cannot have children. But, if the view that marriage is naturally between two persons of opposite gender and that gay relationships are immoral is subjective, then why is not the opposite view also subjective? So, in the end, must not the majority conclusion rest on the commitment that the opponents are wrong? Then, it would follow that their beliefs are disregarded, in the sense that they are substantively rejected.

Justice Kennedy does not write this because of the death of values. In other words, if he had just written that same sex marriage is not immoral and that the opponents are wrong—as the entire Court in *Brown*, *Bolling*, 125 and *Loving*, 126 would have been happy to do—he would have had to face the old Leff “Sez who?” 127 from Chief Justice Roberts in dissent—“Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.” Justice Kennedy had no answer to that.

The answer to that challenge should have been, five lawyers now, but the truth of the matter will soon be apparent. After all, how is *Obergefell* any different from the judicial decision that women are

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123. *Obergefell*, 135 U.S. at 2602. This is the same treatment that Justice Scalia gave philosophy above.
124. *Id.* (emphasis added).
127. See Leff, *supra* note 46.
equal? That was not supported by history or tradition either. Justice Kennedy should have written, yes, we five believe it, and we may be wrong. But if we are wrong, history will correct us in the name of truth. That is what Justice Harlan might once have written. But Justice Kennedy could not. And you and I cannot either. Not without self-consciousness—not without the feeling that there is no foundation under our feet. We all now live subject to the death of values.

In addition to the general shape of constitutional interpretation, the death of values strongly influences one particular area—the role of religion and religious exemptions from the requirements of general laws. I will briefly set forth that influence in the next Part.

V. THE REFLECTION OF THE DEATH OF VALUES IN THE STRUGGLE OVER RELIGIOUS EXEMPTIONS

American law is currently engaged in a controversy over the scope of religious exemptions pursuant to the Religious Freedom Restoration Act (RFRA) and similar statutory and state constitutional provisions. The Supreme Court decision exempting for-profit corporations from compliance with the Affordable Care Act contraception mandate in Burwell v. Hobby Lobby, Stores Inc. and the subsequent injunction in Wheaton Coll. v. Burwell, exempting a religious college from complying with the very accommodation that the parties in Hobby Lobby seemed to have won, point to a very broad judicial interpretation of the RFRA and a continuing divisive debate over the proper place of religious exemptions in American law.

While the arguments involved in this debate are beyond my scope here, I hope to show that the overall shape of the debate over exemptions, on both sides, is formed by the view that religious beliefs are subjective and personal. The debate over religious exemptions is in that sense a reflection of the death of values.

The exemptions debate takes place against the background of Employment Division v. Smith, which held in 1990 that the Free Exercise Clause gives a religious practitioner no protection against

generally applicable laws that are formally neutral about religion. Thus, in the context of the Smith case, a law criminalizing the use of peyote is constitutional even when applied to sincere practitioners of a well-established Native American religion that utilizes peyote in its core ceremonies, without any particular showing by the government why a religious exemption from the law could not be granted.  

Smith was a thunderbolt. Although religious practitioners prior to Smith almost always lost their challenges against generally applicable laws—from a University arguing that race discrimination was religiously required to a religious group requesting exemption from the payment of social security taxes—the government usually had to give some kind of special reason—called a compelling interest—for burdening a religious practice. That meant, at least as a practical matter, that the concerns of religious practitioners would have to be considered when government actions affected them. So, religious practitioners had some leverage. After Smith, that leverage was gone.

The grounds of the Smith decision seemed surprising, given that Justice Scalia wrote the opinion. In response to the claim that the government was directly denying the right of the plaintiffs to the free exercise of religion by forbidding the use of peyote—a clearly textual argument—the textualist Scalia responded only “we do not think the words must be given that meaning.” Then the opinion added that prior case law had never granted protection to religious practitioners from neutral, generally applicable laws like the one at issue in Smith. The opinion did not reject the plaintiffs’ textual interpretation as implausible, nor did Justice Scalia bother to try to show that the commonly understood meaning of the “free exercise” of religion at the time of the adoption of the First Amendment would not have included the plaintiffs’ claims.

Since the Smith opinion did not rely on text or history—the mainstays of conservative constitutional jurisprudence—on what did it rely? Surprisingly, the Smith opinion relied on the kind of policy argument that Justice Scalia usually rejects. According to Justice Scalia, any society that requires the government to produce a compelling interest every time a religious practitioner challenges a generally

133. Although there were no criminal prosecutions in Smith—it was actually a case about the denial of unemployment compensation to drug counselors fired for using peyote in their religious practice—the opinion was written as if it had been a challenge to the criminal statute.
136. 494 U.S. at 878.
applicable law on the basis of the plaintiff’s own perception of the centrality and importance of the religious practice at issue “would be courting anarchy,” and this is especially true in a society of diverse religious beliefs, all of which are constitutionally protected.  

But why could not all these hypothetical religious claims be winnowed by the judiciary? The plaintiffs in Smith were obviously sincere; no one could doubt the centrality and importance of their claim to their well-established religious practice; and, since a number of states grant a specific exemption for the religious use of peyote, why not force the government to explain why no religious exemption could be granted? Future cases with less significant religious claims could be dismissed.  

Justice Scalia explicitly warned that future cases with apparently lesser claims could not be dismissed. The importance and centrality of a religious practice could not be decided by a judge—"What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith?"  

And, although Justice Scalia did not have to rule on this issue, it would seem to follow that a judge could not decide whether a particular claim presented as “religious” really was religious. The reason for all of this inability is, as Justice Scalia wrote, that “faith” is “personal.”  

Justice Scalia was not worried that judges would judge these wrongly. The clear suggestion in Smith is that there is no norm by which such a judgment could be made at all. Religious faith is subjective—always and only a matter of opinion—just as we saw above that value judgments in general are subjective. Therefore, it would also be subjective for a judge to weigh the importance of a religious practice.  

As if to make all this clear, at the end of the Smith opinion, Justice Scalia again warned against “a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.” Such a system would be nothing but subjective opinion upon subjective opinion.  

To his credit, Justice Scalia did not want to leave religious practitioners without legal recourse. He reminded the authorities in Oregon that they were free to enact a statutory exemption for sacramental peyote use, as other states had done. Congress did precisely

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137. Id. at 888. There is something comical about the holding in Smith, given Justice Scalia’s opinion recognizing a personal constitutional right to own a working gun in District of Columbia v. Heller, 554 U.S. 570 (2008). In other words, according to Justice Scalia, a society courts anarchy if it allows religious practitioners to go to court, but not if it allows almost every citizen to be armed.

138. Id. at 887.

139. Id. at 890.
that, legalizing sacramental peyote use in 1994. But, the general reaction to *Smith* brought a great deal more than a specific religious exemption for peyote.

*Smith* was so unpopular that it eventually triggered an almost unanimous response in Congress attempting to overturn the decision—the RFRA. Originally, the RFRA restored the compelling interest test for courts to apply in any case in which the practice of religion is substantially burdened by federal, state, or local governments, even if that burden is occasioned by a law of general applicability. The Justices later held that Congress lacked authority to impose this burden on the states and localities. But that left the RFRA in place for challenges to federal laws. That is why the current religious challenges to the contraceptive mandate in the federal Affordable Care Act proceeded mainly under the RFRA. Meanwhile, many states have adopted their own versions of the RFRA or have reacted to *Smith* by increasing the protection of religious practice in other ways.

The RFRA did not change the subjective understanding of religious exemption claims. While the *Hobby Lobby* case concerned a subsidiary issue—the extent to which for-profit businesses and their owners could claim the protections of the RFRA—the *Wheaton College* case and affiliated litigation over the government’s accommodations for religious entities continue to raise the question of the extent to which the claims of religious practitioners can be challenged. Thus far, the Court has suggested, as Justice Scalia predicted in *Smith*, that plaintiffs claiming religious exemptions, if sincere, must be the sole judges of their religious needs. All that courts can do, aside from judging sincerity, is to apply the compelling state interest test.

Naturally, critics of religious exemptions—and of religion itself—

141. See Ledewitz, supra note 129, at 50.
143. See Ledewitz, supra note 129.
144. In *Hobby Lobby*, Justice Kennedy addressed the government’s argument that no religious exemption was needed to the contraception mandate because “the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated . . . providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.” 134 S. Ct. at 2777. Justice Kennedy made it very clear, with italics, that the RFRA protects the right of “objecting parties to conduct business in accordance with their religious beliefs.” Id. at 2778. Not in accordance with religious practices the courts find to be reasonable.
concede that religious claims are wholly subjective. For someone like Brian Leiter, in his book, *Why Tolerate Religion?*, that subjectivity is one reason to eliminate religious exemptions. If religious exemptions are eliminated, society suffers no loss of knowledge, since religion has nothing to do with truth.

But, undoubtedly for strategic reasons, defenders of religious exemption—and of religion itself—also argue that religious claims are wholly subjective. Winnifred Fallers Sullivan, a well-known and highly respected student of religion, was scathing in her criticism of Justice Sotomayor’s dissent in the *Wheaton College* case, accusing her of challenging the rationality of religious beliefs:

Justice Sotomayor is sputtering mad about the *Wheaton College* injunction. She says that, while she does not deny the sincerity of its religious belief, the College failed to make a showing that filing a form requesting an exemption is a substantial enough burden to trigger a RFRA claim. Shifting to an argument about substantiality is an effort to avoid challenging the rationality of their religious belief, but that is exactly what she is doing. They say that filing the form is enough to make them complicit with evil. Who is she to say nay without getting into exactly the theological battle she is trying to avoid when she claims to respect them?

It is easy to see that the treatment of religious exemptions as completely subjective is not sustainable as a practical matter. In the absence of objectivity of any kind—in the absence of coherence of any kind—religious exemptions must eventually become conscience exemptions and the protections for all such claims must be watered down so that government does not become impossible.

This Article is not the context to consider how all this might be changed or whether it can be or should be. The point here is that the controversy over religious exemptions has its roots in the presumed inability, and certainly the unwillingness, of the Justices to make judgments about religious claims. And the controversy today continues to manifest this purely subjective quality. The struggle over religious exemptions is another example of the consequences of the death of values.

146. *Id.* at 63.
VI. COPING WITH THE DEATH OF VALUES

How does law go on in the face of the death of values? The prior sections suggest that there are two basic ways to cope, one conservative and one liberal—restrictive methods of constitutional interpretation, on the one hand, and the autonomy of individual choice on the other. I will take up both of those strategies here. But, first, I will take up the denial of the depth of the death of values as a coping mechanism.

In this section, these three coping mechanisms are basically set forth. An analysis of their implications follows in Section VII. Even a mere listing of these coping mechanisms, however, must briefly indicate the basic flaws in the three positions. In different ways, each of these three strategies is deformed by its failure to confront the death of values in full and endure the dead end to which the death of values has brought American law. Coping itself is not an adequate response to our situation.

A. The Death of Values is Only Apparent

In his influential book, Laws Quandary, Steven Smith treats statements like the one in Casey about the wrongness of Plessy as evidence of what he calls an ontological gap—the gap between what lawyers think we believe to be real, on the one hand, and, on the other, the commitments we make and keep that appear to assume that other kinds of matters are real. Specifically, Smith writes that legal elites believe, or imagine they believe, that only material things are real—particles and forces from a certain view of science—but speak and act as if something like justice could be real, as in the injustice of Plessy the day it was decided. References to what the law “is” or what “the Constitution” contains no longer make sense given the ontological commitments of at least our legal elites.

Smith proposes that this ontological gap comes from a failure to take metaphysics seriously. He tries to do that by paying attention to our presuppositions—what we mean when we speak of “the law of Equal Protection” or cases wrongly decided. Understanding our language would help lawyers own up to the ontological gap.

At the end of Law’s Quandary, Smith asks what we can do about our ontological gap. But since he does not propose that lawyers stop referring to “the law,” he really means what can we do about our meager ontological commitments? In my terms, the question becomes, what can we do about the death of values?

Smith has two suggestions. One way out is the way of faith, symbolized for Smith by the work of the legal philosopher Joseph Vining. The other way is a kind of humble confession of our circumstances and an openness to richer realities than we have yet known. But none of this is specified by Smith. It is merely sketched.

How serious is the ontological gap for Smith? Smith says that our moral commitments are nonsense given our ontology. But he also writes that we can go on this way for a long time. Perhaps that is why Smith does not concern himself too much with what should be done.

Or, it may be that Smith does not believe there really is an ontological gap. Smith is so enamored of the habits of lawyerly life—references to cases and holdings and so forth—that he attributes to them a kind of alternative ontology in which law is real and discovered rather than imposed by judicial and legislative fiat and through which the unified intention of a single author—classically, God—is revealed in the coherence of law as a whole. This alternative ontology then contradicts the naturalism, positivism, and materialism of modern and postmodern legal thinking that excludes in principle such inspired unity. Since one cannot really hold both of these positions, Smith acknowledges that some form of bad faith is operative among lawyers. But he suggests that most lawyers actually accept the ontology of classical law and more or less mouth the skepticism of postmodernity insincerely.

Unfortunately, for Smith and for us, the prior material as a whole strongly suggests that he has it backward. Lawyers and judges really are subject to the death of values and the skepticism that grounds it. Perhaps lawyers and judges would like to believe differently, and even may privately believe differently, but in the formation of law, the death of values is supreme.

As to why these lawyerly habits persist, I will suggest in Part VIII below the roles that these habits play in law school training.

B. Consensus, Tradition, and Originalism

These are the moves through which the political right in law copes with the death of values. They enable conservatives to identify constitutional rights, or to fend such claims off, without having to decide any substantive normative issues.

Consensus entered into its modern role through interpretation of the Eighth Amendment’s prohibition against cruel and unusual punishment. In a series of decisions since 2002, mentioned above, a 5-4 majority of the Court has found a national consensus against various applications of
Punishments, such as imposition of the death penalty against persons with mental retardation or the use of a sentence of life imprisonment without parole against a juvenile in a non-homicide case.\textsuperscript{149} A four-Justice dissenting bloc has agreed that the existence of a national consensus is a proper ground from which to interpret the Eighth Amendment but has denied that such a consensus exists in each instance.\textsuperscript{150}

Consensus is pretty obviously irrelevant to Eighth Amendment interpretation despite what the Justices say in these cases. Surely those punishment practices the Eighth Amendment is deemed to have barred from its beginning—such as the corporal punishments of the colonial era—cannot be revived by a new national consensus to bring them back. Nor should a punishment regarded as cruel be protected from constitutional prohibition simply because a national majority supports it.

The simple problem with consensus is that it has nothing to do with interpreting cruelty. If the Constitution gives the task of interpretation to the courts, and if cruel punishments are to be banned, then the Justices should be trying to decide what it is that makes a punishment cruel. That task is not diminished by referring to it as philosophy or moral theory. It is the task the Constitution sets. What is cruelty? Not what I believe is cruel or can prove to be cruel beyond possible objection. Just, what is cruelty? The reason this task is not undertaken is the fear, really the certainty, that \textit{any} answer given will be subject to the subjectivity of value judgments.

The second move of conservative jurisprudence, the constitutionalization of tradition, is an unjustified extension of judicial authority, which was the immediate criticism by Justice White when the matter was first raised in a modern constitutional context in \textit{Moore v. East Cleveland}: “What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable.”\textsuperscript{151}

The danger of judicial overreach in promoting an unbounded constitutional protection for tradition was noted by conservative thinkers at the time.\textsuperscript{152} And Justice Scalia has attempted to cabin the doctrine of tradition by reference to a proper level of generality in his famous

\textsuperscript{149} See notes 103-10, supra.
\textsuperscript{150} Id.
\textsuperscript{151} 431 U.S. 494, 549 (1977) (White, J., dissenting).
footnote 6 in Michael H. v. Gerald D.  

But the need to limit tradition just raises the question: why should tradition be constitutionally protected in the first place? After all, any tradition that a national majority wants to incorporate into the Constitution can be incorporated by constitutional amendment. To grant protection without amendment is reminiscent of Professor Bruce Ackerman’s suggestion that the Depression and the response to it in the New Deal should be regarded as a de facto amendment of the Constitution, a suggestion that conservative constitutional thought has generally rejected.

One important reason that tradition occupies a constitutional role is that it allowed Justice Scalia to parry the challenge by the lead opinion in Casey that, without a constitutional protection of abortion, the government could forbid a couple from having more than one child. The obvious answer to this, given Justice Scalia’s general commitments, should have been that the Constitution does not cure all ills. But Justice Scalia could not bring himself to concede that the right of childbirth is subject to government control. So, in footnote 1 in his dissent, he claimed that abortion is not protected by tradition, but childbirth is. Except for the domination of the death of values, he could have said straightforwardly that abortion is morally wrong, while childbirth is not—which I presume Justice Scalia inwardly believes.

The third move of conservative constitutionalism, originalism, is its major contribution to constitutional interpretation and need not represent a rejection of the rational unfolding of a value judgment. The public meaning of a text and the practices against which it was aimed, could enable the formulation of a principle of what a text means. That principle could then be applied in a value-laden way.

But the rejection of value judgments will not apparently allow even that much rationality into constitutional interpretation. Thus, in Town of Greece v. Galloway, and in dissents in Lee, and later in McCreary

153. 491 U.S. 110, 127 n. 6 (1989) (plurality opinion).
155. See e.g., Randy E. Barnett, We the People: Each and Every One, 123 YALE L.J. 2576 (2014).
County v. ACLU,\textsuperscript{158} it is strongly suggested that the existence of a practice at the time of the adoption of a constitutional text—legislative prayer, graduation prayer, and public references to God—immunizes that practice from constitutional challenge—an approach that would have insulated both racial segregation and anti-miscegenation statutes from constitutional challenge.\textsuperscript{159}

The objection that originalism represents moral relativism in tension with the commitments of the founding generation has been ably and consistently set forth by the noted conservative thinker, Harry V. Jaffa.\textsuperscript{160} Despite often agreeing with the results that conservative jurists reached, Jaffa declared that the foundations of originalism lay in “legal positivism, grounded in moral relativism and philosophical nihilism . . .”\textsuperscript{161}

Professor Jaffa particularly points to a statement written by then-Justice Rehnquist in 1976 with regard to inherent rights under the American Constitution:

If such a society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards indeed do take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone’s idea of natural justice but instead simply because they have been incorporated in a constitution by the people.\textsuperscript{162}

Jaffa regards this statement as a heresy against our constitutional tradition. He writes: “Now I venture to say that 99.9% of the American people—outside the academy—do not believe this, nor should they. If the day comes when they do believe it, constitutional liberty will crumble into dust.”\textsuperscript{163}

\textsuperscript{158} McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 US 844, 893 (2005) (Scalia, J., dissenting) (“With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”).

\textsuperscript{159} Granted, Justice Scalia specifically denies that history immunizes unconstitutional practices, \textsuperscript{id. at 892}, but what else but the pure fact of original practice allows the exclusion of polytheists from the principle of religious nondiscrimination Justice Scalia otherwise admits is the meaning of the Establishment Clause? \textsuperscript{id. at 893}.


\textsuperscript{163} Jaffa, \textit{supra} note 160, at 735-36.
But I venture to say that the day has come. What is Eric Posner’s attack on human rights in his new book, *The Twilight of Human Rights Law*, but an updated version of Rehnquist’s legal positivism, now transferred to a critique of the notion of human rights at the international level? Human rights are inherent for all or they are not inherent.

Recently, Steven Smith has attempted to defend a version of originalism that he terms “decisional originalism,” which he believes to be both more rational and more deferring to proper constitutional authority than the “principle originalism” I was describing above. This Article is not the place to discuss his proposal—although I have to point out that following ancient expectations detaches judicial decision-making from current meaning in such a way that it undermines any legitimacy that judicial review has. But one can see the death of values in the option of judicial review that Smith suspects non-originalists are actually practicing, but can never admit—“[J]udges address the issues on the merits and give what seems to them the fairest of most sensible answers.” This is more or less the method of substantive due process interpretation that Justice John M. Harlan favored and if we believed that value judgments could correspond to something real, as Justice Harlan did, judges could engage in that approach expressly.

In any event, as shown above, no form of originalism is utilized by conservative constitutional jurisprudence when constitutional norms do not seem to require value judgments, as in free speech and procedural due process. It is in this sense that originalism allows an escape from the need for value judgments and thus copes with the death of values.

**C. Individual, Sovereign Choice**

Although quite different in apparent method, Jaffa correctly concludes that what passes for liberal constitutional method, is rooted in “that very same legal positivism” that animates conservative constitutional interpretation. The difference is that conservative

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166. Smith’s approach would have ruled out *Loving* and Equal Protection’s heightened scrutiny for gender discrimination, for example.


thought tends to aim at judicial deference to forms of group social life, past and present, while liberal thought aims at judicial deference to the sovereign individual.

In its first appearance, this hyper-individualistic approach was the move of the political left to defend unpopular fundamental rights without having to assert the objectivity of values that, it was felt, could not be defended directly. But the move is now migrating into the realm of religious practice under the Free Exercise Clause and the RFRA.

As explained above, the lead opinion in *Casey* defended the right to choose abortion precisely at the point, and in the service of, individual choice. Both in *Casey* and before, in *Roe*, this strategy of argument took advantage of the death of values by positing the right of privacy and then asserting that the government could not prove that its value judgment prohibiting the practice at issue was objectively justified.

The downside of this approach was not immediately apparent in the abortion context. For in that context, the government’s underlying value—life—was conceded to be objective. The issue was only at what point life begins.

But when this same strategy of individual self-determination was employed in gay rights cases, the result was much more radical. For, in those cases, the government’s justification for banning, first gay sexual expression, and then gay marriage, was that the government viewed the practices in question as immoral. Justice Stevens’ view in dissent in *Bowers*, which was adopted by the majority in *Lawrence*, condemned the government’s right to this moral judgment: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”

This was a revolutionary approach to the legitimate state interest test, for it fully separated law from morality. And this separation has since been adopted in other cases.

Although Justice Scalia, in his dissent in *Lawrence*, criticized the divergence of law from morality—this “proposition is . . . out of accord . . . with the jurisprudence of any society we know”—he should not have done so. The separation between law and morality follows inevitably from the view he expressed nine years earlier in dissent in *Casey* that value judgments are nothing more than matters of

171. In gay marriage cases, for example. See infra note 175.
172. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).
opinion. If gay people have the liberty to engage in sexual relations, as Justice Scalia conceded in *Lawrence*, how could the merely contrary opinion of society be considered a legitimate basis upon which to forbid the conduct? To put this plainly, if values cannot be rational, but can only be a construct, then values can never be a legitimate basis on which to found a coercive legal judgment. Only if society’s claim against gays were a claim of truth, could the repression in *Lawrence* be justified. But then the Justices would have to forthrightly face and evaluate this claim of truth.

The other side of this coin of individual choice is the growing notion that religious practices are entirely non-rational. As described above, no matter how extreme and arbitrary a religious claim seems to be, there can be no second guessing by judges except to test the sincerity of the religious believer. In this way, unreviewable, individual choice, which was originally a claim from the political left, has now migrated to be a claim by the political right. Such is the power of the death of values.

VII. THE DARK SIDE OF COPING WITH THE DEATH OF VALUES

The coping mechanisms described above lead law to monstrous moral arguments, the eventual collapse of morality, the illegitimacy of constitutional government and the loss of democracy. These coping mechanisms are a major reason why law schools emptied out in the recent economic downturn.

But, of course, it is not really the coping mechanisms that are the issue. They are merely the symptoms of law’s failure to confront the death of values. I don’t mean a failure to “cure” the death of values—for Heidegger never promised that nihilism would be overcome—I only mean that the failure to seek knowledge of nihilism is killing law.

173. *Id.* at 586.
174. Granted, the actual formulation of the test is rationally related to a legitimate interest, thus turning reason into mere instrumentality. But I assume Justice Scalia would wish to defend the rationality of the government’s interest. Nevertheless, the death of values undermines that effort.
175. Cases striking down gay marriage bans have pursued two strategies to avoid evaluating substantive moral claims by government. In some cases, as in *Lawrence*, the courts deny that moral claims can justify government action. See *e.g.*, Bourke v. Beshear, 996 F. Supp. 2d 542, 552 (W.D. Ky. 2014). In others, the courts hold, as in *Roe*, that given the fundamental right to marry, the government’s moral claim cannot be proven with sufficient certainty to overcome heightened scrutiny. See *e.g.*, Whitehood v. Wolf, 992 F. Supp. 2d 410, 423-24, 430-31 (M.D. Pa. 2014).
176. See discussion, *supra* Part V.
A. The Justification of Immorality

In his dissent in *Casey*, Justice Scalia felt the need to contest the assertion by the lead opinion that the Justices were engaging in "'reasoned judgment'" in their interpretation of the Constitution.177 But, consistently with the death of values, Justice Scalia contested this assertion not by showing that the right to choose abortion is unreasoned, but by asserting that no such judgment *could* be reasoned:

The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with was bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is, of course, no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered the newborn children not yet human, or the incompetent elderly no longer so.

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases, the best the Court can do to explain how the word 'liberty' *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.178

But why can’t the humanity of the fetus be determined as a legal matter? Law in the Due Process Clause instructs the courts to protect "life." Why can’t law borrow from other disciplines to decide that matter, as it sometimes does, for example, to decide whether a stream is navigable?179 Don’t the advances in fetal imaging suggest that at least at some point the fetus is fully human? Why, in other words, can’t Justice Scalia argue that the lead opinion is wrong in its reasoned judgment, rather than asserting that reason can have nothing to do with it?

All Justice Scalia can say is that the humanity of the fetus is a value judgment and therefore a matter of opinion. And then he even expands this line of argument to include the decision to kill a newborn baby and an incompetent older person.

Let Justice Scalia’s monstrous argument reverberate for a moment:

178. *Id.* at 983-84 (Scalia, J., dissenting.)
If society decided to allow newborn children to be killed, the courts could do nothing about it. It would be a value judgment. Justice Scalia must say this for he has already refused, in advance, to consider whether the fetus is human—"The States may, if they wish, permit abortion on demand . . . ." 180

No common law judge would have treated values this way. Bob Cover, in his book Justice Accused, reminds us that some judges, even without justification in positive law, engaged in legal interpretation during the slavery period “in favorem libertatis.” 181 They would never have suggested that the value of freedom was just a matter of opinion. How then can life be?

This is what happens when judges accept the death of values as something natural and inevitable. They end up afraid to challenge the indefensible.

B. The Collapse of All Morality

It takes the Stevens/Kennedy position in Bowers/Lawrence to make the point express—so express that Justice Scalia is startled at the implications of the death of values he had himself assented to—that since all moral claims are matters of opinion, government may never act to defend morality and may never invoke morality to defend its actions.

This position has not garnered the scorn it deserves for it is viewed as the only basis on which to defend gay rights from government prohibition. I will return to that issue in a moment. But, what about all of the rest of government regulation? Don’t progressives realize that the entire edifice of the social welfare state rests upon the moral judgment that the rich have enough, given the inequalities of income in society, and so must be forced to share their wealth with others?

What kind of claim is this other than a moral one? The wealth of the rich does not itself harm the poor. Their acquisition of wealth has not violated society’s rules. Nor is redistribution fully justified to avoid immediate harm, such as starvation or homelessness. No, it is just right that the rich be made to share.

The justification of income redistribution is a much disputed matter. I don’t mean here to establish anything with regard to it, except that the pure statement that moral judgments cannot justify government coercion would undermine income redistribution.

180. Casey, 505 U.S. at 979 (Scalia, J., dissenting).
But unless morality is constructed, mustn’t the courts defer to majority prohibitions against gay rights? Not necessarily. It is only the death of values that suggests that there is safety in the collapse of morality. Gay rights could be defended as morally right and laws discriminating against gay people could be condemned as morally wrong.

A bold Court in Lawrence could have said that the moral claim by the government in that case was irrational without suggesting that all moral claims are irrational. That would have been difficult in the current atmosphere. But the reason we believe such a position hard to defend is the very death of values that is undermining morality and undermining law.

C. The Illegitimacy of Constitutional Government

Up to this point, I have been emphasizing the interpretation of the Constitution and the content of law under the death of values. But there is another, deeper aspect of our situation. One of the necessities of any form of government is its account of why it is legitimate. Because of the death of values, it is no longer clear that constitutional government is in fact legitimate.

On January 3, 2014, at the annual convention of the American Association of Law Schools, the Section on Constitutional Law sponsored an unusual discussion. Normally, some topic currently before the Supreme Court is discussed on such occasions. But, instead of that kind of program, the Section addressed the topic, “The Importance of Constitutionalism.” The description of the topic made it clear that the issue raised was, in effect, the legitimacy of our constitutional government from the perspective of political theory and what could be called the perspective of “We the People of the United States.”

Four scholars were selected to make presentations. For my purpose here, the key exchange was between Sanford Levinson, from the University of Texas Law School, and Randy Barnett, from Georgetown. Levinson led off the program with an attack on the undemocratic nature of the Constitution. Levinson’s arguments were similar to those raised in the classic book, How Democratic is the American Constitution?, by Robert Dahl.

Then Barnett countered with an electrifying presentation. In effect, he accused Levinson, and by extension, most of the law professors

present—for most of us certainly agreed with Levinson, including me—of a lack of constitutional faith. From the perspective of the Constitution, the legitimacy of democracy is not to be presumed. It would be closer to the understanding of the Framers to assert that the legitimacy of democracy itself, understood as rule by the majority, is the problem with which the Constitution was intended to deal. The undemocratic elements of the Constitution should be thought of as protections of the natural rights of each individual citizen from illegitimate coercion by the majority. The proper question, therefore, is how well the Constitution accomplishes that task. Barnett’s presentation encapsulated his book, *Restoring the Lost Constitution*.183

Barnett was the perfect person to issue this challenge. He was the instigating thinker behind the constitutional challenge that, but for Chief Justice John Roberts’s surprising holding that penalties are taxes, would have upended the Affordable Care Act.184 Barnett has made it his purpose to restore the understanding of the proper role of government in America to that of the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .

As Barnett understands it, the nature of consent to the coercive power of government for the Framers was not any actual or expressed consent, nor presumed consent manufactured from not leaving a jurisdiction. Rather, human beings hypothetically consent to government as long as their unalienable—natural—rights are respected. While this understanding of the Constitution does not justify each particular undemocratic element in it, it does change the focus of debate away from majoritarianism to the protection of rights.

Barnett’s vision is of course not original. It is a lost way of understanding the relationship between the citizen and her government. And it is a powerful justification for something like our form of government. The other influential consent theory is that of John Rawls. But Rawls’ “original position” from which hypothetical persons, who do not know what their endowments and position in society would be, choose political arrangements that are then considered just, suffers from

its unreality. Rawlsian thinking collapsed in recent years under, among other things, the pressure from religious practitioners who considered their religious commitments more fundamental than any political commitments. In any event, Rawls was not mentioned, as far as I remember, in that January discussion.

The difficulty with Barnett’s position today, under the power of the death of values, is that it presupposes that natural rights are real. This foundation is clear in his book when Barnett quotes the sermon of Elizur Goodrich delivered to the governor and legislature of Connecticut on the eve of the Constitutional Convention:

“The principles of society are the laws, which Almighty God has established in the moral world, and made necessary to be observed by mankind; in order to promote their true happiness, in their transactions and intercourse. These laws may be considered as principles, in respect of their fixedness in operation; and as maxims, since by the knowledge of them, we discover those rules of conduct, which direct mankind to the highest perfection, and supreme happiness of their nature. They are as fixed and unchangeable as the laws which operate in the natural world.”

The problem the death of values poses for Barnett is that this real foundation for unchanging rights is now in question. Barnett never confronts this problem. Instead, he deals with it by substituting human consensus as the foundation for our rights in place of the unchanging moral architecture of the universe:

Whatever else people may believe they have a right to, most all people believe that they have the right to make their own choices and act as they please with what belongs to them; that they can do as they will with what is theirs provided their actions do not harm others.

Barnett does not appear to see that without the foundation appealed to by Goodrich, which Barnett evidently believes, along with Heidegger, can no longer serve as the foundation of a civilization, his “rights” amount to nothing more than a conservative political agenda in which rich people would prefer not to be taxed or regulated. Worse, from Barnett’s perspective, his invocation of consensus brings us right back to

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187. BARNETT, supra note 183, at 81 (emphasis provided).
188. Id. at 80.
the majoritarianism that he originally rejects as the foundation for the legitimacy of government. People apparently do not believe what Barnett attributes to them, or they do not believe it in the same way that he does, or they would not have voted for the Affordable Care Act, in effect, twice. And it is their actual commitments, not Barnett’s verbal formulas, that comprise our rights under a theory of consensus. This is the dead end to which the death of values brings the project of legitimizing constitutional government.

D. The Loss of Democracy

Before ending this Section, I want to present one more breakdown brought about by the death of values—the inability of law to protect democracy itself. This is surprising, since democracy would seem to be the sort of process value I earlier suggested the Justices of the Supreme Court could protect despite the death of values. It turns out, however, that democracy is the sort of spiritual practice—in the sense of the German word, Geist—that requires a faith we no longer have.

Because I am going to criticize three Republican Party legal strategies—the voter ID laws, the political gerrymander and the manipulation of the Electoral College—let me begin with a Democratic Party strategy that illustrates the same nihilistic worldview. In the late spring of 2014, Democratic Party operatives were widely reported to be building elaborate “get-out-the-vote” targeting strategies in states with close Senate election races. This strategy made perfect sense because one big problem for the Democratic Party is that groups that lean their way, such as young voters and racial minority groups, tend to sit out off-year elections. That reduction in turnout was one reason the Democrats faced real problems in the fall, 2014 elections.189

But turnout was not the only reason the Democrats were in trouble. President Barack Obama’s popularity ratings were low because after six years in office, he and his Party, in the view of many, had failed to deliver prosperity and a safer world. Turnout manipulation is a way to insulate the Party from that democratic fallout from failure. If Democratic Party officials really cared about democracy, they would have welcomed the disaster that was about to befall the Party as a necessary democratic correction by the people. But, of course, no partisan Democrat felt that way.

The turnout strategy did not work. The 2014 elections were bad for the Democrats. But, in a closer year, the Democrats might have held off the democratic reckoning. The Democrats certainly were willing to try to do so.

What did Heidegger mean when he told Der Spiegel in that 1966 interview that he was not convinced that democracy could be assigned to this age?

A decisive question for me today is how a political system can be assigned to today’s technological age at all, and which political system would that be? I have no answer to this question. I am not convinced that it is democracy.190

I am not claiming to understand Heidegger, but his observation shines a light on the turnout phenomenon. The experts, who believe that they can and should substitute the techniques of voter turnout for the genuine expression of the will of the people, are already convinced that there is no such thing as the will of the people. There are, instead, just outcomes with winners and losers. We want our side to win and in a technological age, we develop techniques to try to accomplish that result.

I am not suggesting that turnout-the-vote technologies are morally wrong. They are beyond good and evil. Such techniques are an inevitable result of a time that is too technologically adept to leave the people to their own democratic devices.

Now that the reader can see that I am pointing to technological forces rather than human evil, and that Democrats have the same worldview as do Republicans, let me introduce three Republican Party strategies that, if all were implemented fully, would destroy democracy in the United States.

That sounds like a hysterical exaggeration. But it is not.

Let me begin with voter ID laws. These are laws that require showing some form of government-issued voter photo ID before one can vote. In principle, such laws are neutral and benign—similar to the requirement to present a photo ID before flying. Such laws will only disenfranchise a small number of voters. But, almost all the voters they will disenfranchise vote Democratic. In a close election—and recently many of our elections have been close—this could make the difference. That is why Mike Turzai, a Republican leader in Pennsylvania chortled that voter ID would allow Republican Party Presidential candidate Mitt Romney to win Pennsylvania:

190. Der Spiegel, supra note 47.
House Majority Leader Mike Turzai (R-Allegheny) suggested that the House’s end game in passing the Voter ID law was to benefit the GOP politically.

“We are focused on making sure that we meet our obligations that we’ve talked about for years,” said Turzai in a speech to [Republican State Committee] members Saturday. He mentioned the law among a laundry list of accomplishments made by the GOP-run legislature.

“Pro-Second Amendment? The Castle Doctrine, it’s done. First pro-life legislation—abortion facility regulations—in 22 years, done. Voter ID, which is gonna allow Governor Romney to win the state of Pennsylvania, done.”

Since no one believes there is any sizeable amount of voter fraud going on that voter ID laws will end, this comment amounts to an admission of the intent of vote suppression.

Then there is the political gerrymander, which Republicans have been astonishingly successful in implementing. In the 2012 election, the Republican use of the political gerrymander allowed that Party to control the House of Representatives against all expressions of national sentiment. In North Carolina, for example, Sam Wang reported in the New York Times that:

[The two-party House vote was 51 percent Democratic, 49 percent Republican, the average simulated delegation was seven Democrats and six Republicans. The actual outcome? Four Democrats, nine Republicans — a split that occurred in less than 1 percent of simulations. If districts were drawn fairly, this lopsided discrepancy would hardly ever occur.]

Similar lopsided splits occurred in other states, like Pennsylvania.

Finally, there is the threat of permanent minority Presidential elections that could easily be accomplished through manipulation of the Electoral College. Presidents in the United States are not elected directly by the people. Instead, in each state, Presidential electors are actually elected and each state awards its electoral votes in the manner its legislature chooses.

This system is already undemocratic because of the way the number


of a state’s electoral votes is determined in the Constitution—the number is equal to the total congressional delegation so that smaller states have disproportionate weight because of their two Senators. Yet in general the current system works tolerably well in the sense that the Presidential candidate with the most votes nationally usually wins, and when that does not happen, as it did not most recently in 2000, the direct vote is usually extremely close. The American people have undoubtedly come to rely on these facts.

The reason the Electoral College system usually works to elect the candidate with the higher number of votes nationally is that, with the exception of Maine and Nebraska,\(^{193}\) electors are elected on a winner-take-all basis. That is, all electors pledged to the presidential candidate who wins the most votes in a state become electors from that state. In contrast, Maine and Nebraska use the congressional district method, selecting one elector in each congressional district by popular vote and selecting the remaining two electors by a statewide popular vote.

The winner take all method has the effect of discounting the votes of the minority Party. So, it is predictable that the Democratic Presidential candidate will win California and the Republican candidate will win Texas before the campaign begins. But since this suppression happens equally in Democratic and Republican leaning states, the overall result nationally is usually reflective of the national vote.

But in the last few years, Republican Party leaders have discussed a national strategy of converting Democratic leaning states in which Republicans temporarily control the state government, such as occurred in Pennsylvania, to the congressional district method. If this actually occurred in only a few Democratic leaning states, but in no Republican leaning ones, the result would be that the Republican candidate for President would usually win, even if the national vote for President were, for example, 51% to 49% in favor of the Democratic candidate. The Presidential candidate with fewer votes might even win every election.\(^{194}\)

This result would be a disaster for America—and I don’t mean because Republicans would be elected. It would mean the end of popular...

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government and, perhaps eventually, the takeover of a now-discredited political system by some form of dictatorship. Republicans who talk about doing this simply don’t understand the magnitude of what they are thinking of doing. Our political system is hanging on by a thread. But the reason this manipulation can actually be discussed is the same reason the Democrats are content to win by turnout technique—we no longer believe in something like “the will of the people.” That is the fruit of the death of values.

The point for law is that the Supreme Court today lacks the confidence and vision to protect the people from these machinations. Voter ID laws should have been struck down as an interference with the right to vote. The Pennsylvania Supreme Court essentially did that in 2012, remanding a voter ID law for a trial under an unattainable “no voter disenfranchisement” standard pursuant to the Pennsylvania Constitution. But, in contrast, the United States Supreme Court myopically upheld an Indiana voter ID law under the federal Constitution in 2008. Similarly, the Supreme Court has never struck down a political gerrymander and has so far failed to note in its opinions on the subject just how effective a threat to democracy this form of gerrymander has become.

In terms of the Electoral College, since the text of the Constitution specifically allows the manipulation that some Republicans are pushing, it would take an act of real judicial courage to require all states to retain the winner take all format because, at this point, democratic legitimacy requires it. It is unlikely that this nonpartisan will exists on the Supreme Court.

I end this Part on this note purposely. The death of values has brought about the death of law as a meaningful enterprise. Under the reign of the death of values, there is nothing law can do.

Finally, and not surprisingly, these breakdowns in law are reflected in the current downturn in law school applications. That is where this examination of the death of values finishes.

195. Again, I mean this literally. It was widely rumored that the Republican controlled legislature in Pennsylvania would have made the switch to a congressional system but for the fact that an honorable man, Republican Governor Tom Corbett, opposed the change.

196. Applewhite v. Com., 54 A.3d 1 (Pa. 2012). The standard was not satisfied, and the lower court judge found the law to be a violation of the Pennsylvania Constitution in January 2014.


VIII. THE DEATH OF LAW SCHOOL AND THE DEATH OF VALUES

The 2008 recession hit law school applications and enrollment very hard. In the fall of 2014, there were 37,924 full- and part-time students enrolled in their first year of law study, a decline of 30% from the beginning of the 2010-2011 school year.199

The reason for the decline is not mysterious. The recession affected employment for lawyers. A year after graduation, the unemployment rate for the law school class of 2011 was 12% versus a one-year unemployment rate of 5.8% for the class of 2007.200 Potential law school students were wary of going into debt to go to law school when job prospects were uncertain. Law schools have responded by lowering the cost of law school, which in turn has affected the income and job prospects of law school faculty.

But is unemployment the entire story of this decline? This is a dramatic reduction in a very short time. Would engineering or arts school enrollment respond in similar dramatic fashion to a downturn in employment? Or physics study? Perhaps part of the story of law school decline is that some of these potential students did not have a burning desire to study law or to become lawyers—that, instead, it was just a career option rather than a vocation.

I have been to several conferences in recent years that have addressed supposed shortcomings in legal education as a way of addressing this new, straitened context for law schools. Advances in teaching and academic support have been proposed and adopted nationally. The American Bar Association is requiring increases in experiential learning, including an enhanced focus on clinical education. An effort is being made to render law school graduates practice ready.

But I have not heard much, if anything, about what law school is supposed to be about. Yes, there are skills to be acquired, but what are those skills supposed to enable a legal practitioner to do? I believe part of the reason for law school decline is that law professors today have little idea of what the study of law is. And without a clear understanding of that, the study of law cannot excite students.

Different answers to the question of what law study is about can be imagined. But all are questionable in light of the death of values.

For example, law is always said to be about resolving disputes.


200. Id.
Every society needs a formal mechanism to do that. That is obviously one purpose of a legal system, particularly with regard to disputes among individuals and businesses. (The American penchant for judicially enforceable limits on government used to be fairly unique in the world, but it has always been the case that societies used law for resolving private disputes). Could law schools then teach dispute resolution?

The answer is probably not, in part because dispute resolution is not a brute fact. Some ways of resolving disputes are better than others, in the sense of reducing future disputes and reducing future tension over past disputes. Presumably, decisions that accord with a popular sense of justice and fairness resolve disputes better. So, “might makes right” would resolve the dispute in question but would not function well in the long run.

The problem for American law, and the reason law school is not about resolving disputes, is that the popular sense of justice is that a just solution means really just and not “just as a matter of opinion.” A judge is not free to say in deciding a case that “most people would find for the plaintiff.” And it will also not be considered satisfactory for the judge to say that “the plaintiff wins because he will make trouble for everyone if he loses.”

Therefore, the only way for a legal system to resolve disputes is to engage in a search for real justice. If American law finds it difficult to do this because of the death of values, then even this ordinary role for law will suffer.

This conclusion does not necessitate that the substance of justice must come from a judge. A part of the conception of real justice could include resolving who decides what. It could be that a legislative decision has already been made that applies to some particular dispute. But it is also the case that the American Constitution has been interpreted consistently to place at least some decisions beyond the authority of legislatures and executives. So, sometimes it will have to be judges who decide.

But whoever ultimately decides, that decision must include an element of enduring justice. We can therefore conclude that dispute resolution cannot forthrightly provide a role for law school unless law schools confront the death of values.

If not dispute resolution, are law students learning to discern the law? But that would also require something of the ontology of values that has died. Law would have to be something to be discovered.

There are, of course, lawyerly methods in which students in law
schools are inculcated. All American law schools teach students to argue in the interests of their clients based on supposed holdings of prior cases. All law students gain a sense of law as a systematic whole of at least somewhat interrelated parts. All law students learn to distinguish authoritative aspects of judicial decisions from dicta and learn to distinguish one case from another in its application to a current case. All American lawyers know how to write briefs and make arguments to judges based upon these techniques. These have been lawyerly skills since the era of the common law. At that time, these skills were thought of as the methods through which law was discovered.

But even though lawyers still argue the proper interpretation of cases, I do not believe that law students are learning genuine common law thinking. Lawyers today are also very comfortable with the notion of “majority” and “minority” views of legal issues, with judges in different states taking one position or the other based on disagreements over the usual sorts of pragmatic considerations. And while a lawyer may view cases applying strict liability in tort or finding liability in a holder in due course, for example, as either wise or mistaken—and thus “correct” or not in a sense—that sense is not the same as the older view that one judicial approach really was the law and the other really was not the law.

When judges decide such cases today, in the increasingly rare situations in which statutes do not control, they know that they are making choices of some kind. And, like the Justices in 1992, they try to avoid making value judgments when they can. Instead, they decide according to human norms deemed to be predetermined—whether maximizing utility or the gross national product or promoting procedural fairness. These norms are said by such judges to be embedded in positive legal sources. Such decisions are not exceptions to the death of values but the best we think we can do under it.

Others may see common law judging differently. But even Steve Wise, the American lawyer who is using the common law most creatively today to establish legal rights for animals, admits that most common law judges are applying human norms when they decide cases rather than applying any enduring value. Wise distinguishes formal judges, who follow either prior case law or the legal principles that the cases may be said to represent, from substantive judges who apply contemporary public values or the community’s sense of justice, and distinguishes both of these from principle judges, who apply moral principles to cases. This latter group is a minority of judges and even among that minority, not all these judges are thinking in terms of
enduring moral principles.\footnote{See How Common Law Judges Decide Cases, NONHUMAN RIGHTS PROJECT, http://www.nonhumanrightsproject.org/how-common-law-judges-decide-cases/} We are in a period in which law schools teach familiar and even ancient techniques of legal analysis but no longer have a clear idea what these techniques are supposed to do. We cannot credibly teach objective values with universal application because of the death of values—values that legal methods used to be thought to reach. But then why do law schools still teach more or less the same way they did fifty years ago? This was the kind of question that the precursors of legal realism used to ask, who expected economics and statistics to eventually supplant traditional legal analysis in law school education.

I am not sure of the answer to this question. But it may be that there is no legitimate reason. It is possible that law schools teach these traditional techniques, and lawyers utilize them, out of habit and self-interest.

By habit I don’t just mean that lawyers are taught the way they are because they have always been taught that way and therefore these training practices carry authority and legitimacy by virtue of their pedigree. There is some of that, as illustrated in the 1973 movie, The Paper Chase. But that world is fading—most law students today have never seen that movie and are not particularly romantic about these practices. The so-called Socratic method, with its humiliations and alleged insights, is not what it used to be.

No, by habit I mean the disreputable reliance on established practices to avoid thinking about what judges and lawyers might actually be able to contribute to the welfare of society. Law professors teach what is called mid-level doctrinal analysis to first year law students because we don’t know how to teach anything else. Aside from some occasional experimentation with economics, and aside from the high profile constitutional/political controversies, we law professors have no idea how legal issues should be decided. It is to be assumed that judges, who are also products of this law school system, actually decide cases based not on anything they learned in law school, but based on intuitive judgments of various kinds or commitments from outside law.

The habitual law school curriculum would not be of very much use to a judge actually trying to decide a societal issue, which is why I assume that good judges use the sort of pragmatic approach that Judge Richard Posner talks about as the proper judicial role.\footnote{See RICHARD A. POSNER, HOW JUDGES THINK (2008).} At the best and
most innovative law schools, students might pick up a few tools of the
social sciences, such as a little economics and statistics. But not enough
to be of help to a judge deciding a case.203

Certainly, law school could become the place where talented
generalists learn all the tools we know for promoting flourishing social
life—lawyers would then be social physicians to society—but that is in
no sense what law school is like today. Today we still teach students to
read cases.

Habit thus in part represents a kind of intellectual sloth in the law
school curriculum. But there may be another reason that law schools
teach formal legal analysis to the practical exclusion of everything else.
This other reason would be less benign than intellectual laziness.

There is nothing very impressive about what lawyers actually do.
Without the mumbo jumbo of the legal formalism that Steven Smith
celebrates, clients in particular and society in general might figure out
that law and lawyers are an expensive and unnecessary addition to the
problem solving skills that ought usually to be applied to disputes
instead of applying law. It is thus in the interest of lawyers that law
schools teach not real analysis but a kind of Neverland analysis
consisting of teasing out case holdings and distinguishing precedent,
which only lawyers can do.

Worse than that, the actual outcomes of cases might be dependent
on ideology and political commitments that formal legal analysis has
nothing to do with. So, law students might study cases like Citizens
United v. FEC204 or Bush v. Gore205 or Roe v. Wade,206 but never come
to grips with why such cases were decided the way that they were. Chief
Justice Roberts might hold that the individual mandate in National
Association of Independent Business v. Sebelius207 is a tax rather than a
penalty, but a class in constitutional law would have no context in which
to address that decision. It is perfectly obvious that the line of Eighth
Amendment cases adverted to above had nothing really to do with
national consensus, but was determined, rather, by the felt necessities of
five Justices. But how is this to be taught?

Under all these circumstances, law school feels arcane and

203. “Lawyers eventually learn that judges are more realistic than formalistic, but they have
not been equipped by their education to articulate and substantiate pragmatic arguments in a form
convincing to judges.” Jonathan Maur, How Judges Think: A Conversation with Richard Posner,
http://www.law.uchicago.edu/alumni/magazine/spring08/posnerhowjudgesthink.
204. 558 U.S. 310 (2010).
206. 410 U.S. 113 (1972).
disconnected from social life. A student might still enroll because law is
the only route to what seems like the levers of social power, but the
content of law school teaching would be beside the point. Law school
would not be the kind of attractor that science and art can be. It would
not be clear what is being studied there.

What can be done? It is beyond the scope of this Article to try to
reform law school. But four tentative observations are in order.

First, technology is not any kind of answer. Technology is a ground
of the death of values. The Internet and its implications encourage
shallow living.208 Even one-on-one skyping, which I engage in
sometimes to read philosophy communally, has a very different feel
from in-person contact. Online courses will inevitably emphasize
information for a student over transformation of the student.

Second, the death of values is irreversible. It is part of the dead end
of metaphysics that Heidegger saw and announced.209 But does that
mean that the notion and role of the rule of law must be abandoned? The
Crits suggested that it did years ago and for their trouble they were
invited to leave the legal academy.210 But they now have their revenge,
when even the legal mainstream is expressly subject to the death of
values.

Yet, I have seen the rule of law provide what seems like a kind of
restraint on arbitrary power. These are valuable traditions—can they still
be relied upon in some way? Or must they be abandoned as relics of a
dead end?

This question should haunt law professors. The title that Heidegger
chose for his meditation on his own failed connection to the Nazi Party,
as well as the world’s situation in 1936-1938, as well as the question of
being—thoughts that of necessity went into a drawer—was the banality,
Contributions to Philosophy.211 Heidegger explained this choice as
follows: “[A]ll essential titles have become impossible on account of the
exhaustion of every basic word . . . .”212 What does that teach us about

208. See Nicholas Carr, The Shallows: What the Internet is Doing to Our Brains
(2011).
209. For Heidegger, it was also called the collapse of German idealism: “[T]he age that was no
longer strong enough to stand up to the greatness, breadth and originality of that spiritual
world . . . .” Martin Heidegger, Introduction to Metaphysics, 48 (Gregory Fried & Richard
210. Some of the stories of discrimination against members of the Critical Legal Studies
movement—if the term member can be forgiven—are told by Mark V. Tushnet in Critical Legal
211. Heidegger, supra note 6.
212. Id. at 5.
our own basic words—words such as “the rule of law”? Perhaps they can no longer be used.

Third, law professors must practice candor above everything else. In contexts in which traditional legal analysis is merely a necessary charade—something a lawyer would use to dress up a brief—the professor must admit this and attempt to give a fuller account of the realities of law. This will return to the law school classroom a sense of the real. But, will students still come to law school, and will society still need law schools, when we admit that our stock in trade is not relevant? We should have begun asking that during the era of legal realism, but we did not want to admit—or, we truly did not believe—the bankruptcy of our endeavor. Now, the foundations of law are much shakier than they were then.

Finally, there is still truth. Significance still comes on the scene. There is still yearning for liberation and freedom. There is still injustice, economic and otherwise. There is deadly peril for our nation and for our planet. Philosophy did not end with Nietzsche. And the American people have not quite lost their hope for constitutional democracy. Somehow, we law professors have to learn a new way that reaches out toward these yearnings and needs—and begins to ask how to be of service. I hope to attempt a beginning toward a new way in the second part of this Article—Being in Law School.

If we do begin to learn a new way, then law schools might not stand so empty.