

# REGENT UNIVERSITY LAW REVIEW



## SYMPOSIUM: EDUCATION IN AMERICA. ITS PAST. ITS PRESENT. ITS FUTURE.

THE FUTURE OF EDUCATION

*The Honorable Timothy Downing*

THE ROOTS OF MODERN EDUCATION

*Distinguished Panelists*

THE WOKE WORLD: WHERE IS EDUCATION  
TODAY?

*Distinguished Panelists*

## NOTES

RISKING A NEW BLITZKRIEG: BANNING  
ARTIFICIAL INTELLIGENCE IN NATIONAL  
SECURITY

*Isaiah Klassen*

ENLIGHTENING THE ENLIGHTENED: A  
CRITIQUE OF ENLIGHTENMENT THINKING  
AND THE SECULAR RELIGION AND ON THE  
NEED FOR A RETURN TO COVENANT

*Robert E. Ranney*

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“Christian Leadership to Change the World.”*

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Volume 35

2022–2023

Number 3

---

## CONTENTS

### SYMPOSIUM: EDUCATION IN AMERICA. ITS PAST. ITS PRESENT. ITS FUTURE

#### THE FUTURE OF EDUCATION

*The Honorable Timothy Downing* 455

#### THE ROOTS OF MODERN EDUCATION

*Distinguished Panelists* 471

#### THE WOKE WORLD: WHERE IS EDUCATION TODAY?

*Distinguished Panelists* 525

## NOTES

### RISKING A NEW BLITZKRIEG: BANNING ARTIFICIAL INTELLIGENCE IN NATIONAL SECURITY

*Isaiah Klassen* 573

### ENLIGHTENING THE ENLIGHTENED: A CRITIQUE OF ENLIGHTENMENT THINKING AND THE SECULAR RELIGION AND ON THE NEED FOR A RETURN TO COVENANT

*Robert E. Ranney* 599





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Volume 35

2022–2023

Number 3

---

## THE FUTURE OF EDUCATION

*The Honorable Timothy Downing\**

Well, I have to agree—or disagree—with something that was said earlier. I think it is entirely appropriate to begin by thanking the audience and people here, and so I want to do the same. Thank you to all the Law Review students, all the students in Regent Law. I know there is a lot of campus support here as well, the people that are not from the law school here, and it took a lot of effort for this event to go on. The panels were fabulous. And, so, thank you for all the hard work that has gone into this, Dean Lingo, for your support and your leadership, for the law school. It has been a blessing. Being at the banquet last night, it was incredible, and seeing the support that is coming out for the law school. And it is just encouraging, but that takes a lot of hard work.

My friend, Dean Walton, when he called me and asked me to speak here, I was extremely humbled to get the opportunity to do that. And to be honest, I told him, you can have someone much better than me come to speak at this event. But it is humbling because he talks about when he was younger, looking up to me; I was looking up to him. Y'all know this about Dean Walton, but he was not just number one in our class in academics, he set the bar in all sorts of areas: his energy, his enthusiasm, the life-giving spirit that he brings to everything that he does. Truly, a family man, a man of righteousness and integrity. He set the bar for us, in not just academics, but in everything he did. And so, to have him now

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\* The Honorable Timothy Downing serves as a judge on the Oklahoma Court of Civil Appeals. He also currently serves as an Appellate Military Judge for the Oklahoma Military Court of Appeals. Previously, he served as the First Assistant Attorney General of Oklahoma, United States Attorney for the Western District of Oklahoma, Counselor to the Oklahoma Secretary of State, member of the Oklahoma House of Representatives (Assistant Majority Floor Leader, Assistant Majority Whip, and Vice-Chair of the Judiciary Committee), Judge Advocate in the United States Army Reserve, Senior Law Clerk for Jay Sekulow at the American Center of Law and Justice, and Legal Fellow for United States Senator James Inhofe. Judge Downing received his Juris Doctorate from Regent University School of Law, a Masters in Management from Oral Roberts University, and a B.A. in Public Affairs and Administration from the University of Oklahoma.

here as a dean, and teaching, and instructing at the school,<sup>1</sup> it does not surprise me, because that is what we experienced here from our faculty and staff when I was a student, that describes perfectly what your law professors are like. They are not only the best and the brightest and the highest academics, but they are also people that love you and encourage you, and they have a spirit that wants to lift everybody up. And, Dean Walton, I am so proud of you, and it is just an honor to get to be back here. He mentioned my wife and kids that are here. When we moved here, Destiny and Trinity were just little kids; we had our third child while we were here at law school, and then left pregnant with our fourth child. And so, we have a lot of life that happened, and we consider this our second home. I mean, there are so many memories coming back here that we love and hold dearly. So, I hope for you, I know you are in the middle of law school thinking, “Will this ever end?” Do not do that, I know it is hard. It is easy for me to say that, but just enjoy it. This is going to be a memory of a lifetime for you during your time here at law school, and I am excited for each of you.

As we talk about education today, and one of the reasons when Ernie called me, I was like, “Well, you could get someone better,” is, I first think, “Well, I am not in education. I do not consider myself an academic.” But I prayed about it over the weekend. I said, “You know, if You believe I should speak, I am going to do that.” And so, I prayed. And I feel like I got a word that I think all of you will enjoy.

I was sitting at a table here with a man who is a father, very much like I was. He came here, he was in education, and he is coming to law school now. And, so, you are going to be amazed. Whether you come from education or you have experienced it in the future, education is going to be a big part of your life in one way or another. And all of you in this room either currently have or are developing a worldview about being regents, and that is, we are the hand, and the feet, and the mouth for the body of Christ on the earth today.<sup>2</sup> We truly are here to represent Him.<sup>3</sup> And so when we talk about education, we first, in my mind, have to go to what does God think about education? What is His heart? Because if we first do not know the God who we serve, and we are here to represent what He

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<sup>1</sup> S. Ernie Walton, J.D., REGENT UNIV., <https://www.regent.edu/faculty/j-d-s-ernie-walton/> (last visited Jan. 26, 2023).

<sup>2</sup> See *Fast Facts*, REGENT UNIV., <https://www.regent.edu/about-regent/regent-facts/> (last visited Mar. 12, 2023). See generally 1 Corinthians 12:12–27.

<sup>3</sup> See 2 Corinthians 5:20 (“We are therefore Christ’s ambassadors, as though God were making his appeal through us.”).

thinks, then we are going to be lost.<sup>4</sup> And so that is where it begins: to change the future of education is to know the heart of God.

For far too long, education has been the poster child of banning God from a public domain.<sup>5</sup> It literally has been the poster child for saying God does not belong here. And Americans have been duped to believe in a sacred and secular dichotomy, and it is a myth.<sup>6</sup> But can I tell you, the God who created the universe is very much sovereign, and a part, and cares about every area of life.<sup>7</sup> Our Founders knew that; they knew that our country was only as solid as the Americans and the citizens that were here.<sup>8</sup> And they knew that our citizens were only as solid as they were grounded upon our faith and morality. John Adams pointed this out in one of his notable quotes where he said, “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”<sup>9</sup> George Washington is quoted as saying, “Religion and morality are the essential pillars of a civil society.”<sup>10</sup> We are truly a nation under God, and God cares about everything, and particularly education,<sup>11</sup> and it does not matter if it is public school. It does not matter if it is a private school, a charter school, virtual school, home school—and if I left [out] any of them, just plug it in. God cares about education. He cares about our children. So, where we go to find the heart of God? We go to

<sup>4</sup> See generally *Psalm* 100:3 (“Know that the LORD is God. It is he who made us, and we are his . . . .”); 1 *John* 2:3 (“We know that we have come to know him if we obey his commands.”); *Romans* 8:5–7 (“The mind of sinful man is death, but the mind controlled by the Spirit is life and peace . . . .”).

<sup>5</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421, 425, 436 (1962) (prohibiting official school prayer); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205–06, 211–12 (1962) (prohibiting official Bible readings in public schools); *Stone v. Graham*, 449 U.S. 39, 39–40, 42–43 (1980) (striking down a state statute requiring the Ten Commandments in each public school classroom); *Wallace v. Jaffree*, 472 U.S. 39, 40, 60–61 (1984) (invalidating a statute by which the state “endorse[d]” prayer in schools).

<sup>6</sup> See generally David Kim et al., *The Sacred/Secular Divide and the Christian Worldview*, 109 *J. BUS. ETHICS* 203, 203–04 (2012).

<sup>7</sup> See *Matthew* 6:25–33, 10:29–31; 1 *Corinthians* 10:31.

<sup>8</sup> See, e.g., *THE FEDERALIST NO. 55* (James Madison) (“[I]f there is not sufficient virtue among men for self-government . . . [then] nothing less than the chains of despotism can restrain them from destroying and devouring one another.”); JAMES MCHENRY, *PAPERS OF JAMES MCHENRY ON THE FEDERAL CONVENTION OF 1787*, reprinted in 11 *AM. HIST. REV.* 595, 618 (1906) (quoting Benjamin Franklin, who, when asked if the United States was a republic or a monarchy, responded, “[a] Republic . . . if you can keep it”).

<sup>9</sup> Letter from John Adams to Massachusetts Militia (Oct. 11, 1798), in *NAT’L ARCHIVES: FOUNDERS ONLINE*, <https://founders.archives.gov/documents/Adams/99-02-02-3102> (last visited Feb. 4, 2023).

<sup>10</sup> Letter from George Washington to the Philadelphia Clergy (Mar. 3, 1797), in *NAT’L ARCHIVES: FOUNDERS ONLINE*, <https://founders.archives.gov/documents/Washington/05-21-02-0249-0005> (last visited Feb. 5, 2023).

<sup>11</sup> See generally *Proverbs* 22:6 (“Train a child in the way he should go, and when he is old he will not turn from it.”); *Proverbs* 16:16 (“How much better to get wisdom than gold, to choose understanding rather than silver!”).

scripture. And there is a passage that I want to point you to in Matthew chapter 18 where we find out how God feels about children. In Matthew chapter 18, the disciples come to Jesus, and they say, “Tell us who is the greatest in the kingdom of heaven?”<sup>12</sup> And Jesus looks around and there is a child standing there, and He has the child come and stand beside Him, and He says, “I tell you this, if you want to be greatest in the kingdom of heaven, be like this little child.”<sup>13</sup>

So, Jesus is making the point; He is saying, who is the greatest in the eyes of the Lord? It is the heart of a child, a child who is humble, a child who has childlike faith. And He says, “Be like this little child.”<sup>14</sup> They are important to Him. But then He takes it a step further; He says, “I tell you this, whoever welcomes a child like this in my name, welcomes me.”<sup>15</sup> And so we see Jesus say this at other times when He talks about going out and serving widows, and orphans, and people in prison; He is saying, “You are doing this for me.”<sup>16</sup> So God is telling His disciples, what you go out and do for children, you are doing as unto the Lord. Those of you who are going to get involved in education on this front, you are truly doing the Lord’s work, you are truly doing what Christ has called you to do. And then there is a third part of this passage where we see our Christ used words that are pretty stern. Jesus says this, “But if anyone causes one of these little ones who believe in me to stumble, it would be better for him to have a large millstone hung around his neck and be drowned in the depths of the sea.”<sup>17</sup> So not only does He say children are important, and it is important what you do for them, but He gives a stern warning that says, “Do not lead these little children astray, woe unto you.”<sup>18</sup> Can I tell you, that is exactly what we see happening in America today with the agenda that we see in some of our classrooms:<sup>19</sup> to lead children astray and to deceive them. And

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<sup>12</sup> *Matthew* 18:1.

<sup>13</sup> *See Matthew* 18:2–4 (“He called a little child and had him stand among them. And he said: ‘I tell you the truth, unless you change and become like little children, you will never enter the kingdom of heaven. Therefore, whoever humbles himself like this child is the greatest in the kingdom of heaven.’”).

<sup>14</sup> *Id.*

<sup>15</sup> *See Matthew* 18:5.

<sup>16</sup> *Matthew* 25:37–40 (stating that anything done for the least of the children of God is done for him); *James* 1:27 (exhorting the church to take care of orphans and widows).

<sup>17</sup> *Matthew* 18:6.

<sup>18</sup> *Matthew* 18:6–7 (“But if anyone causes one of these little ones who believe in me to sin, it would be better for him to have a large millstone hung around his neck and to be drowned in the depths of the sea. Woe to the world because of the things that cause people to sin! Such things must come, but woe to the man through whom they come.”).

<sup>19</sup> *See, e.g.,* Laura Meckler, *Gender Identity Lessons, Banned in Some Schools, Are Rising in Others*, WASH. POST (June 3, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/06/03/schools-gender-identity-transgender-lessons/> (describing the prevalence of gender ideology in schools across

we see that that grieves the heart of God. So why is it that children are so important to God? Well, first, they are His kids, right? We are all God's children, so we know that to be true.<sup>20</sup> But there is another thing here, and that is that children are God's plan, full stop. My dad is a pastor—was—he retired a few years ago and he used to preach a sermon as a kid that I still remember this day. And he said this: “When God wants to change the world, He sends a baby to do it.” When you think about that, God is not up there in heaven looking around saying, “Man, I got this great plan, it would work perfectly, but I need a grownup; I need a hot-shot grown-up that could really help me out.” That is not how He works.<sup>21</sup>

You see, when God wanted to save the world from its sin, He sent His Son, Jesus Christ, as a baby.<sup>22</sup> And in the humblest of beginnings, He sent Him in a manger where He had to be nurtured, and be in a family, and grow up.<sup>23</sup> When God wanted to deliver the Israelites from Egypt, He sent a baby, He sent Moses, and He put him in a basket going down the Nile River.<sup>24</sup> And Moses had to grow up and learn and grow into the things God

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America); Dov Fischer, *Controversial Gender Ideology in Public Education Undermines Families of Faith*, EDSOURCE (May 10, 2022), <https://edsource.org/2022/controversial-gender-ideology-in-public-education-undermines-families-of-faith/671790> (identifying the divisive views on sexuality—namely the concept of gender identity—in the California school system that are antithetical to traditional family values); Zach Goldberg & Eric Kaufmann, *Yes, Critical Race Theory Is Being Taught in Schools*, CITY J. (Oct. 20, 2022), <https://www.city-journal.org/yes-critical-race-theory-is-being-taught-in-schools> (noting the prevalence of Critical Race Theory in American schools).

<sup>20</sup> In a certain sense, all men may be considered “offspring” of God, as in God all men “live and move and have our being.” *Acts* 17:28–29; *see also Genesis* 1:27 (“So God created man in his own image, in the image of God he created him; male and female he created them.”). However, it is important to note that only those who believe in Jesus Christ may be considered children of God in the full sense. *John* 1:12–13 (“Yet to all who did receive him, to those who believed in his name, he gave the right to become children of God—children born not of natural descent, nor of human decision or a husband’s will, but born of God.”); *see also 1 John* 3:1 (“How great is the love the Father has lavished on us, that we should be called children of God!”).

<sup>21</sup> *See 1 Corinthians* 1:26–31 (“Not many of you were wise by human standards; not many were influential; not many were of noble birth. But God chose the foolish things of the world to shame the wise; God chose the weak things of the world to shame the strong. . . . [S]o that no one may boast before him.”).

<sup>22</sup> *See John* 3:16–17 (“For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life. For God did not send his Son into the world to condemn the world, but to save the world through him.”); *Isaiah* 9:6–7 (“For to us a child is born . . . . And he will be called Wonderful Counselor, Mighty God, Everlasting Father, Prince of Peace.”).

<sup>23</sup> *See Luke* 2:7, 39–49.

<sup>24</sup> *Exodus* 1:22–2:10; *Exodus* 3:10 (“So now, go. I am sending you to Pharaoh to bring my people the Israelites out of Egypt.”).

had called him to do.<sup>25</sup> And at first [Moses] did not think he should.<sup>26</sup> You know, in this room we are no different as God's regents. You are called and you were placed here, and God intentionally puts you here in advance.<sup>27</sup> In our classrooms today in America, God has sent babies into our world to change the world. Ephesians chapter 2 verse 10 tells us, "For we are God's handiwork, created in Christ Jesus to do good works which God prepared in advance for us to do."<sup>28</sup> Jeremiah 1:5 says, "Before I formed you in the womb I knew you, before you were born I set you apart; [and] I appointed you as a prophet to the nations."<sup>29</sup>

See, we can replace the word in this talk, "Future of Education." Literally, you can replace the word, "education" with many things. We could call this talk "The Future of Our Homes." We could call it "The Future of Business." We could call it the "Future of America." Proverbs 22:6 tells us, "Train up a child in the way he should go, and when he is old he will not depart from it."<sup>30</sup> And for those of you raised in a Christian home, you probably heard that when you were getting disciplined a few times.

But there was another quote said this morning on the panel here before I got up here that I was going to use today, and it is, "The philosophy of the schoolroom in one generation will be the philosophy of government in the next."<sup>31</sup> That is saying exactly the scriptural truth, that the way we train children in classrooms will be our future to come. I am in the military, and in the Army, they have known this for some time. I went through Fort Benning for basic training, and they treat everybody the same way. We all memorized the Soldier's Creed. We all memorized the Army Values. I remember being in a CS chamber where they take your mask off, and the gas is making your eyes water.<sup>32</sup> And for those of you

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<sup>25</sup> Compare *Exodus* 2:11–12, 3:11, 4:1–17 (providing examples of Moses failing and the Lord teaching him), with *Exodus* 10:3–4, 11:4–10, 12:31–32 (describing the work that Moses did for the Lord and how he was courageous in his calling).

<sup>26</sup> *Exodus* 3:7–4:17 (recording Moses' argument with God when God called him and Moses doubted God's plan).

<sup>27</sup> *Psalms* 33:11 ("But the plans of the LORD stand firm forever, the purposes of his heart through all generations."); Proverbs 16:9 ("In their hearts humans plan their course, but the LORD establishes their steps."); *Romans* 8:28 ("And we know that in all things God works for the good of those who love him, who have been called according to his purpose.").

<sup>28</sup> *Ephesians* 2:10.

<sup>29</sup> *Jeremiah* 1:5.

<sup>30</sup> *Proverbs* 22:6.

<sup>31</sup> Monte Kuligowski, *Does the Declaration of Independence Pass the Lemon Test?*, 2 DUKE J. CONST. L. & PUB. POL'Y 287, 324 n.114 (2007).

<sup>32</sup> See generally Michael Volkin, *In Basic Training, Surviving the Gas Chamber Requires Sound Strategy*, MILITARY.COM, <https://www.military.com/join-armed-forces/gas-chamber-surviving-basic-training.html> (last visited Feb. 5, 2023) (explaining how part of basic training is the gas chamber: a room full of CS gas, which causes tearing and other reactions).

who have gone through the military, you know what that is like. And we would have to recite the Soldier's Creed. We would learn all types of skills that had nothing to do with being a JAG officer, and I thought, "Man, this is crazy." But you know what, the military understands that that brand new lieutenant, that brand new enlisted soldier, someday—fast forward twenty years—is the general officer, they are the senior NCO, they literally become the Army, and so they train us in a way that we have work ethics and character and we have morality.<sup>33</sup> Likewise, the way we train up the children in our classrooms with work ethic, with discipline—grounded in morality—is how they are going to lead their homes, their workplaces, and their positions of power. You cannot train other generations with a woke agenda and expect a different future for our country. That is why God cares about our classrooms, He cares about our kids, and He wants us as His body to go out and help train them up, and He gives a strong warning for those who wanted to deceive and lead our children astray. Knowing God's heart is where we begin to change our future in education in America.

The second place you turn, I believe as a regent, to represent the Lord, is begin to pray. Once you know His heart, the very first work—and it is the work—it is doing the work, is prayer. We start with prayer.<sup>34</sup> We do not end with it. It is not something we do after the fact. We know it is hard—now we begin to pray. On my calendar and every job I have ever had, I have a very unique thing on my calendar. It is usually Monday morning, first thing, and it is "20:7," and that stands for Psalm chapter 20, verse 7, and it says this, "Some trust in chariots and some in horses, but we trust in the name of the Lord our God."<sup>35</sup> My first year out of law school, I was mobilized for one year in Fort Hood, and I had the docket down there. Fort Hood is one of the largest military bases in the world.<sup>36</sup> And I had a huge docket. Every week I worked, I had more work left than I began with. You are all going to have law jobs like that at some point. Almost all law jobs are that way—let's be honest. And I remember being frustrated by that. I was praying over it—over my docket, and I remember

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<sup>33</sup> See generally C. Todd Lopez, *Ethical Behavior More Than Just Yearly Online Training*, U.S. DEP'T OF DEF. (May 12, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3023359/ethical-behavior-more-than-just-yearly-online-training/> (explaining the military's goal of developing a military force with a strong sense of ethics); *Army Values*, U.S. ARMY STAND-TO! (June 12, 2018), <https://www.army.mil/standto/archive/2018/06/12/> ("These values are Loyalty, Duty, Respect, Selfless Service, Honor, Integrity and Personal Courage.").

<sup>34</sup> See generally 1 *Thessalonians* 5:17–18 ("[P]ray continually; give thanks in all circumstances, for this is God's will for you in Christ Jesus.").

<sup>35</sup> *Psalms* 20:7.

<sup>36</sup> Huma Khan, *Fort Hood: Tragedy Not the First for Largest U.S. Facility*, ABC NEWS (Nov. 5, 2009), <https://abcnews.go.com/WN/Politics/fort-hood-tragedy-largest-us-base/story?id=9009379>.

the Lord brought this scripture in my remembrance. In fact, Professor Velloney would give devotions—he was a professor when I was in law school.<sup>37</sup> And he did devotions on Psalm chapter 20 verse 7. I heard it repeatedly. And God brought that to my remembrance. And it simply is this: yes, I have horses and chariots; I have talents—you are going to have talents leaving this law school—but you cannot trust in that. You do everything you can, but you begin with prayer and say, “Lord, you are the one who gives me the victory.” And that habit started there; it was in the legislature. When I was in the legislature, we would start Monday mornings, I would get the legislators together, and we would pray over stuff that seemed impossible to do.

In Oklahoma, the state budget has to be balanced.<sup>38</sup> That is seemingly impossible. Ask a federal legislator that. But there were these tough times, and we would lean on this prayer time. As a U.S. Attorney, I would get my first assistant every Monday morning, and we would pray over our cases, we would pray over our office, over our employees, issues that we know they were going through personally. And we began that way. Then we went to our staff meeting. Then we would begin to do the work. And can I tell you that discipline starts for you in law school.

Dean Walton and I were clerks at the ACLJ together. And I remember one day he was telling us that he was studying the Scriptures on the cord of three strands and prayers of agreement. And he was like, “You know, I have been really convicted that we are all the students praying for pro-life, and we are praying for great things to happen on the abortion front.” And he said, “I just feel convicted that we need to gather and pray together.” So, we spent some time on our lunches. And I remember sitting out here at the water fountain praying, and we did not take long—maybe twenty minutes. And I remember coming together and praying for God to change our justices, for God to bring victory in our courtrooms, and for God to overturn *Roe v. Wade*,<sup>39</sup> and for us to see a victory there. And can I tell you that the reason I remember that today, when I am reflecting on prayer in school, is because I was praying with somebody. I do not remember the individual prayers I was having, but I distinctly remember that time when we gathered and prayed intently over something. Prayer is powerful because it does not just change things around you. It changes who you are.<sup>40</sup> It aligns your mind, and your heart, and your spirit with the things of God. Prayer is the most powerful thing

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<sup>37</sup> See generally David D. Velloney, J.D., LL.M., REGENT UNIV., <https://www.regent.edu/faculty/david-velloney/> (last visited Feb. 5, 2023).

<sup>38</sup> OKLA. CONST. art. 10, § 23.

<sup>39</sup> 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

<sup>40</sup> See, e.g., Jonathan Edwards, The Most High a Prayer Hearing God, *reprinted in* 4 The Works of President Edwards 567, 567 (New York, Leavitt, Trow & Co. 1843).



we can do for our schools and in our schools, and that is why there has been such a huge fight to remove prayer from our classrooms.<sup>41</sup>

I remember as a kid in small-town Oklahoma, where we have more churches than we have homes—that maybe a little bit of exaggeration, but not by much. And I remember getting this book—it was in the early 90s—it was called, “Know Your Rights,” and it was written by a man by the name of Jay Sekulow.<sup>42</sup> I did not know who he was at the time, but in my small-town school in Oklahoma, they were trying to eliminate prayer, and they did that by school board members and administrators being fearful that they would be sued and held personally liable. And I remember reading this book and basically it said, “Hey, the government cannot tell you that you cannot pray at school,”<sup>43</sup> and reading about this really sparked something in me, and I remember it to this day. Can I tell you that fight thirty years ago—trying to remove prayer from school—is the precursor to what we are seeing today? Anytime you remove prayer, it has a damaging effect. If you remove prayer in your personal life, it is going to have a damaging effect. If you remove prayer from the church you go to—and it is possible for that to happen—if prayer leaves your church, it is going to cause problems. If you remove prayer from your family, it is going to cause problems in your family. To think that removing prayer in the public sphere, in government, and in education would not cause problems is ridiculous. Prayer is the obstacle to deception and lies.<sup>44</sup> When you have prayer in our schools, it prevents deception and lies from ruling and reigning. The agenda we have in our schools, to call evil good and good evil, that the Bible warned us about, can happen when prayer is not there to block it.<sup>45</sup> So the most important thing we do as regents is to bring prayer to the forefront: to pray for our schools and to pray in our schools. And that is how we will begin to shape the future of education.

So, once you know the heart of God, and once you are starting to pray for the heart of God, then the third thing to do is get to work. And I could call this the “Old Oklahoma Talk,” right? I mean, everyone had a grandparent or somebody in their lives that said, “Well, get to work, get it

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<sup>41</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (prohibiting official school prayer); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415–16 (2022) (concluding that a football coach was improperly fired for expressing his religious beliefs through private prayer).

<sup>42</sup> JAY ALAN SEKULOW, *KNOWING YOUR RIGHTS* (1993).

<sup>43</sup> See *id.* at 17–25.

<sup>44</sup> See, e.g., *James* 1:5 (“If any of you lacks wisdom, he should ask God, who gives generously to all without finding fault, and it will be given to him.”); *Jeremiah* 33:3 (“Call to me and I will answer you and tell you great and unsearchable things you do not know.”).

<sup>45</sup> See, e.g., *Isaiah* 5:20 (“Woe to those who call evil good and good evil, who put darkness for light and light for darkness, who put bitter for sweet and sweet for bitter.”); *Matthew* 26:41 (“Watch and pray so that you will not fall into temptation. The spirit is willing, but the body is weak.”).

done.” James 2:26 is kind of that short about it; it says, “Faith without works is dead.”<sup>46</sup> We have to work. We cannot just pray and hope things turn out better. We have to get to work. There is a verse, Proverbs chapter 21 verse 3[1]—and I think it pairs well with Psalm chapter 20 verse 7—and it says this, “The horses are made ready for battle, but victory rests with the Lord.” It is almost identical to Psalm 20:7, but it has the words, “made ready.”<sup>47</sup> So it is still talking about horses and chariots, it is still trusting in the Lord, but it is saying, “You got to make them ready.” The horses and chariots are not just there. You have got to study for your law school exams; you have got to pass some of the—I guess, I heard some midterms were going on this week, and that is part of it, you have got to get to work. And so, what does that look like in changing education? Well, for some of you, you are going into education. In fact, we have a lot of people in education in this room right now, and maybe you are going to be directly in that mission field. And that is not a profession; that is your calling. And that is a high, high calling. I cannot think of anything more precious and more important to the heart God than for you to be in education directly or in some way. But some of you will not be. You will be lawyers. You may be in a different college than in the university you [are] attending today, but you are going to have a lot of opportunities that come up. When Dean Walton asked me to speak, I had to think about it. My first instinct was, “What do I know about education? I have never had anything to do with education in my career.” But the reality is I have, and you will, too.

During my time as a legislator, I ran largely on military, and law enforcement, and public safety.<sup>48</sup> I was on the judiciary committee, and that is where I thought my world was. Education really was not my prime policy area, but I left after my first term, winning the only award given to the house member—there is one senator, one house—to be a champion for children.<sup>49</sup> Because while I was there, we had nationwide teacher

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<sup>46</sup> James 2:26 (King James).

<sup>47</sup> Compare Proverbs 21:31 (“The horse is made ready for the day of battle, but victory rests with the LORD.”), with Psalm 20:7 (“Some trust in chariots and some in horses, but we trust in the name of the LORD our God.”).

<sup>48</sup> Associated Press, *Former GOP Lawmaker Becomes US Attorney in Oklahoma City*, ENID NEWS & EAGLE (June 5, 2019), [https://www.enidnews.com/news/state/former-gop-lawmaker-becomes-us-attorney-in-oklahoma-city/article\\_73edc104-647a-5a7e-8b57-f5944511e591.html](https://www.enidnews.com/news/state/former-gop-lawmaker-becomes-us-attorney-in-oklahoma-city/article_73edc104-647a-5a7e-8b57-f5944511e591.html) (noting that Tim Downing “earned a reputation as a tough-on-crime lawmaker”); see *United States Attorney Timothy J. Downing Announces Resignation*, U.S. ATT’Y’S OFF. W. DIST. OF OKLA. (Feb. 9, 2021), <https://www.justice.gov/usao-wdok/pr/united-states-attorney-timothy-j-downing-announces-resignation>.

<sup>49</sup> Darla Shelden, *Sen. AJ Griffin, Rep. Tim Downing Praised for School Choice Leadership*, OKLA. CITY SENTINEL (July 7, 2017), [https://www.city-sentinel.com/community/sen-aj-griffin-rep-tim-downing-praised-for-school-choice-leadership/article\\_3b7983f9-d62c-5ade-9122-8d8b704477c3.html](https://www.city-sentinel.com/community/sen-aj-griffin-rep-tim-downing-praised-for-school-choice-leadership/article_3b7983f9-d62c-5ade-9122-8d8b704477c3.html).

walkouts all across the country.<sup>50</sup> Our state was no different.<sup>51</sup> We had special sessions—all on education—and I ended up right in the middle [of the] big ole’ fight on education.<sup>52</sup> And I was like, “What do I know about this?” But that was God saying, “Hey, this is important, this is a season, and this is what I have called you to do.” As the First Assistant Attorney General for Oklahoma—we have twelve different units and a lot of really cool, exciting things that I could talk about in the AG’s office—but that included education.<sup>53</sup> We had state laws that needed to be enforced. Or even in Oklahoma, we had school districts who wanted to force children to share locker rooms and restrooms with children of the other sex.<sup>54</sup> And we had state laws that prevented that,<sup>55</sup> so we would send demand letters, and we would reach out to the districts and do everything we could to correct that. We had laws on the books that prevented radical ideology, and curriculums, and training, and we enforced that.<sup>56</sup> We would reach out and say, “Hey, you should not have this book in your library. You should not be having this curriculum in your school. You should not be doing this training.” And that was part of my duties in the AG’s office.

As a U.S. attorney, I would go into the U.S. Attorney’s office thinking, “All right, I am fighting the cartel,” all the things you think about and the fun things in the U.S. Attorney’s office. Never would I have thought COVID was going to happen, and it brought a lot of unique challenges. So, I fought against city government discriminating against churches and

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<sup>50</sup> See, e.g., Cory Turner et al., *Teacher Walkouts: A State by State Guide*, NPRED (Apr. 15, 2018, 2:16 PM), <https://www.npr.org/sections/ed/2018/04/25/602859780/teacher-walkouts-a-state-by-state-guide>; Josh Eidelson, *Teacher Strikes are Spreading Across America with No End in Sight*, BLOOMBERG (Apr. 2, 2018, 2:58 PM), <https://www.bloomberg.com/news/articles/2018-04-02/teacher-strikes-are-spreading-across-america#xj4y7vzkg>.

<sup>51</sup> Rivka Galchen, *The Teacher’s Strike and the Democratic Revival in Oklahoma*, NEW YORKER (May 28, 2018), <https://www.newyorker.com/magazine/2018/06/04/the-teachers-strike-and-the-democratic-revival-in-oklahoma>; Dana Goldstein & Elizabeth Dias, *Oklahoma Teachers End Walkout After Winning Raises and Additional Funding*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html>.

<sup>52</sup> Galchen, *supra* note 51; Goldstein & Dias, *supra* note 51.

<sup>53</sup> See *generally Divisions*, OFF. OF THE OKLA. ATTY GEN., <https://www.oag.ok.gov/divisions> (last visited Feb. 6, 2023).

<sup>54</sup> See Nuria Martinez-Keel, *Oklahoma Outlawed School Bathroom Use by Gender Identity. This Boy Is Challenging It.*, OKLAHOMAN, <https://www.oklahoman.com/story/news/education/2022/09/25/oklahoma-16-year-old-challenging-transgender-school-bathroom-law/69493410007/> (Sept. 27, 2022, 1:28 PM).

<sup>55</sup> OKLA. STAT. tit. 70, § 1-125 (2022) (requiring individuals to use public school bathrooms belonging to the individual’s sex “as identified on the individual’s original birth certificate”).

<sup>56</sup> *Id.* § 24-157.

places of worship who were educating their children and their faith, from being forced to close while Walmarts were allowed to be open.<sup>57</sup>

We were the first office to send a demand letter to a city mayor and tell them, basically, “Hey, you need to allow churches to be open.” And we had great success, and that became a model within the Department of Justice to handle COVID and cities shutting down churches.<sup>58</sup> You are going to be the same. You are going to have opportunities, and you probably already have them all around you, and you think, “No, that is not my lane, that is not what God is calling me to do.” Can I tell you, we are all called to be a part of our children’s future and education? It may be through government jobs, like I have described; you may be going into private practice and practicing a totally different area of law. It may be in estate planning—or whatever it is—and somebody comes in and says, “I got this issue with my school board. I got this issue with school.” And God pricks your heart and says, “I care about that. You need to get involved.” You may be a nonprofit like the ACLJ or ADF, and just on the front lines every day fighting for our schools.<sup>59</sup> But even if none of those things present themselves—and I heard some of the panelists mention this today—truly, we are all called to be a minister to the children around us and make a difference. So, raising your own kids, being a part of the lives of kids who are around you, doing what Jesus did, and taking your opportunities to go speak to children and pour into them:<sup>60</sup> you are going to have those opportunities. You can get involved in school boards or in city and state policymaker conversations. Ask God where you should be involved and then be bold and humble, and get involved and make a difference. That is how we will make a change in the future of education

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<sup>57</sup> *Norman Mayor Clark Responds to Attorney General’s Concerns, Reopens Churches*, OKLA.’S NEWS 4, <https://kfor.com/news/health/coronavirus/norman-mayor-clark-responds-to-attorney-generals-concerns-reopens-churches/> (May 8, 2020, 10:34 PM).

<sup>58</sup> Stephen Dinan & James Varney, *Churches Turn Back Shutdown Orders with Justice Department Help*, WASH. TIMES (May 10, 2020), <https://www.washingtontimes.com/news/2020/may/10/churches-turn-back-shutdown-orders-justice-departm/>.

<sup>59</sup> *See, e.g., Parental Rights*, ALL. DEFENDING FREEDOM, <https://adflegal.org/issues/parental-rights> (last visited Feb. 6, 2023) (describing the work that Alliance Defending Freedom does to protect parental rights in education and other spheres); *2020 Victories: The ACLJ Is Scoring Big Wins for Families Facing Pandemic-Related School Issues as We Continue to Fight for Educational Justice*, ACLJ (Dec. 23, 2020), <https://aclj.org/school-choice/2020-victories-the-aclj-is-scoring-big-wins-for-families-facing-pandemic-related-school-issues-as-we-continue-to-fight-for-educational-justice> (discussing the launch of ACLJ’s School Choice initiative and the organization’s efforts to fight for parental involvement in education).

<sup>60</sup> *See, e.g., Matthew* 19:13–14 (recounting the story of Jesus commanding the disciples to bring the little children unto Him).

as His regents and as His body. It is when we look around to say, “Lord, here am I, send me, how can I make a difference?”<sup>61</sup>

And then my final point I want to leave you with, you might think, “Oh, this is a no-brainer, of course this is how we are.” But it is this: having sought God’s heart, having prayed for His will, having done all that you can do with your own efforts, now expect a miracle. It is easy to fall into the traps of thinking that nothing is going to change, but when you catch His heart and you see people serving Him, they begin to look a little bit ridiculous. I think of Noah; he is a great example of that. That God told him His plan, God went to work to do it.<sup>62</sup> Decade after decade nothing was happening, nothing was changing, and then the rain came.<sup>63</sup> Go back to my prayer time with Dean Walton. In our lifetime, abortion was just something we lived with. In a conservative state like Oklahoma,<sup>64</sup> I just grew up with it, thinking it was part of my life. And it was hard in those prayer times to think, “How could this ever change?” And I will be transparent—we are supposed to pray, we are supposed to do things—but how could this ever change? But the miracle happened this year in *Dobbs* when the Supreme Court reversed *Roe* and returned abortion to the states.<sup>65</sup> And in conservative states like mine, there is no abortion today.<sup>66</sup> Amen.

And I think it is important to point out, we heard about a lot of the important strategies from Erin in her talk on Friday, and there was some incredible work that went on there, so I do not want to diminish that at all. But I do want to point this out: the Mississippi legislature was passing pro-life legislation<sup>67</sup> like every conservative legislature had done for everyone,<sup>68</sup> and when I was in the legislature, we passed pro-life

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<sup>61</sup> *Isaiah* 6:8.

<sup>62</sup> *Genesis* 6:9–7:6.

<sup>63</sup> *Genesis* 5:32, 6:3, 7:6.

<sup>64</sup> See *Political Ideology by State*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/compare/political-ideology/by/state/> (last visited Feb. 6, 2023) (reporting that thirty-eight percent of Oklahomans—a plurality—consider themselves to be politically conservative).

<sup>65</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (“We hold that *Roe* and *Casey* must be overruled.”).

<sup>66</sup> Associated Press, *Oklahoma Governor Signs the Nation’s Strictest Abortion Ban*, NPR (May 6, 2022, 5:58 AM), <https://www.npr.org/2022/05/26/1101428347/oklahoma-governor-signs-the-nations-strictest-abortion-ban>; *Abortion in Oklahoma*, COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, <https://www.plannedparenthood.org/planned-parenthood-comprehensive-health-great-plains/abortion-information/abortion-oklahoma> (last visited Feb. 6, 2023).

<sup>67</sup> H.B. 1510, 2018 Reg. Sess. (Miss. 2018).

<sup>68</sup> See Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe. Here’s Which Ones and Why*, GUTTMACHER INST., <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why> (Apr. 19, 2022).

legislation.<sup>69</sup> In the AG's office, we defended pro-life legislation.<sup>70</sup> They were doing the same thing, being consistent, continuing to follow God's heart and plan. And the miracle happened in God's own time. I want to point you back to my conversation about prayer in school with Jay Sekulow writing books in the early '90s, and out here on the front line, trying to make a difference for prayer in school. And this year the Supreme Court said coaches can gather with players on the football field and pray.<sup>71</sup> That is the exact same thing thirty years ago that my school was saying we could not pray after our football games. It is literally the exact same thing. And despite the decades that coaches were being told, "Be quiet, shut up, go away," losing this fight over and over again, Coach Kennedy in Washington state was just doing the same thing that he knew was right for his school, was right for his program; win or lose, he was going to do the right thing, and God brought the breakthrough in His timing.<sup>72</sup> My wife is a cross-country coach—also a track coach—and at one of her recent cross-country meets, all the students gathered—public schools, lots of public schools there—and they got in a big circle. Hundreds of girls about to take off on a cross-country run, and they had a big, huge prayer, every single one of them. Can I tell you, those things bring hope? These miracles, seeing things going on in our public schools, breathe hope to me that there is a great future ahead and God is not done. We are seeing more states begin to adopt policies to give parents and children options if they are in schools where they are stuck with a woke agenda.<sup>73</sup> We are seeing states pass laws and prevent training and curriculum that is designed to lead children astray.<sup>74</sup> These are all signs that I give you to say: do not give up on our country or education just yet. God is not done, and He is at work.

We have had decades of prayer, decades of serving and working, and God will bring forth a miracle. And in education, God is not limited in how He can restore or renew a generation. Nothing is off limits to the Creator of the universe.<sup>75</sup> There is not a public, private, virtual, charter school or

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<sup>69</sup> OKLA. STAT. tit. 63, § 1-740 (2023).

<sup>70</sup> Laurel Calkins, *Oklahoma Abortion Ban Faces Challenge at State High Court (3)*, BLOOMBERG L. (May 26, 2022, 12:14 PM), <https://news.bloomberglaw.com/health-law-and-business/oklahoma-high-court-to-weigh-blocking-states-total-abortion-ban>.

<sup>71</sup> Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415–16 (2022).

<sup>72</sup> *Id.*

<sup>73</sup> *School Choice in America*, EDCHOICE, <https://www.edchoice.org/school-choice-in-america-dashboard-scia/> (last visited Feb. 20, 2023) (providing a database of school choice status' across the United States).

<sup>74</sup> See, e.g., IDAHO CODE § 33-138 (2022) (prohibiting race- and sex-based curricula); Legality of Critical Race Theory in Montana, 58 Att'y Gen. of Mont. Op. 1 (May 27, 2021) (determining that "race scapegoating" and other uses of Critical Race Theory violate the Constitution); TENN. CODE ANN. § 49-6-1019 (LEXIS through the 2022 Reg. Sess.) (prohibiting the promotion of one race or sex as being superior to another).

<sup>75</sup> See, e.g., *Isaiah* 14:27 ("For the LORD Almighty has purposed, and who can thwart him?"); *Isaiah* 43:13 ("When I act, who can reverse it?").

home school that is beyond His reach. He can bring forth life and restoration where we see only a valley of dry bones.<sup>76</sup> His arm is not too short to bring this generation however He chooses.<sup>77</sup> And make no mistake, He will be doing it through the prayers and faithful work of His body in this earth. Our job as regents is to know His heart, to pray for it, to work for it, and to expect the miracle. God's job is to bring it forth in His time, and He is going to do it through each of you in this room. And I am excited to see it. So, God bless you. God bless Regent University. And thank you again for allowing me to share this day with you.

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<sup>76</sup> See generally *Ezekiel* 37:1–10.

<sup>77</sup> *Isaiah* 59:1 (“Surely the arm of the LORD is not too short to save . . .”).









## THE ROOTS OF MODERN EDUCATION

### *Distinguished Panelists\**

**Mr. Peter Mitchell:** Good morning, everyone. Our first panel this morning is titled “The Roots of Modern Education.” What we want to do is give an overview of how we got to a point in history where I think almost everyone would agree education faces serious challenges, and some would say even a crisis, today.<sup>1</sup> And I just want to ask both of our speakers to begin by sharing with us from their unique background and wide range of experience how we got to this point—say—over the last one hundred years or so. So, Ms. Rechtenbach, could you start out as sharing with us where where has education come from, and how have we gotten to this point?

**Mrs. Mallory Rechtenbach:** So if you look at the court cases, and you look at what’s been litigated in terms of education, to me, there are three critical questions that the courts have really analyzed over the last one hundred years. The first one is in relation to parental rights. And that is, who is best situated to make decisions about children’s upbringing and lives?<sup>2</sup> Is it their parents, or is it the State and the government and public

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\* Dr. Paul Kengor is the Senior Director and Chief Academic Fellow for the Institute for Faith and Freedom, a Professor of Political Science at Grove City College, and a Visiting Fellow at the Hoover Institute at Stanford University. An internationally acclaimed scholar of the Cold War, Ronald Reagan, and communism, Dr. Kengor is the author of numerous works, including *A Pope and a President* and *God and Ronald Reagan*.

Mallory Rechtenbach, J.D., is clerking for the Honorable Judge L. Steven Grasza on the U.S. Court of Appeals for the Eighth Circuit and will soon be returning to Alliance Defending Freedom as legal counsel on the parental rights team. Ms. Rechtenbach is a Blackstone Fellow and was a First Year Lawyer Fellow with ADF and the inaugural First Amendment Fellow for the Institute for Free Speech.

Peter Mitchell, H.E.D., is the author of *The Coup at Catholic University: The 1968 Revolution in Catholic Education*, an examination of the tensions faced by religiously affiliated universities during the upheavals of the 1960s. He is currently a law student at Regent University School of Law.

<sup>1</sup> See, e.g., Laura Meckler, *Public Education Is Facing a Crisis of Epic Proportions*, WASH. POST (Jan. 30, 2022), <https://www.washingtonpost.com/education/2022/01/30/public-education-crisis-enrollment-violence/> (explaining experts’ view that the current “crisis” in public education is akin to “the earthquake following *Brown v. Board of Education*” but involving students who are severely deficient academically and socially).

<sup>2</sup> E.g., *Meyer v. Nebraska*, 262 U.S. 390, 396–97, 400, 402–03 (1923) (finding a Nebraska law that forbade teaching in school of languages other than English unconstitutional in part because of a parent’s right to educate his children); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530, 534–35 (1925) (finding that a law requiring parents and guardians to send all children between eight and sixteen years to public school violated the “liberty of parents and guardians to direct the upbringing and education of children under their control”); *Wisconsin v. Yoder*, 406 U.S. 205, 207–09, 234–36 (1972) (finding a compulsory public school-attendance law violated the free exercise rights of an Amish family).

schools? The second question is, how does freedom of speech apply within the special context of a public school?<sup>3</sup> And that question applies to both students and teachers,<sup>4</sup> and I think a lot of times we forget that teachers have freedom of speech issues as well in public schools. And then the third question is, what is the role of religion in schools?<sup>5</sup>

If you look back one hundred years ago, religion was routinely taught in schools.<sup>6</sup> We are looking at a one-room schoolhouse where you have students of various ages, and religion was just part of the curriculum.<sup>7</sup> And then we went through one hundred years of litigation, where it was routinely removed.<sup>8</sup> And now just last term at the Supreme Court, we had

<sup>3</sup> *E.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 513–14 (1969) (finding that an Iowa public school could not constitutionally restrict its students from wearing black arm bands in protest of the Vietnam war); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262, 264, 276 (1988) (finding a public school's decision to pull what it deemed to be offensive articles from a student-run newspaper constitutional).

<sup>4</sup> *E.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 411, 413 (1979) (finding unconstitutional a view of the First Amendment that allowed public school teachers who voiced concerns about school policies and practices to be penalized); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415–16, 2432–33 (2022) (holding that the First Amendment protects a public-school football coach's right to pray privately at the fifty-yard line after a football game).

<sup>5</sup> *E.g.*, *Engel v. Vitale*, 370 U.S. 421, 424, 436 (1962) (holding that prayer in public schools violates the Establishment Clause of the First Amendment); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 231–33, 253 (1990) (holding that schools which create a limited open forum for non-curricular student groups must provide equal access to religious student groups under the First Amendment); *Lee v. Weisman*, 505 U.S. 577, 597–99 (1992) (holding that mandatory prayer at a public-school graduation ceremony violated the Establishment Clause of the First Amendment).

<sup>6</sup> See Robert Marquand, *The Rise and Fall of the Bible in US Classrooms. As the Outcry Grows to 'Get Religion Back into the Classroom,' the Monitor Looks at the Historic Role of the Bible in American Public Schools*, CHRISTIAN SCI. MONITOR (Sept. 5, 1985), <https://www.csmonitor.com/1985/0905/dback3-f.html> (noting that the Bible was taught in classrooms until the 1940s).

<sup>7</sup> See Diane Church, *Exploring the History of One-Room Schoolhouses*, HARTFORD COURANT (June 16, 2015, 2:23 PM), <https://www.courant.com/community/south-windsor/rnw-sw-south-windsor-one-room-schoolhouse-0625-20150616-story.html>; Marquand, *supra* note 6.

<sup>8</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 3, 18 (1947) (finding a bus funding program that served some religious schools constitutional *but* reasoning that there exists “a wall of separation between church and state” that must remain “high and impregnable”); *Engel*, 370 U.S. at 422–24, 436 (holding unconstitutional a state law requiring the public-school day to begin with a prayer approved by the state board of regents); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205–06 (1963) (finding unconstitutional a public school program requiring the school day to open with a few verses being read out of the Bible); *Wallace v. Jaffree*, 472 U.S. 38, 40–42, 61 (1985) (holding unconstitutional a state law requiring the school day in public schools to open with a moment of silence for prayer or meditation); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294, 301 (2000) (finding unconstitutional a high school policy allowing student-led and initiated prayer before kickoff at high school football games). Compare *McCullum v. Bd. of Educ.*, 333 U.S. 203, 204–05, 211–12 (1948) (finding unconstitutional a program at a public school that allowed religious leaders to come to the

the Coach Kennedy case where you have a teacher who knelt to pray a fifteen-second prayer in his head and was let go because of that.<sup>9</sup> So, we've really come a long way in terms of the role of religion in schools. And so, each of these three questions, has an entire line of cases behind it, and has really developed. So I think, where we've come in the last one hundred years; there's good news and bad news, and the good news is that a hundred years ago we didn't have any legal cases to point to that protected free speech, that protected parental rights. You had *Meyer v. Nebraska*, which was in 1923,<sup>10</sup> and that's really the first kind of parental rights case. So, it really was 100 years ago that all of these cases started.<sup>11</sup> So back in those days you couldn't really point to [a case that said,] "Oh, I'm protected by this case."<sup>12</sup>

But the bad news is that now there are significantly more threats to free speech, to religion, and to parental rights in the education and school context.<sup>13</sup>

**Mr. Mitchell:** So, Dr. Kengor, I would appreciate you weighing in with your perspective, on how Christians respond to this, particularly in the context of education.

**Dr. Paul Kengor:** Yeah, yeah. And thank you very much, Peter and Tyler, I feel like it's a Grove City College reunion. I got Judge Batchelder

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school and offer religious instruction for students who opted-in and affirming the high wall of separation), *with Zorach v. Clauson*, 343 U.S. 306, 308–09, 313–15 (1952) (finding constitutional a released time program for religious instruction in which the religious instruction did not take place on public school property and noting that Americans "are a religious people").

<sup>9</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415–16, 2432–33 (2022).

<sup>10</sup> 262 U.S. 390, 396–97, 399–400 (1923).

<sup>11</sup> Suzanne Buchanan, *The Evolution of Parental Rights in Education*, 16 J.L. & EDUC. 339, 341–43 (1987) (tracing the Court's recognition of parental rights in education from 1923 to the modern day).

<sup>12</sup> *See id.* at 343 (explaining that *Meyer v. Nebraska* was the first significant parental rights case in Supreme Court jurisprudence).

<sup>13</sup> *See, e.g., Hawley Introduces Parents' Bill of Rights to Defend Parents' Role in Education*, JOSH HAWLEY U.S. SEN. FOR MO., <https://www.hawley.senate.gov/hawley-introduces-parents-bill-rights-defend-parents-role-education> (Nov. 16, 2021) (giving one example of an effort to protect parental rights in the face of the current onslaught); *Protecting Parental Rights at the State Level*, PARENTAL RTS., <https://parentalrights.org/states/> (last visited Feb. 5, 2023) (providing data on legislative developments to protect parental rights throughout the nation); Nadra Nittle, *Parental Rights Bills Have Been Introduced in Most States. Teachers Are Pushing Back*, THE 74 (Apr. 2, 2022), <https://www.the74million.org/article/parental-rights-bills-have-been-introduced-in-most-states-teachers-are-pushing-back/> (highlighting the resistance that state parental-rights bills are receiving from educators); Ronald Kreager Jr., *Homeschooling: The Future of Education's Most Basic Institution*, 42 U. TOL. L. REV. 227, 228, 253 (2010) (explaining various threats to the right of parents to control the upbringing of their children, specifically in reference to homeschooling).

here, Brad Lingo, Josh Ehst, who was our quarterback last year at Grove City College. He's at the law school here, so it's good to be back [at Regent Law].

I've spoken in this room before. In fact, Chuck Dunn, who had been provost at Grove City College, came down here. He was here for a while and used to host an annual Reagan symposium here,<sup>14</sup> which I came down for a number of times. So, it's good to be back.

Picking up on Mallory's point about religious schools and the role of religion in schools. I'd like to just share a few quotes from some different people on this, some mentors, some people who have inspired me with their writings. Russell Kirk, who quoted T.S. Eliot on the permanent things, and they describe the permanent things as "those time-tested principles, mores, or norms which transcend the world's cultures and which we ignore at our [ ]risk. [These are] [t]hings such as duty to one's parents, courtesy toward guests, honor, courage, character, magnanimity, courtesy, chastity, mercy, order, humility, and prudence."<sup>15</sup> And he said that the goal in higher education, he believed, was to conserve and preserve these time-tested values.<sup>16</sup> Our schools, our institutions of higher education, should be focused on these higher principles. He invoked G.K. Chesterton's quote about the "democracy of the dead"—that is, the considered opinions of the wise men and women who died before our time."<sup>17</sup> The experience of the race, he said that we owe "a moral debt to our ancestors."<sup>18</sup> They can teach us about where we need to go today, and Kirk referred to this as "ordered liberty."<sup>19</sup>

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<sup>14</sup> *Dr. Charles Dunn*, TOWNHALL, <https://townhall.com/columnists/drcharlesdunn>, (last visited Feb. 25, 2023) (showing Charles Dunn served as a dean of Grove City College before serving at Regent University); *Charles W. Dunn, Ph.D.*, REGENT UNIV., <https://www.regent.edu/faculty/ph-d-charles-w-dunn/> (last visited Feb. 25, 2023) (showing Charles Dunn served as the dean of the Robertson School of Government for several years until his retirement in 2013); *10th Annual Reagan Symposium Addresses Challenges to Fostering Global Freedom*, REGENT UNIV. NEWS (Mar. 20, 2015), <https://www.regent.edu/news/10th-annual-reagan-symposium-addresses-challenges-fostering-global-freedom/> (showing the Robertson School of Government hosted the 10th annual Reagan Symposium in 2015).

<sup>15</sup> James E. Person, Jr., *Lost Causes and Gained Causes*, THE RUSSELL KIRK CTR. (Mar. 2, 2009), <https://kirkcenter.org/essays/lost-causes-and-gained-causes/>; see also JAMES E. PERSON, JR., *RUSSELL KIRK: A CRITICAL BIOGRAPHY OF A CONSERVATIVE MIND 19–20* (1999).

<sup>16</sup> RUSSELL KIRK, *The Conservative Purpose of a Liberal Education*, in *THE ESSENTIAL RUSSELL KIRK* (George A. Panichas ed., 2007) (ebook) (explaining that the purpose of education is "to teach what it is to be a true human being, living within a moral order").

<sup>17</sup> RUSSELL KIRK, *THE INTELLIGENT WOMAN'S GUIDE TO CONSERVATISM 15–16* (1957) (quoting G. K. CHESTERTON, *ORTHODOXY* 85 (1952)).

<sup>18</sup> *Id.* at 14.

<sup>19</sup> RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 61 (1974) (ebook); Paul G. Kengor, *Ronald Reagan's City of God*, INST. FOR FAITH & FREEDOM (Mar. 14, 2014), <https://www.faithandfreedom.com/Ronald-reagans-city-of-god/>.

You need to have a society, a culture, a country of people with internal order before you can govern externally; George Washington talked about this too.<sup>20</sup> You need to be able to self-govern yourself before you could self-govern your country.

The Pope, John Paul II, is standing next to Ronald Reagan in Miami in September, 1987.<sup>21</sup> He called this “*ordered freedom*,”<sup>22</sup> and I think it’s interesting that you would need somebody from Poland to come to America to share this perspective.<sup>23</sup> But I think it’s fascinating. He said, “From the beginning of America, freedom was directed to[ward] forming a well-ordered society and to promoting its peaceful life.”<sup>24</sup> Now, if you ask Americans today what’s the purpose of freedom, how many are going to turn to you and say, “Well, it’s for the purpose of forming a well-ordered society?” That’s not even in their mental framework. “Freedom was channeled to the fullness of human life, to the preservation of human dignity and to the safeguarding of all human rights. *An experience in ordered freedom is truly a cherished part of the history of this land.*”<sup>25</sup> And then he said this, and think about this. Maybe I’ll create a bumper sticker out of this quote:

The only true freedom, the only freedom that can truly satisfy, is the freedom to do what we ought as human beings created by God according to his plan. It is *the freedom to live the truth of what we are and who we are* before God, the truth of our identity as children of God, as brothers and sisters in common humanity. That is why Jesus Christ linked truth and freedom together . . . .

[F]reedom is indeed a great gift of God to this nation.<sup>26</sup> And this is a Polish Pope saying this about America, and yet “freedom [should] observe God’s law—which is the [] standard of all human liberty.”<sup>27</sup>

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<sup>20</sup> George Washington, Farewell Address (Sept. 19, 1796); William White, Address of the Philadelphia Clergy (Mar. 3, 1797) (explaining that Washington believed that “Religion and Morality are the essential pillars of Civil society”).

<sup>21</sup> Photograph of Ronald Reagan and Pope John Paul II, in *St. John Paul II in Miami*, ARCHDIOCESE OF MIA. (Sept. 10, 1987), [https://www.miamiarch.org/CatholicDiocese.php?op=Gallery\\_16032864887000](https://www.miamiarch.org/CatholicDiocese.php?op=Gallery_16032864887000).

<sup>22</sup> John Paul II, Pope, Meeting with the President of the United States of America Mr. Ronald Reagan, at par. 3 (Sept. 10, 1987).

<sup>23</sup> *Biographical Profile of John Paul II*, VATICAN, [https://www.vatican.va/content/john-paul-ii/en/biografia/documents/hf\\_jp-ii\\_spe\\_20190722\\_biografia.html](https://www.vatican.va/content/john-paul-ii/en/biografia/documents/hf_jp-ii_spe_20190722_biografia.html) (last visited Jan. 25, 2023).

<sup>24</sup> John Paul II, *supra* note 22, at para. 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Kirk said that universities and colleges ought not to be “degree-mills,” as he put it.<sup>28</sup>

We think of higher education as the next step, thirteenth grade, where you go after high school. And Kirk said this, “[H]igher learning is meant to develop order in the soul, for the human person’s own sake. I am saying that the higher learning is meant to develop order in the commonwealth, for the republic’s sake,” so again, this idea of ordered liberty, ordered freedom; and, “I am arguing that a system of higher education which has forgotten these ideas is decadent . . . .”<sup>29</sup>

We were talking last night, Tyler, Josh, Sam, and I, after the wonderful event last night, about how so many law schools are not even thinking about this. And, if I may say this as an endorsement of your school—and no one asked me to say this—but you can come here and learn those first things, those permanent things, those higher principles.

A lot of the other schools—you’re going there to get that degree, that diploma, that degree mill to go on and get a job. But what kind of education is it really that doesn’t develop the soul? I’ll finish with a couple of quotes from Ronald Reagan. Reagan was fond of the quote from Galatians 5:13-14, “For you were called for freedom, brothers. But do not use [your] freedom as [ ] opportunit[ies] for the flesh; rather, serve one another through love. For the whole law is fulfilled in one statement, namely, ‘You shall love your neighbor as yourself.’”<sup>30</sup> Reagan gave a speech at Georgetown University on its bicentennial in 1988, where he said this, “At its full flowering, freedom is the first principle of society; [of] this society, [of] Western society . . . . And yet freedom cannot exist alone. And that’s why [it’s] the theme for your bicentennial.”<sup>31</sup> [What] he was telling Georgetown “is so very apt,” and, by the way, I think it applies to Regent as well that is “learning, faith, and freedom. Each reinforces the others, each makes the others possible. For what are they without [the] other?”<sup>32</sup> And he quoted de Tocqueville. “[De] Tocqueville said it in 1835, and it’s as true today as it was then: ‘Despotism may govern without faith, but liberty cannot. Religion is more [important] in democratic societies than in any others,’” because in democratic societies you have the freedom to do

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<sup>28</sup> Russell Kirk, *Simplicity & Audacity in Reform: A Call for Reactionary Radicalism*, IMAGINATIVE CONSERVATIVE (May 6, 2018), <https://theimaginativeconservative.org/2018/05/simplicity-audacity-reform-call-reactionary-radicalism-russell-kirk.html>.

<sup>29</sup> *Id.*

<sup>30</sup> Kengor, *supra* note 19 (citing *Galatians* 5:13–14) (explaining Ronald Reagan’s agreement with the idea of using biblical freedom for the promotion of liberty).

<sup>31</sup> Ronald Reagan, President of the United States, Remarks at Georgetown University’s Bicentennial Convocation (Oct. 1, 1988).

<sup>32</sup> *Id.*



almost anything you want.<sup>33</sup> So the only thing really navigating that freedom is faith. You need the rudder of faith. Reagan spoke of what he called “the twin beacons of faith and freedom [that] brightened the American sky.”<sup>34</sup> So if you have the American sky lighted by these twin beacons of faith and freedom, and you have a country that’s suddenly dimming the beacon of faith, it’s going to be a lot darker; it’s going to be a lot more difficult to navigate with that freedom, and that’s where we are in America today. What’s the single largest religious grouping out there right now, according to pollsters? The “nones,” the people with no religious affiliation.<sup>35</sup> So the more that faith is removed from freedom, it’s going to be more and more difficult for America to navigate.<sup>36</sup>

So to bring this full circle back to Russell Kirk, Ronald Reagan and Pope John Paul II, learning needs to be about learning this relationship between faith and freedom. And, as Kirk said, any institution of higher education that’s not teaching this is “decadent,” and it’s failing to preserve the traditions of the past.<sup>37</sup> So I commend you folks here for having this right.

**Mr. Mitchell:** Thank you. So, the whole tension between freedom and yet channeling that freedom towards the good—we all cherish freedom, as Americans, and everyone says “I’m American and this is a free

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<sup>33</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 288 (John C. Spencer ed., Henry Reeve trans., 1838); see also Carson Holloway, *Tocqueville on Christianity and American Democracy*, HERITAGE FOUND. (2016), <https://www.heritage.org/civil-society/report/tocqueville-christianity-and-american-democracy>.

<sup>34</sup> Ronald Reagan, President of the United States, Address to the Nation About Christmas and the Situation in Poland (Dec. 23, 1981).

<sup>35</sup> PUB. RELIGION RSCH. INST., THE 2020 CENSUS OF AMERICAN RELIGION 7 fig.1 & n.1 (2021), <https://www.ppri.org/wp-content/uploads/2021/07/PRRI-Jul-2021-Religion.pdf> (showing that the “unaffiliated” constitute the largest percentage (23%) of religious Americans); Jack Jenkins, *Nones’ Now as Big as Evangelicals, Catholics in the US*, RELIGION NEWS SERV. (Mar. 21, 2019), <https://religionnews.com/2019/03/21/nones-now-as-big-as-evangelicals-catholics-in-the-us/> (noting how “nones” constitute 23.1% of the population whereas Catholics constitute only 23% and Evangelicals only 22.5%).

<sup>36</sup> See Reagan, *supra* note 34 (warning that freedom, not tempered by learning and faith, leads to “license,” “decadence,” and ultimately, “unfreedom”); TOCQUEVILLE, *supra* note 33, at 331 (“Religion is much more necessary in the republic which they set forth in glowing colours than in the monarchy which they attack; and it is more needed in democratic republics than in any others. How is it possible that society should escape destruction if the moral tie be not strengthened in proportion as the political tie is relaxed? [A]nd what can be done with a people which is its own master, if it be not submissive to the Divinity?”); Hugh Whelchel, *Why America’s Freedom Depends on the Morality of America’s People*, INST. FOR FAITH, WORK, & ECONS. (Feb. 5, 2018), <https://tifwe.org/america-freedom-morality-people/> (discussing how the Founding Fathers understood that freedom and republican government could not survive without morality grounded in religion).

<sup>37</sup> RUSSELL KIRK, *DECADENCE AND RENEWAL IN THE HIGHER LEARNING: AN EPISODIC HISTORY OF AMERICAN UNIVERSITY AND COLLEGE SINCE 1953*, at ix–x (1978) (describing the American university as “decadent” because it fails to inculcate wisdom and virtue).

country,” but we have to channel that freedom, particularly in education. We need to be directing that towards an end, towards a purpose. My own experience as an undergraduate in the 1990s, and in graduate school at Christian universities, was that we were often told by our professors, “Well, you know the Bible or the Church may say this, but you all need to think for yourselves and be free.” And I, with a group of students, we challenged some of that. We came here to learn the Christian tradition, and the professors flatly refused to do that, because they said, “we’re not here to indoctrinate you.”<sup>38</sup> And so we found ourselves in this battle, if you will, in this tension between the two: “What is the proper role of authority in the context of having freedom?”

So, a lot of what I then was inspired to do was, go look at how the heck did we get here in this situation? Now I want to go back to the American Association of University Professors, which is basically the guiding body that [influences] accreditation of universities in this country.<sup>39</sup> And I went digging through their old documents as early as 1940. And what’s interesting is these words have been quoted in court decisions, right up to 2021.<sup>40</sup> It’s still very relevant. The American

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<sup>38</sup> See PETER M. MITCHELL, *THE COUP AT CATHOLIC UNIVERSITY: THE 1968 REVOLUTION IN CATHOLIC EDUCATION* 15–17 (2015) (discussing how Catholic education shifted from emphasizing orthodoxy and tradition to academic freedom and free inquiry).

<sup>39</sup> The American Association of University Professors sets standards for higher education, but the accreditation process is handled by six, regional accreditation agencies. See *Mission*, AM. ASS’N OF UNIV. PROFESSORS, <https://www.aaup.org/about/mission-1> (last visited Jan. 25, 2023) (“Founded in 1915, the AAUP has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom in this country’s colleges and universities.”); Darlene Y. Bruner, *American Association of University Professors*, BRITANNICA (Jan. 27, 2017), <https://www.britannica.com/topic/American-Association-of-University-Professors> (describing the AAUP as a non-profit organization that promotes academic freedom through advocating for professional standards in higher education); *Regional Accrediting Organizations*, COUNCIL FOR HIGHER EDUC. ACCREDITATION, <https://www.chea.org/regional-accrediting-organizations-accreditor-type> (last visited Jan. 25, 2023) (describing how the United States is divided into six accreditation regions, each with its own accreditation agency); J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J. COLL. & U.L. 79, 84 (2004) (noting that all major universities had adopted the AAUP’s standards by 1940).

<sup>40</sup> See, e.g. *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 755–56 (1976) (noting that colleges were nonsectarian in part because they subscribed to the AAUP’s *Statement of Principles on Academic Freedom and Tenure*); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971) (stating that part of the reason there was no religious influence at four universities was because of their adherence to the AAUP’s *Statement on Academic Freedom and Tenure*); *Braun v. Dep’t of Health & Hum. Servs.*, 998 F.3d 1312, 1313–14 (Fed. Cir. 2021) (en banc) (Newman, J., dissenting) (quoting from the *Statement of Principles on Academic Freedom and Tenure* to define tenure); *Vega v. Miller*, 273 F.3d 460, 475–76 (2d Cir. 2001) (Cabranes, J., dissenting) (collecting cases that rely on the AAUP’s *Statement on Academic Freedom and Tenure* to resolve disputes involving academic freedom and tenure); *Crenshaw v. Erskine Coll.*, 850 S.E.2d 1, 7–8, 11 (S.C. 2020) (quoting from the *Statement of Principles on Academic Freedom and Tenure* to highlight the importance of tenure for higher education); *McAdams*

Association of University Professors very consciously said that freedom means putting religion out of the classroom.<sup>41</sup> I just want to read a quote from the AAUP, as it's called: "Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science, and to express his conclusions . . . without [any] interference from political or ecclesiastical authority."<sup>42</sup> So right there, that says the enemy of freedom is authority. That's the position of the AAUP.<sup>43</sup> Okay, fast-forward. That's in 1940.<sup>44</sup> Twenty-seven years later, in the height of the Sixties, a man named David Fellman, who was the president of the AAUP, spoke at Notre Dame at a big rally of educators.<sup>45</sup> So they all went there—this is like college presidents [and] university administrators—we're all going to have a pow-wow, how can we make our universities more free in 1967?<sup>46</sup> The cultural context of that year is obvious. With the Vietnam war and everything going on, it was not a moment when authority was looked at very well in our society.<sup>47</sup> Mr. Fellman, the president of this body, said, "[the] only final truth is [our] conviction that there are no [final truths]."<sup>48</sup> So this is the man directing all educators in our country to go back to their schools with "what did you learn at the conference, boys and girls?" Well, there is no final truth, and that's the only final truth. And even the inherent contradiction in that principle.<sup>49</sup> It was so explicitly stated at that

v. Marquette Univ., 914 N.W.2d 708, 730 (Wis. 2018) (referring to the AAUP's *Statement of Principles on Academic Freedom and Tenure* to help define the scope of the academic freedom doctrine).

<sup>41</sup> MITCHELL, *supra* note 38, at 73–75.

<sup>42</sup> *Id.* at 73 (quoting JAMES JOHN ANNARELLI, ACADEMIC FREEDOM AND CATHOLIC HIGHER EDUCATION 4 (1987)).

<sup>43</sup> *Id.* at 73–74; see Hans-Jeorg Tiede & Julia Schleck, *What is Academic Freedom?*, AM. ASS'N OF UNIV. PROFESSORS, [https://www.aaup.org/sites/default/files/Webinar-Slides\\_Academic-Freedom-Basics.pdf](https://www.aaup.org/sites/default/files/Webinar-Slides_Academic-Freedom-Basics.pdf) (last visited Mar. 19, 2023) (explaining the AAUP's current position on academic freedom).

<sup>44</sup> MITCHELL, *supra* note 38, at 75–76.

<sup>45</sup> *Id.* at 78–79.

<sup>46</sup> The goal of greater academic freedom was exemplified in the AAUP's *Statement on Government of Colleges and Universities*, which was published in 1966. See *Statement on Government of Colleges and Universities*, AM. ASS'N OF UNIV. PROFESSORS <https://www.aaup.org/report/statement-government-colleges-and-universities> (last visited Jan. 25, 2023) (arguing for greater faculty involvement with school governance and insulation of faculty control over curriculum from administration absent exceptional circumstances); Am. Ass'n of Univ. Professors, *Organizational Notes*, 52 AAUP BULLETIN 262 (1966) (noting David Fellman's speech at Notre Dame on April 23, 1966).

<sup>47</sup> *Public Trust in Government: 1958–2022*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/> (noting that public trust in government fell during the 1960s in the midst of the Vietnam War after the 1950s).

<sup>48</sup> MITCHELL, *supra* note 38, at 79.

<sup>49</sup> Paula Gottlieb, *Aristotle on Non-contradiction*, STAN. ENCYC. OF PHIL. <https://plato.stanford.edu/entries/aristotle-noncontradiction/#:~:text=6.->

moment, and in many ways we're still living the effects of that in education.<sup>50</sup> So how do we, as Christians—first of all, we need to be aware of what's happened—but then we need to articulate how we respond to that. So, Ms. Rechtenbach, I'd love to hear—you had a very close and unique perspective with this case at the School of the Ozarks, it brings a lot of these tensions into play. And could you share with us that story and what happened in that case? It kind of brings it all together.

**Mrs. Rechtenbach:** Absolutely. It is a case that Alliance Defending Freedom is currently litigating, and one aspect of this that is completely new in the last couple decades is the regulatory state.<sup>51</sup> We now have “legislators” who were not elected and who are able to create regulations that are governing every school in the country.<sup>52</sup> College of the Ozarks is a great example.<sup>53</sup> Biden's Department of Housing and Urban Development created a regulation that basically said, “You have to allow any student who says that they are transgender to stay in the dorm of

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,The%20Principle%20of%20Non%20Contradiction%20and%20Action,action%20are%20better%20than%20others. (Mar. 6, 2019) (explaining that the principle of non-contradiction means that “while it is possible for  $x$  to be actually  $F$  and potentially not  $F$ , it is impossible for something to be actually  $F$  and actually not  $F$ . A table can be actually red and potentially not red, but not actually red and actually not red at the same time”); Greg Koukl, *There Is No Truth*, STAND TO REASON (Feb. 19, 2013), <https://www.str.org/w/there-is-no-truth> (explaining that the statement “there is no truth” is self-contradictory as it presumes its own truth).

<sup>50</sup> See Carol M. Swain, *The Sad Spiritual State of American Colleges and Universities*, 15 U. ST. THOMAS L.J. 431, 436, 440 (2019) (discussing how moral relativism dominates the campuses of American higher education institutions).

<sup>51</sup> *How College of the Ozarks is Standing up to the Biden Administration*, ALL. DEFENDING FREEDOM, <https://adlegal.org/article/meet-college-standing-biden-administration> (Nov. 30, 2022) (describing Alliance Defending Freedom's suit on behalf of the School of the Ozarks); Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 RUTGERS U. L. REV. 605, 625–27, 644–45 (2016) (recounting the expansion of the administrative state after the New Deal and its further growth through the 1970s to today); Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 ADMIN. L. REV. 377, 377–78, 381 (1997) (noting how pervasive federal agency regulations have become in citizens' day-to-day lives).

<sup>52</sup> Lindsey M. Burke, *Reducing the Federal Footprint on Education and Empowering State and Local Leaders*, in BACKGROUNDERS at 2–3 (The Heritage Found., Ser. Pub. No. 2565, 2011) (discussing how the federal bureaucracy dictates education policy to schools across America); *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 996 (8th Cir. 2022) (noting that HUD's sexual orientation and gender discrimination regulation applies “across the entire economy, and does not specifically address the subject of housing for students at colleges and universities” (emphasis added)).

<sup>53</sup> *Sch. of the Ozarks, Inc.*, 41 F.4th at 996–97 (describing how the School of the Ozarks sued to enjoin the implementation of HUD's regulation for violating the Administrative Procedures Act, the First Amendment, and the Religious Freedom Restoration Act).

their choosing.”<sup>54</sup> So if they are a man who says “I am a transgender woman” then you have to allow them in the women’s dorms.<sup>55</sup>

**Dr. Kengor:** By the way, that’s through HUD, right?

**Mrs. Rechtenbach:** Yes.

**Dr. Kengor:** Of course. Whatever agency it takes.

**Mrs. Rechtenbach:** Yes, exactly.

You know, in a lot of secular schools, they have co-ed dorms, and it’s probably not as big of a deal.<sup>56</sup> But if you look at religious schools, it is a significant regulation.<sup>57</sup> College of the Ozarks is a Christian school, and they have gender-separated dorms, and they have strict rules even about men going into the women’s dorm to visit [and] things like that.<sup>58</sup> They’re very strict about it. This regulation would completely upset their religious beliefs and their entire university structure,<sup>59</sup> so Alliance Defending Freedom, their regulatory team, which is a new team in the last couple of years that had to be created because of all of the regulations that are now

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<sup>54</sup> *Id.* at 996 (describing how HUD, per an executive order, extended the Fair Housing Act’s anti-discrimination provisions to cover discrimination on the basis of sexual orientation and gender identity).

<sup>55</sup> *See id.* (discussing how HUD’s anti-discrimination regulations would apply to all sexual-orientation or gender-identity discrimination claims arising under the Fair Housing Act).

<sup>56</sup> Jordyn Pair, *Without Co-ed Dorms, Hillsdale Among the Few*, COLLEGIAN (Apr. 13, 2017), <https://hillsdalecollegian.com/2017/04/without-co-ed-dorms-hillsdale-among/> (noting that ninety percent of colleges have co-ed dorms).

<sup>57</sup> *See, e.g., Residence Life FAQs*, GROVE CITY COLL., <https://www.gcc.edu/Home/Experience-the-Grove/Campus-Life/Residence-Life/On-Campus-Housing-Information/Residence-Life-FAQs> (last visited Jan. 25, 2023) (prohibiting members of the opposite sex from staying overnight in dorm rooms of the other sex); PENSACOLA CHRISTIAN COLL., *STUDENT HANDBOOK: 2022–2023*, at 26–27 (2022), <https://static.pcci.edu/PCC/Handbook/PCCStudentHandbook22-23.pdf?update=5> (similar); LIBERTY UNIV. DIV. OF STUDENT AFFS., *THE LIBERTY WAY: STUDENT HONOR CODE 2022–2023*, at 12 (2022), <https://www.liberty.edu/students/wp-content/uploads/sites/89/2022/10/The-Liberty-Way.pdf> (similar).

<sup>58</sup> *Residence – Student Life*, COLL. OF THE OZARK, <https://www.cofu.edu/About/FAQS/FAQs-Details/residence-student-life> (last visited Jan. 25, 2023) (prohibiting the opposite sex from entering any residence hall of the other sex).

<sup>59</sup> Appellant’s Opening Brief at 12, *Sch. of the Ozarks*, 41 F.4th 992 (No. 21-2270) (“Were the College to comply with the government’s new mandate, the College would suffer immeasurable harm to its religious exercise, its free speech, and its students’ privacy interests. Abandoning its code of conduct and opening female private spaces to biological men jeopardizes the College’s ability to function, harms students, and dissuades them from attending the College. The College would also incur regulatory compliance costs of time, money, and speech were it to comply, because it would have to change its policies, statements, trainings, and signage, and even renovate its buildings.” (citation omitted)).

coming about.<sup>60</sup> You have to fight those as well, not just actual laws that are passed. They challenged this in Federal court, and it went up to the Eighth Circuit.<sup>61</sup> The judge that I currently work for was actually on the panel, and Alliance Defending Freedom lost two to one, and my judge dissented, and it was a great dissent if you would like to read it.<sup>62</sup> But one of the big issues is standing, and that's something that ADF really challenges.<sup>63</sup> In every single case we have to argue standing, because a lot of times they try to get it kicked on standing.<sup>64</sup> They say, "Oh, well, you know, the regulation is not a final regulation,"<sup>65</sup> or something like this where they can say [that] "you can't challenge it now. You don't have any transgender students who are trying to stay in the opposite dorm. So you can't challenge this now."<sup>66</sup> When you have pre-enforcement challenges,

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<sup>60</sup> See, e.g., *Erik Baptist*, ALL. DEFENDING FREEDOM, <https://adflegal.org/biography/erik-baptist> (last visited Feb. 5, 2023) (describing Mr. Baptist's focus on administrative litigation and advocacy); *Julie Blake*, ALL. DEFENDING FREEDOM, <https://adflegal.org/biography/julie-blake> (last visited Feb. 5, 2023) (similar); *Matt Bowman*, ALL. DEFENDING FREEDOM, <https://adflegal.org/biography/matt-bowman> (last visited Feb. 5, 2023) (similar); see also, e.g., Appellant's Opening Brief, *supra* note 59, at 1–2; Plaintiff's Brief in Support of Their Motion for Preliminary Injunction at 1–2, *All. for Hippocratic Med. v. FDA* (N.D. Tex. Nov. 18, 2022) (No. 2:22-cv-00223-Z) (demonstrating how the ADF challenges agency regulations).

<sup>61</sup> *Sch. of the Ozarks, Inc. v. Biden*, No. 6:21-03089-CV-RK, 2021 WL 2301938 (W.D. Mo. June 4, 2021), *aff'd*, 41 F.4th 992 (8th Cir. 2022).

<sup>62</sup> *Sch. of the Ozarks*, 41 F.4th at 1001 (Grasz, J., dissenting).

<sup>63</sup> See Plaintiff's Brief in Support of Their Motion for Preliminary Injunction, *supra* note 60, at 7 (ADF arguing that the Alliance for Hippocratic Medicine has standing to challenge an FDA regulation concerning chemical abortion); Appellant's Opening Brief, *supra* note 59, at 21 (arguing that the School of the Ozarks had standing to challenge HUD's gender and sex-discrimination policy).

<sup>64</sup> See, e.g., Brief for Appellees at 17, *Sch. of the Ozarks*, 41 F.4th 992 (No. 21-2270) (arguing that School of the Ozarks lacks standing to challenge the HUD sex-discrimination policy); Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction at 8–9, *All. for Hippocratic Med.*, (No. 2:22-cv-00223-Z) (arguing that the Alliance for Hippocratic Medicine lacks standing to challenge the FDA's chemical abortion guidelines); *Am. Coll. of Pediatricians v. Becerra*, No. 1:21-cv-195, slip op. at 33–34, 40 (E.D. Tenn. filed Nov. 18, 2022) (dismissing the ADF's case for lack of standing).

<sup>65</sup> See Brief for Appellees, *supra* note 64, at 15 (arguing that School of the Ozarks lacks standing to challenge the HUD sex-discrimination policy).

<sup>66</sup> See *id.* at 39 (arguing that the idea that a complaint will be filed against School of the Ozarks by a student is speculative).

and those have been around for a long time.<sup>67</sup> And so that’s something that is constantly being fought and litigated right now.<sup>68</sup>

That’s one example, but there are tons of other examples, too—of CRT impacting peoples’ religious beliefs as well.<sup>69</sup> You also have transgender issues that are coming in K-12. Harrisonburg is a great example.<sup>70</sup> That’s another case that I worked on with ADF, and you have a policy [throughout] the entire school district—it’s here in Virginia—that says, if a student comes to a teacher or any anybody at the school, and says “I’m transgender, I want you to refer to me by this other name. I want you to refer to me by these other pronouns,” then the teachers are, number one, required to refer to them by the name and pronouns of their choosing.<sup>71</sup> If you look at that in First Amendment terms, that’s compelled speech,<sup>72</sup> so you are compelling them to speak something that as Christians, some of

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<sup>67</sup> See Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 974–75 (2022) (discussing the growing prevalence of pre-enforcement challenges against federal regulations); Arthur G. Sapper, *The Little Statute that Gets No Respect: How Courts Have Ignored the Administrative Procedure Act with Respect to Whether Pre-Enforcement Challenge Provisions are Exclusive*, 35 B.Y.U. J. PUB. L. 1, 2 (2020) (summarizing the history of pre-enforcement review since the Supreme Court’s decision in *Abbott Laboratories v. Gardner*).

<sup>68</sup> See, e.g., *Citizens for Const. Integrity, Inc. v. United States*, No. 21-1317, slip op. at 12–16 (10th Cir. filed Jan. 10, 2023) (illustrating how federal courts address standing arguments); *Dream Defs. v. DeSantis*, No. 21-13489, slip op. at 9–11 (11th Cir. filed Jan. 10, 2023) (similar).

<sup>69</sup> See, e.g., *Ibanez v. Albemarle Cnty. Sch. Bd.*, No. CL21001737-00, slip op. at 1–2, 4 (Va. Cir. Ct. filed June 1, 2022) (dismissing an ADF suit alleging racial-discrimination due to CRT curriculum for lack of standing); Jorge Gomez & Leo Schlueter, *Tyranny in Disguise: Critical Race Theory in America’s Schools Is a Threat to Religious Liberty*, FIRST LIBERTY (Aug. 13, 2021), <https://firstliberty.org/news/critical-race-theory-in-americas-schools/> (explaining how critical race theory (CRT) threatens religious freedom); Neal Hardin, *What is Critical Race Theory?*, ALL. DEFENDING FREEDOM (Mar. 6, 2023), <https://adflegal.org/article/what-critical-race-theory> (explaining how CRT rejects constitutional protections for religious liberty); *Why I’m Suing My Former Employer, a School District, over Critical Race Theory*, ALL. DEFENDING FREEDOM, <https://adflegal.org/article/why-im-suing-my-former-employer-school-district-over-critical-race-theory> (Jan. 20, 2023) (describing how an assistant principal was fired for objecting to CRT curriculum).

<sup>70</sup> *Parents, Teachers Sue VA School District for Concealing Children’s Discomfort with Biological Sex*, ALL. DEFENDING FREEDOM (June 6, 2022), <https://adflegal.org/press-release/parents-teachers-sue-va-school-district-concealing-childrens-discomfort-biological>.

<sup>71</sup> *Id.*; *Supporting Our Transgender Students*, ALL. DEFENDING FREEDOM, <https://adflegal.org/sites/default/files/2022-06/HCPSTransgenderStudentsStaffPresentation.pdf> (last visited Mar. 21, 2023) (containing the slideshow that the Harrisonburg school used in its pronoun policy trainings).

<sup>72</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

them [teachers] have concerns about using pronouns that are not correct.<sup>73</sup> To them, you're not speaking truth by saying, "you're a man, but I'm going to refer to you as a woman." Second, the policy says that the teachers are not permitted to tell the parents what's going on with their students.<sup>74</sup> The teachers now are restricted from speaking. So, in the same policy you have both a restriction on speech, and you have compelled speech.<sup>75</sup> So, there's a group of teachers that came to ADF and said, "My religious beliefs say that there is truth. There is right and wrong. There is man and woman, and that God created men and women differently, and also says that the parents have the right to control the upbringing of their children, and that the parents and the nuclear family is the center of the life rather than the State being the center of the life."<sup>76</sup> And so that case is currently being litigated as well.<sup>77</sup> This is something that we're seeing from all different aspects. But standing is going to be a big issue in that case as well, because, once again, a lot of these are done through these kind of

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<sup>73</sup> *VA Parents, Teachers Ask Court to Protect Parents' Right to Direct Upbringing of Children*, ALL. DEFENDING FREEDOM (Oct. 31, 2022), <https://adfllegal.org/press-release/va-parents-teachers-ask-court-protect-parents-right-direct-upbringing-children>; see also Verified Complaint for Declaratory and Injunctive Relief - Demand for Jury Trial ¶¶ 4–6, at 2–3, *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.*, No. 5:22-cv-2237 (N.D. Ohio Dec. 12, 2022) (describing how a teacher was fired for refusing to use students' preferred pronouns as doing so would violate her religious beliefs); Verified Complaint ¶¶ 2–3, 8, 10–11, 19–20, at 1–5, *Ricard v. USD 475 Geary Cnty. Schs. Sch. Bd. Members*, No. 5:22-cv-04015 (D. Kan. Mar. 7, 2022) (describing how a Christian teacher was reprimanded, suspended, and denied a religious accommodation for refusing to follow a school board's pronoun policy).

<sup>74</sup> *VA Parents, Teachers Ask Courts to Protect Parents' Right to Direct Upbringing of Children*, *supra* note 73; *Figliola v. Sch. Bd.*, No. CL22-1304, slip op. at 3–5 (Va. Cir. Ct. Dec. 2, 2022) (describing Harrisonburg School Board's policy on gender pronouns and parental notification); *Supporting Our Transgender Students*, *supra* note 71.

<sup>75</sup> Memorandum in Support of Plaintiffs' Motion for Temporary Injunction at 15–17, *Figliola*, No. CL22-1304 (describing how the Harrisonburg school board's pronoun policy compels and constricts teachers' speech).

<sup>76</sup> Affidavit of Plaintiff D.F. in Support of Plaintiffs' Motion for Temporary Injunction ¶¶ 15–16, at 3, ¶¶ 24–26, 28–36, at 5–6, *Figliola*, No. CL22-1304 (describing plaintiff's religious beliefs regarding God's design for men and women and how the school's pronoun policy is contrary to plaintiff's religious beliefs); Affidavit of Plaintiff K.M. in Support of Plaintiffs' Motion for Temporary Injunction ¶¶ 13–26, at 4–5, *Figliola*, No. CL22-1304 (similar); Affidavit of Plaintiff L.N. in Support of Plaintiffs' Motion for Temporary Injunction ¶¶ 24–35, at 4–6, *Figliola*, No. CL22-1304 (similar); Affidavit of Plaintiff N.S. in Support of Plaintiffs' Motion for Temporary Injunction ¶¶ 11–24, at 2–4, *Figliola*, No. CL22-1304 (similar).

<sup>77</sup> *Parents, Teachers Sue VA School District for Concealing Children's Discomfort with Biological Sex*, *supra* note 70.



informal regulations where Congress is not passing laws necessarily on this.<sup>78</sup> So that creates challenges in litigation.<sup>79</sup>

**Mr. Mitchell:** So, it sounds like the regulations are saying to a school like College of the Ozarks, “Your rules about dorms, they are standing in the way of freedom.”

**Mrs. Rechtenbach:** Yes.

**Mr. Mitchell:** “We need to get rid of rules so that we can be free.” And then again, tying into Dr. Kengor’s comments about ordered freedom, the order that parents are in charge of their children.<sup>80</sup> But you would think that that would be like the boundary of common sense. We’re at a point where we’ve transgressed the boundaries of common sense in a lot of places in our wider society. But then the rubber really hits the road in terms of education and forming young people. Dr. Kengor, can you weigh in on that?

**Dr. Kengor:** Yeah, the whole abolition of objective truth; I mean, that’s the problem with so much of this, right?<sup>81</sup> But you have to use the tools at your disposal, your defense. We do have first-amendment freedoms: Freedom of Religion, Freedom of Speech, Freedom of Press, freedom of conscience.<sup>82</sup> Madison argued for the inclusion of conscience in the First Amendment, so, in addition to Freedom of Religion, he actually

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<sup>78</sup> Matt Bowman, *How the Biden Administration is Using Regulations to Erode Religious Freedom*, ALL. DEFENDING FREEDOM (July 12, 2022), <https://adflegal.org/article/how-biden-administration-using-regulations-erode-religious-freedom> (describing seven specific federal regulations that the Biden Administration is either promulgating or amending that will threaten religious liberty).

<sup>79</sup> See Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 481–82, 485, 508, 520 (2016) (describing how the Supreme Court, by creating “doctrines of extreme deference” to administrative agencies, made it difficult to challenge administrative regulations).

<sup>80</sup> See *supra* notes 15–19, 21–28 and accompanying text.

<sup>81</sup> See C.S. LEWIS, THE ABOLITION OF MAN OR REFLECTIONS ON EDUCATION WITH SPECIAL REFERENCE TO THE TEACHING OF ENGLISH IN THE UPPER FORMS OF SCHOOLS 18–20 (HarperCollins Publishers, Inc., HarperCollins ed. 2001) (1944) (defining the doctrine of objective value as “the belief that certain attitudes are really true, and others really false” and asserting that without objective value “justice or injustice, confront one another, and no *rapprochement* is possible”); C.S. LEWIS, *The Poison of Subjectivism*, in CHRISTIAN REFLECTIONS 72–73 (Walter Hooper ed. 2014) (1967) (“Until modern times no thinker of the first rank ever doubted that our judgements of value were rational judgements or that what they discovered was objective. . . . The modern view is very different. It does not believe that value judgements are really judgements at all.”).

<sup>82</sup> U.S. CONST. amend. I.

wanted to use the word conscience.<sup>83</sup> He wanted conscience in there. He lost that battle, and that's too bad that he did.<sup>84</sup> Colleen Sheehan, who is an expert on Madison said that today you could appeal to conscience, right?<sup>85</sup> Which we always should.

Today, when most Americans think about conscience, [however] they do not include the Supreme Judge of the World, the Moral Governor of the Universe, or even a standard of natural justice, as Jefferson did in the Declaration of Independence and the Virginia Statute for Religious Freedom, or as Madison did in the "Memorial and Remonstrance."<sup>86</sup> The appeal to conscience today tends to have nothing to do with a sense of duty to God or acting in accordance with a higher law. Rather, when people talk about conscience, they tend to mean something like—as Wikipedia [defines] it—a "gut feeling" or "vague sense of guilt."<sup>87</sup>

Right? That's not exactly what they mean by conscience.<sup>88</sup>

That said, let me add this: during the whole COVID situation, I was pleased to see—in many cases, but also a lot of cases that didn't honor this—one of the only real appeals that you had was to your appeal of conscience and religious freedom.<sup>89</sup> So many different colleges and

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<sup>83</sup> See 1 ANNALS OF CONG. 431 (1789) (Joseph Gales ed., 1834) (announcing James Madison's intention to propose amendments that he believed should be in the Constitution). Madison proposed: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* at 434. Scholars believe that Madison understood religious liberty "as the right to exercise religious duties according to the dictates of conscience, not the right to choose religious beliefs." MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 65–66 (First Harvard Univ. Press ed. 1998).

<sup>84</sup> See U.S. CONST. amend. I (showing that the word conscience was not included in the text).

<sup>85</sup> Colleen Sheehan, *James Madison and Our First Duty*, INST. FOR FAITH & FREEDOM (Sept. 23, 2014), <https://www.faithandfreedom.com/james-madison-and-our-first-duty-by-dr-colleen-sheehan/> (stating that the freedom of conscience and religion is a right the government cannot violate); *Conference Speaker Sheehan to Discuss 'First Freedoms'*, GROVE CITY COLL., <https://gcc.edu/Home/Staff-Directory/Staff-Detail/conference-speaker-sheehan-to-discuss-first-freedoms> (last visited Feb. 3, 2023).

<sup>86</sup> Sheehan, *supra* note 85.

<sup>87</sup> *Id.*

<sup>88</sup> See SANDEL, *supra* note 83, at 65–66 (stating that for "Madison and Jefferson, freedom of conscience meant the freedom to exercise religious liberty"); Sheehan, *supra* note 85 (describing Madison and Jefferson's understanding of conscience to be "directed to the accomplishment of good and the avoidance of evil").

<sup>89</sup> See *Doster v. Kendall*, 54 F.4th 398, 405–06 (6th Cir. 2022) (granting preliminary injunctions for eighteen Air Force service members' religious exemptions); *Schelske v. Austin*, No. 6:22-CV-049-H, 2022 WL 17835506, at \*1 (N.D. Tex. Dec. 21, 2022) (agreeing that soldiers have a right to sincere religious objection to the COVID-19 vaccine); *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 730 (6th Cir. 2021) (favoring sixteen student-athletes' religious exemptions). *But see, e.g., Ferrelli v. N.Y. Unified Ct. Sys.*, No. 1:22-CV-0068, 2022

institutions across the country, you could make a medical appeal if you wanted to be exempted from a vaccine,<sup>90</sup> and it would be rejected.<sup>91</sup> But many of the conscience appeals were honored,<sup>92</sup> and I know this in many different cases, but in many cases, they weren't honored,<sup>93</sup> which was really quite shocking. But that's something you ought to be able to appeal to your freedom of religion, freedom of conscience, and have that

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WL 673863, at \*1–2 (N.D.N.Y. Mar. 7, 2022) (denying a temporary restraining order and preliminary injunction for the employees of the New York Unified Court System who challenged the vaccine mandate); *Does 1-6 v. Mills*, 16 F.4th 20, 24 (1st Cir. 2021) (denying appellants preliminary injunction to prevent enforcement of the vaccination requirement because it violated appellants' rights under the Free Exercise Clause); *Harris v. Univ. of Mass.*, 557 F. Supp. 3d 304, 306 (D. Mass. 2021) (denying two students preliminary injunctions to enforce their religious exemptions). The most common case used to support vaccine mandates is *Jacobson v. Massachusetts*, 197 U.S. 11, 38–39 (1905) (holding a state may exercise its police power to compel vaccinations and override liberty interests for compelling state interests); Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 226–27 (2022) (asserting that *Jacobson* was mildly used until COVID put vaccines at the center of public attention).

<sup>90</sup> See, e.g., Ronald J. Colombo, When Exemptions Discriminate: Unlawfully Narrow Religious Exemptions to Vaccination Mandates by Private Colleges and Universities, 44 W. NEW ENG. L. REV. 293, 327–28 (2022) (demonstrating Syracuse University's process for medical exemptions); Vaccine Exemption Appeal Process, MICH. STATE UNIV., <https://msu.edu/together-we-will/covid19-vaccine/exemption-appeal.html> (last visited Feb. 3, 2023) (showing Michigan State University's medical appeal process); COVID-19 Vaccine Compliance, UNIV. OF MIA., <https://ehs.miami.edu/services/employee-health-office/coronavirus-vaccine/index.html> (last visited Feb 3, 2023) (showing University of Miami's medical appeal process for faculty and staff).

<sup>91</sup> See Paul Kengor, *Paul Kengor: NCAA Recognizes Natural Immunity – When Will Colleges Follow?*, TRIBLIVE.COM (Feb. 3, 2022, 7:00 PM), <https://triblive.com/opinion/paul-kengor-ncaa-recognizes-natural-immunity-when-will-colleges-follow/> (noting that many students' formal medical appeals were rejected, including students who had natural immunity); *Am.'s Frontline Drs. v. Wilcox*, No. EDCV 21-1243, 2021 WL 4546923, at \*1–2, 8 (C.D. Cal. July 30, 2021) (demonstrating a medical appeal regarding natural immunity to COVID was rejected).

<sup>92</sup> See, e.g., *School Immunizations*, MASS.GOV, <https://www.mass.gov/info-details/school-immunizations#school-immunization-data-> (last visited Mar. 14, 2023) (scroll down to “College data;” then click “College Statewide Exemption Rates 1992-Current”) (showing that 94% of the total exemptions, including religious exemptions, were allowed in Massachusetts colleges from 2021 to 2022).

<sup>93</sup> See, e.g., *Harris*, 557 F. Supp. at 306 (dealing with the University of Massachusetts's denial of a student's religious exemption); see also *Dahl*, 15 F.4th at 730 (dealing with sixteen student-athletes who sued because Western Michigan University ignored or denied their religious exemption requests and barred them from participating in athletic activities); Patrick Nothaft, *Western Michigan University Reaches Settlement in Lawsuit over COVID-19 Vaccine Mandate for Athletes*, MLIVE (Nov. 16, 2021, 3:43 PM), <https://www.mlive.com/broncos/2021/11/western-michigan-university-reaches-settlement-in-lawsuit-over-covid-19-vaccine-mandate-for-athletes.html> (showing that the sixteen students eventually received permanent relief from the vaccine mandate on freedom of conscience grounds).

honored.<sup>94</sup> Madison said, a man's freedom of conscience is more sacred than his property. His conscience is his property. It's "more sacred than his castle."<sup>95</sup> So to Madison, your conscience was like a tangible thing as your very property was.<sup>96</sup> So, these are things that that we can appeal to—or we should be able to appeal to. We're going to lose some cases. We're going to win other cases. But you have to appeal to that.

I would add—aside from that—using some of the different buzz words and slogans that are out there by the other side.<sup>97</sup> They like to use words like tolerance and diversity;<sup>98</sup> well, then, use it back against them, right? If you really believe in tolerance, if you really believe in diversity, then you ought to tolerate and honor my diverse point of view.<sup>99</sup> I have seen

<sup>94</sup> See Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160–62 (2013) (claiming that the existence of the freedom of religion clause is proof of the "government's recognition of the priority and superiority of God's true commands over anything the state or anyone else requires or forbids"); Memorandum of Law in Support of Preliminary Injunction at 2–3, 14–16, 20, *Harris*, 557 F. Supp. 3d 304 (No. 1:21-cv-11244) (arguing that the denial of plaintiff's valid religious exemption in Massachusetts violated First Amendment rights as well as procedural and substantive due process rights); Brief Amicus Curiae of the Foundation for Moral Law, in Support of Plaintiffs/Appellees and Affirmance at 4–5, *Doster*, 54 F.4th 398 (No. 1:22-cv-00084) ("The First Amendment applies to all servicemen and servicewomen without exception."); Plaintiffs-Appellants' Opening Brief at 2–5, *Does 1-6*, 16 F.4th 20 (No. 1:21-cv-242) (contending that employers in Maine have a duty under Title VII of the Civil Rights Act to provide religious exemptions to the COVID-19 vaccine mandate).

<sup>95</sup> James Madison, *For the National Gazette, 27 March 1792, Property*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-14-02-0238> (last visited Apr. 8, 2023).

<sup>96</sup> *Id.*

<sup>97</sup> See Paulsen, *supra* note 94, at 1171 (noting that the modern view of religious freedom provides weaker First Amendment protection because the modern view only preserves religious ideas because "it is nice, good, liberal, and tolerant"); see, e.g., Benjamin Hobson, *The Myth of the 'So-Called Tolerant Left,'* INDEPENDENT (Aug. 20, 2020), <https://www.independent.co.uk/the-myth-of-the-so-called-tolerant-left/> (listing buzz words like "woke" and "tolerant left" as catchphrases the "left" uses).

<sup>98</sup> See Jonathan Butcher & Mike Gonzalez, *Critical Race Theory, the New Intolerance, and Its Grip on America*, HERITAGE FOUND., Dec. 7, 2020, at 9–11 (noting that Critical Race Theory and cancel culture are strategically used to suppress free speech and legal and administrative neutrality); Aja Romano, *A History of "Wokeness,"* VOX (Oct. 9, 2020, 10:00 AM), <https://www.vox.com/culture/21437879/stay-woke-awokeness-history-origin-evolution-controversy> (noting that the "woke" movement has been marketed to associate with leftist buzz words like diversity and inclusion).

<sup>99</sup> See Winfried Löffler, *Secular Reasons for Confessional Religious Education in Public Schools*, 149 DÆDALUS, J. AM. ACAD. ARTS & SCIS. 119, 127–28 (2020) (arguing that teaching about tensions between different religions in public schools will promote worldview tolerance); Liz Jackson, *Free Speech, False Polarization, and the Paradox of Tolerance*, 77 PHIL. EDUC. 139, 139, 143 (2021) (noting that in the United States opposing views are often met with intolerance); Alexis Levit, *Why are the Tolerant Left so Intolerant?,* STAN. REV. (Apr. 20, 2020), <https://stanfordreview.org/stanford-intolerant-left/> (discussing how Stanford, a liberal institution, does not practice diversity or tolerance towards political minorities like conservatives); Paul G. Kengor, *The Liberal Religion of "Tolerance,"* INST. FOR FAITH &

this many times; you say that back to them and they give you the deer-in-the-headlights look like, “I hadn’t really thought of that. Oh, you mean diversity ought to include your different opinion?” Yeah, it doesn’t just include race, gender and sexual orientation, right? At a university, what’s more important than diversity of ideas?

And I would add here, too, on the academic freedom point: academic freedom has become this Trojan horse for so many bad [ideas].<sup>100</sup> It’s tough. I believe in academic freedom. My next book that’s coming out is on Bella Dodd, who is probably the most famous female communist of the twentieth century, and she eventually left the party.<sup>101</sup> She is the one that organized the Teachers Union for the Communist Party and so forth.<sup>102</sup> She talked about when she ran the New York State Teachers Union—which had about ten thousand members, about a thousand of them were party members.<sup>103</sup> She said we use that phrase “academic freedom” to get in every idea that we wanted to get in.<sup>104</sup>

But if you’re a university, a college place like Regent, a place like Grove City College, the college has a mission statement as well.<sup>105</sup> And so the faculty that you hire usually do and should sign a contract to agree to adhere to basic tenets of the mission statement, and at the least not to publicly fight against or try to undermine those values.<sup>106</sup> In that sense

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FREEDOM (Sept. 26, 2014), <https://www.faithandfreedom.com/the-liberal-religion-of-tolerance/> (explaining that liberals actually practice selective tolerance that often excludes religious views).

<sup>100</sup> See MARY A. NICHOLAS & PAUL KENGOR, *THE DEVIL AND BELLA DODD: ONE WOMAN’S STRUGGLE AGAINST COMMUNISM AND HER REDEMPTION* 150 (2022) (discussing how communists used academic freedom as a Trojan horse to teach socialism); *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, GOVERNOR RON DESANTIS (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> (discussing the prevalence of “woke indoctrination” in Florida schools).

<sup>101</sup> NICHOLAS & KENGOR, *supra* note 100, at 3.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 220–21.

<sup>104</sup> *Id.* at 142.

<sup>105</sup> *Vision & Mission*, REGENT UNIV., <https://www.regent.edu/about-regent/vision-mission/> (last visited Feb. 1, 2023) (“Regent University serves as a center of Christian thought and action to provide excellent education through a biblical perspective and global context equipping Christian leaders to change the world.”); *Vision, Mission & Values*, GROVE CITY COLL., <https://www.gcc.edu/home/our-story/faith-freedom/vision-mission-values> (Feb. 1, 2023) (“Grove City College equips students to pursue their unique callings through a Christ-centered, academically excellent, and affordable learning and living experience.”).

<sup>106</sup> See REGENT UNIVERSITY STUDENT HANDBOOK 9–10 (2022) (showing that Regent University expects all employees to understand and adhere to Regent’s Statement of Faith, especially while acting in their official capacity); *Statement of the Grove City College Board of Trustees*, GROVE CITY COLL. (May 13, 2022), <https://www.gcc.edu/Home/Our-Story/Leadership-Teams/Office-of-the-President/A-Response-to-the-CRT-Petition> (“My job as president, for which I am accountable to the Board of Trustees, is to ensure that our faculty and staff are missionally aligned.”).

there are certain limits to academic freedom; in the sense that you're working within the organization and its mission. But too often people will again use that academic freedom as a Trojan horse to undermine the very ideas that the institution wants to push forward.<sup>107</sup> So, it's a tricky subject, and be careful how they use that; they too often use it as a tool of exploitation, rather than the way that it properly should be used.<sup>108</sup>

**Mr. Mitchell:** Yes, that's well said. Eugene Kevane was a professor at Catholic University in Washington in the 1960s.<sup>109</sup> In 1967, the Board of Trustees fired a young professor because he was teaching undergraduates basically anti-Christian principles.<sup>110</sup> Well, he led a walk-out of the students and professors in the name of freedom, protesting the Board.<sup>111</sup> And they [the professors] basically, said, "This is America. How can you tell us what to believe and what to think? This is America."<sup>112</sup> And Eugene Kevane, who was a professor—he was the Dean of the School of Education—he said, "Yes, this is America. That's why we have the freedom to be a religious institution, and we have the freedom to have a test of faith at our private school."<sup>113</sup> But they [the Board of Trustees] lost the case. This was not a case in court, but the board basically backed down because the media was outside.<sup>114</sup> The students and professors were protesting.<sup>115</sup> It was the front-page story in the *New York Times* for about four days that week, and they finally caved.<sup>116</sup> And in the Board's minutes

<sup>107</sup> See *supra* note 100 and accompanying text.

<sup>108</sup> See Cary Nelson, *Defining Academic Freedom*, INSIDE HIGHER ED (Dec. 21, 2010), <https://www.insidehighered.com/views/2010/12/21/defining-academic-freedom> (defining academic freedom to mean that "both faculty members and students can engage in intellectual debate without fear of censorship or retaliation," and clarifying that the purpose of academic freedom is to serve the public good); NICHOLAS & KENGOR, *supra* note 100, at 150 (showing how academic freedom was not used to serve the public good); Post Editorial Board, *'Living Hell' and the Destruction of Academic Freedom*, N.Y. POST (Nov. 26, 2022, 6:26 PM), <https://nypost.com/2022/11/26/living-hell-and-the-destruction-of-academic-freedom/> (describing how one Stanford professor's life became "a living hell" due to a "deeply hostile work environment" after he, along with other professors from Harvard and Oxford, authored a declaration flagging the huge medical and social costs of the pandemic lockdown).

<sup>109</sup> MITCHELL, *supra* note 38, at 15 & n.1, 103.

<sup>110</sup> *Id.* at 25, 29, 31 (describing how Father Charles Curran, associate professor of Sacred Theology, was fired).

<sup>111</sup> *Id.* at 44–47.

<sup>112</sup> *Id.* at 250 ("Curran thus saw himself as a crusader for the American values of freedom and democracy, which he felt the traditional Catholic understanding of authority had opposed and even destroyed.").

<sup>113</sup> *Id.* at 103, 250–51.

<sup>114</sup> *Id.* at 55.

<sup>115</sup> See *supra* note 111 and accompanying text.

<sup>116</sup> MITCHELL, *supra* note 38, at 64 & n.32; John D. Morris, *Catholic U. Classes Stopped as Protest Spreads in Faculty; Catholic U. is Idle as Protest Widens*, N.Y. TIMES (Apr. 21, 1967), <https://www.nytimes.com/1967/04/21/archives/catholic-u-classes-stopped-as>

in the confidential meeting—before this all happened—they said, “Well, we’re going to lose this battle to win the war,”<sup>117</sup> but unfortunately, in my opinion, they didn’t do that. They lost the battle, and the Left never gave up pushing back against them.<sup>118</sup>

What’s interesting now—I want to talk about a very recent case in Wisconsin. *McAdams v. Marquette* decided in [2018] by the Wisconsin Supreme Court.<sup>119</sup> We’ve come full circle. Whereas in the past, the big bad authority was the conservative religious school.<sup>120</sup> Now the big bad authority is the woke university that is forcing people to adhere to a party line.<sup>121</sup> A professor at Marquette University []—he blogged on his private blog, criticizing a graduate instructor who would shut down any debate about gay marriage within her class.<sup>122</sup> A young man in the class, who was at Marquette—nominally a Christian university—said, “Well, I believe that marriage is for a man and a woman, and that’s my religious faith.”<sup>123</sup> And she [the instructor] said, “That’s hate speech. You are not allowed to say that in my classroom.”<sup>124</sup> So Professor McAdams blogged about her,

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protest-spreads-in-faculty-catholic-u.html; *Dynamic Priest*; Charles Edward Curran, N.Y. TIMES (Apr. 25, 1967), <https://www.nytimes.com/1967/04/25/archives/dynamic-priest-charles-edward-curran.html>.

<sup>117</sup> See MITCHELL, *supra* note 38, at 55.

<sup>118</sup> See *id.* at 256–58.

<sup>119</sup> *McAdams v. Marquette University* was authored by Justice Daniel Kelly the founding editor of Regent University Law Review. 914 N.W.2d 708, 708 (Wis. 2018).

<sup>120</sup> See MITCHELL, *supra* note 38, at 83–84 (contending that in the 1960s the AAUP stopped tolerating the idea that religious faith and academic freedom could coexist in universities).

<sup>121</sup> See, e.g., *McAdams*, 914 N.W.2d at 712–14 (showing that a university fired a professor and revoked his tenure for publishing a blog post about another professor telling a student that he did not have the right to openly discuss gay rights in class because it was hate speech); Butcher & Gonzalez, *supra* note 98, at 9–13 (discussing how the liberal woke university has forced acceptance of ideas like black Nationalism and Critical Race Theory); Levit, *supra* note 99 (noting that conservatives at Stanford faced public shaming after Ben Shapiro’s speech on campus).

<sup>122</sup> *McAdams*, 914 N.W.2d at 712–14; John McAdams, *Marquette Philosophy Instructor: “Gay Rights” Can’t Be Discussed in Class Since Any Disagreement Would Offend Gay Students*, MARQ. WARRIOR, (Nov. 9, 2014, 6:06 PM), <http://mu-warrior.blogspot.com/2014/11/marquette-philosophy-instructor-gay.html>.

<sup>123</sup> See *McAdams*, 914 N.W.2d at 713, 715; McAdams, *supra* note 122. Marquette University promotes itself as a Catholic university, but some believe Marquette’s religious foundation is just a social construct that does not fully conform to Catholic beliefs. *Compare About Marquette*, MARQ. UNIV., <https://www.marquette.edu/about/> (last visited Feb. 13, 2023) (describing itself as “a transformative, Catholic, Jesuit university”), *with* McAdams, *supra* note 122 (“Like the rest of academia, Marquette is less and less a real university. And when gay marriage cannot be discussed, certainly not a Catholic university.”).

<sup>124</sup> See *McAdams*, 914 N.W.2d at 713 (revealing the instructor said that “some opinions are not appropriate, . . . you don’t have a right in this class to make homophobic comments”); see also McAdams, *supra* note 122 (noting how McAdams believed these comments by the graduate professor showed a typical tactic among liberals in which opinions contrary to their belief are “deemed ‘offensive’ and [insinuating that contrary opinions] need to be shut up”).

criticizing her, and the University suspended him and banned him from coming onto campus, as if he was some kind of threat to everyone's security.<sup>125</sup> That case went to the Wisconsin Supreme Court [], and the court found in favor of Professor McAdams against Marquette for breach of contract, because they said that he had the right to legitimately exercise his academic freedom.<sup>126</sup> So it's amazing, I guess, that we've come to this point now, where now the authority—which once was a very religious authority that was sometimes overbearing—has now become an authority against people of faith. Ms. Rechtenbach, you have a vast array of cases that you're aware of and know so much about. Can you share with us any context of that fight for freedom and religious freedom within education?

**Mrs. Rechtenbach:** Yes, what's really interesting, is, I wrote down when you were sharing about your story—where the professor said, “you know we're not here to indoctrinate you.”<sup>127</sup> Well, now, you have teachers and schools and universities overtly saying, “our purpose is to indoctrinate students into this tolerant, diverse perspective, and if you are opposed to that, then you should be silenced.”<sup>128</sup> So, it's really interesting how indoctrination—they used to believe that it was religious indoctrination—

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<sup>125</sup> *McAdams*, 914 N.W.2d at 712–13; see Karen Herzog, *Marquette University Professor John McAdams Remains Banned from Campus*, MILWAUKEE J. SENTINEL (Jan. 13, 2015), <https://archive.jsonline.com/news/education/marquette-university-professor-john-mcadams-remains-banned-from-campus-b99425150z1-288427731.html> (a Marquette University spokesperson said, regarding McAdams' banishment, “The university has a policy in which it clearly states that it does not tolerate harassment and will not stand for faculty members subjecting students to any form of abuse, putting them in harm's way”); *McAdams*, *supra* note 122.

<sup>126</sup> *McAdams*, 914 N.W.2d at 712, 739–40.

<sup>127</sup> See *supra* p. 477–78.

<sup>128</sup> See, e.g., *McAdams*, 914 N.W.2d at 713 (silencing a student by telling them they could drop the class if they disagreed because “some opinions are not appropriate”); Michael Torres, *Parents Must Stop Letting Woke Colleges Indoctrinate Their Children*, NEWSWEEK (July 19, 2020, 8:00 AM), <https://www.newsweek.com/parents-must-stop-letting-woke-colleges-indoctrinate-their-children-opinion-1518780> (noting how colleges are not tolerating dissent from “woke” ideology); Conor Friedersdorf, *What an NYU Administrator Got Wrong About Campus Speech*, ATLANTIC (Apr. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/04/what-an-nyu-administrator-got-wrong-about-campus-speech/524442/> (noting that a vice provost at New York University defended students that shut down speakers at other institutions of higher education asserting that “the idea of freedom of speech does not mean a blanket permission to say anything anybody thinks”). School officials that “do not believe any religious or political or other potentially controversial speech is appropriate in school . . . could turn the public schools into indoctrination centers and result in treating students as ‘closed-circuit recipients.’” Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1024–25 (1995) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)).



and now, indoctrination is something that they are trying to accomplish in schools, but not from a religious perspective.<sup>129</sup>

But, in terms of cases, you have an entire kind of line of religious freedom in schools. So, the first one is *Barnette*, which was in 1943, and this was a Jehovah's witness, who said, "It is against my belief to salute the flag."<sup>130</sup> They used to, every morning, stand up and say the Pledge of Allegiance—and a lot of schools don't even do that anymore—but a Jehovah's witness family said, "We only salute God. We do not salute the flag."<sup>131</sup> And they won in 1943 in the Supreme Court, and that was a big win.<sup>132</sup> But then you have *Everson*, which was in 1947.<sup>133</sup> And *Everson* is a very interesting case, because you have a New Jersey law that basically reimbursed parents for transportation to Catholic private schools, and a taxpayer challenged this law.<sup>134</sup> That's also interesting about the Establishment Clause: it's really the only area where a taxpayer can challenge a law in other areas.<sup>135</sup> If I went in and said, "I'm a taxpayer. I have a problem with my money going to X, Y or Z," they would say, "get out of here."<sup>136</sup> You can't do anything about that. But the Establishment

<sup>129</sup> See, e.g., Nicholas Humphrey, *What Shall We Tell the Children?*, 65 SOC. RSCH. 777, 779–81, 783–84, 787–89 (1998) (arguing against religious indoctrination through a neuropsychologist lens by asserting that religions produce a cultural dungeon); *infra* notes 117–224 and accompanying text (discussing the trend toward homeschooling as Christian parents leave after the governmental mandates of COVID); Jerry Bergman, *Darwinism and Indoctrination by Our Public Schools*, REVOLUTION AGAINST EVOLUTION (Feb. 26, 2005), <https://www.rae.org/essay-links/indoctrination/> (discussing how the indoctrination in Public Schools and Universities' textbooks has moved away from traditional morality and towards Darwinism).

<sup>130</sup> *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943).

<sup>131</sup> *Id.*; see Laura Rene McNeal, *From Hoodies to Kneeling During the National Anthem: The Colin Kaepernick Effect and Its Implications for K-12 Sports*, 78 LA. L. REV. 145, 169 (2017) ("[I]n the current education milieu, students are refusing to stand during the national anthem."). See generally Valeriya Safronova & Joanna Nikas, *High School Students Explain Why They Protest Anthems and Pledges*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/style/high-school-students-explain-why-they-protest-anthems-and-pledges.html> (providing reasons why "high school students . . . sit or kneel during the national anthem or Pledge of Allegiance, or why they stand and recite the words" since Colin Kaepernick began sitting in 2016).

<sup>132</sup> *Barnette*, 319 U.S. at 642.

<sup>133</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>134</sup> *Id.* at 3.

<sup>135</sup> U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion."); *Flast v. Cohen*, 392 U.S. 83, 85, 103, 105–06 (1968) (explaining that taxpayers have standing for Establishment Clause violations); *ArtIII.S2.C1.6.5 Taxpayer Standing*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-5/ALDE\\_00013002/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-5/ALDE_00013002/) (last visited Jan. 14, 2023) (noting that taxpayer standing under the Establishment Clause is a "narrow exception").

<sup>136</sup> See CYNTHIA BROUGH, CONG. RSCH. SERV., LEGAL STANDING UNDER THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE 1–2 (2011) (affirming that even if a citizen has a grievance about their taxes, they likely will not have standing).

Clause, they let you challenge.<sup>137</sup> And so a taxpayer challenged it, and this case, the right side came out—they said, “No, that’s fine. That doesn’t violate the establishment clause.”<sup>138</sup> But the opinion also says, in the words of Jefferson, the clause against establishment of religion by law was intended to “erect ‘a wall of separation between Church and State.’”<sup>139</sup>

This line would then be resurrected years later, and the entire purpose of the establishment clause would be changed.<sup>140</sup> If you look at the history of the Establishment Clause, if you go back to when they were discussing this clause, it was intended to be a principle of federalism.<sup>141</sup> So you have, you know, states on one side with religion, and then you have the federal government on the other side. So, at the time the States had churches.<sup>142</sup> So, you know, Virginia, or whatever state, they could say, “Our State, believes in this religion,” and that was fine under the establishment clause.<sup>143</sup> The issue was you couldn’t create a national religion.<sup>144</sup> You couldn’t [] say, the United States is now Presbyterian. Then you had Jefferson who wrote this letter in, I believe it was 1803, to the Baptists, which was a minority religion at the time and Jefferson was

<sup>137</sup> *Flast*, 392 U.S. at 105–06 (noting that the Establishment Clause puts a limit on taxation and therefore is different than a normal taxpayer grievance); see BROUGHER, *supra* note 136, at 2, 4.

<sup>138</sup> See *Everson*, 330 U.S. at 8, 16–18 (holding there was not an Establishment Clause violation).

<sup>139</sup> *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

<sup>140</sup> Daniel Dreisbach, *The Mythical “Wall of Separation”: How a Misused Metaphor Changed Church–State Law, Policy, and Discourse*, HERITAGE FOUND. (June 23, 2006), <https://www.heritage.org/political-process/report/the-mythical-wall-separation-how-misused-metaphor-changed-church-state-law#:~:text=Nearly%20seven%20decades%20later%2C%20in,and%20State> (noting that the Founders originally intended for the Establishment Clause to check the federal government’s power but instead it has morphed into “a strict separations dogma intolerant of religious influences” in federal and state courts).

<sup>141</sup> Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 604, 629–31, 636–37 (2006) (“The precise and clear intention and meaning of those who drafted the Establishment Clause has been lost on the modern Supreme Court, which, with the recent exception of Justice Thomas, has failed to appreciate the Founders’ original concern with federalism.”).

<sup>142</sup> Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 672, 676–77 (2013) (noting that the Establishment Clause was originally understood merely to reserve to the states the power to establish or disestablish religion); see also John R. Vile, *Established Churches in Early America*, FREE SPEECH CTR., <https://mtsu.edu/first-amendment/article/801/established-churches-in-early-america> (last visited Jan. 16, 2023).

<sup>143</sup> See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436–37, 1503 (1990) (“[A]s the delegates gathered at the Constitutional Convention in Philadelphia in 1787 and at the meeting of the First Congress in New York in 1789, some form of establishment still held sway in most of New England, and the resolution of disestablishment controversies elsewhere could not be seen as assured.”); Gedicks, *supra* note 142, at 672; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50, 52 (2004) (Thomas, J., concurring); see also Vile, *supra* note 142.

<sup>144</sup> See Gedicks, *supra* note 142, at 676–77.

not as religious, and he had just gone through this very contentious election.<sup>145</sup> And he was basically saying, “Yes, they came after me for not being religious, but I want to protect the minority religions.”<sup>146</sup> So, he was saying, there is a wall between me as the President, the Federal government, and religion.<sup>147</sup> He wasn’t saying that religion had to be kept out of all institutions. We know that because he then, as when he was governor, declared days of prayer and thanksgiving.<sup>148</sup> This phrase would then be created in *Everson*, that for the next eighty years has now led to religion being slowly removed, because the entire purpose of the Establishment Clause was changed.<sup>149</sup> It was changed from a way to protect religious freedom. It was supposed to work in tandem with the Free Exercise Clause, so that you had the ability to exercise your religion, and the state could not infringe on your ability to exercise your religion—the State being the federal government.<sup>150</sup>

Then we go on to *McCullum*, which was in 1948, which held that religious instructors from different denominations couldn’t go into public schools to offer voluntary religious lessons.<sup>151</sup> These were not required.<sup>152</sup> The parents said, “I want my child to have religious lessons,” but they

<sup>145</sup> Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson’s “Wall of Separation” Metaphor*, 16 CONST. COMMENT. 627, 627, 629–30 (1999).

<sup>146</sup> See David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 399, 403, 414–16 (2003) (noting that while “Jefferson was [not] a fervent religionist” he understood the concerns of the Danbury Baptists and “assured them that the federal government would never meddle with the free exercise of religion”); *Jefferson’s Religious Beliefs*, THOMAS JEFFERSON’S MONTICELLO, <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/jeffersons-religious-beliefs/> (last visited Feb. 14, 2023) (“Thomas Jefferson’s religious beliefs . . . were a critical topic in several of his important political campaigns and he was viciously and unfairly attacked for alleged atheism.”).

<sup>147</sup> Dreisbach & Whaley, *supra* note 145, at 656, 662–63.

<sup>148</sup> *Id.* at 657 (noting that in 1779, as governor, Jefferson issued proclamations of prayer and thanksgiving). However, as president, Jefferson departed from precedent and no longer issued days of prayer and thanksgiving. *Id.* at 632. Despite this departure, there are several instances that Jefferson virtually mimicked the same rhetoric of his presidential predecessors. *Id.* at 656 (noting that his annual messages were “replete with similar expressions of thanksgiving and devotion”).

<sup>149</sup> See Barton, *supra* note 146, at 411, 457–58 (noting that *Everson* introduced Jefferson’s wall of separation in 1947); see also Hana M. Ryman & J. Mark Alcorn, *Establishment Clause (Separation of Church and State)*, FREE SPEECH CTR., <https://www.mtsu.edu/first-amendment/article/885/establishment-clause-separation-of-church-and-state> (last visited Jan. 16, 2023) (showing that religious diversity continues to expand and grow, as indicated by *Carson v. Makin* in 2022).

<sup>150</sup> See Barton, *supra* note 146 at 415–16, 418; Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313–14 (1986).

<sup>151</sup> *McCullum v. Bd. of Educ.*, 333 U.S. 203, 207–12 (1948).

<sup>152</sup> *Id.* at 207, 209.

wouldn't allow the instructors to come in and do this.<sup>153</sup> Then in 1962, *Engel*, which held that non-sectarian school sponsored prayer violated the establishment clause.<sup>154</sup> So, now [school-sponsored] prayer is completely out of schools.<sup>155</sup> Then in 1981, you have *Widmar*, where the court ruled, that the University of Missouri could not exclude from campus facilities a student group that wanted to just use the building for worship and prayer.<sup>156</sup> So they were saying, "No, a student group can't come in here on your own time and have a Bible study and have prayer time, have worship."<sup>157</sup> But the court said, "No, that doesn't violate the Establishment Clause."<sup>158</sup> So that was a win. But then, in 1985, you have *Wallace*, where the court overturned a law that just allowed a moment of silence.<sup>159</sup> The school would have a moment of silence in the morning, where you could pray, where you could think, meditate whatever you want to do.<sup>160</sup> There was no prayer led, and the court said "No," even that violated the establishment clause.<sup>161</sup> Then in 2000—skipping forward a few years—you have *Santa Fe v. Doe*, where the school had a student who would recite a prayer before football games.<sup>162</sup> That was student led, and they said, "No, this is school sponsored, even though it's a student giving the prayer. And, the students that are listening are basically being forced to hear this prayer, and therefore that violated the establishment laws."<sup>163</sup> Now 2022. We just had *Kennedy v. Bremerton*, where a teacher wanted to kneel silently, say a prayer in his head for fifteen seconds, and the school said, "that violates the Establishment Clause for you to think a prayer in your head while on school property."<sup>164</sup> My favorite part is that the Ninth Circuit said, "Oh, well, you can pray non-demonstratively, so as long as no one knows you're praying, then you're fine. But as soon as somebody

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<sup>153</sup> See *id.* at 207, 211–12.

<sup>154</sup> *Engel v. Vitale*, 370 U.S. 421, 424–25, 430, 436 (1962).

<sup>155</sup> See *id.* at 425, 430, 435; Mark W. Cordes, *Schools, Worship, and the First Amendment*, 48 SUFFOLK U.L. REV. 9, 17 (2015) (noting after *Engel* "school-sponsored prayer in public schools violate[d] the Establishment Clause").

<sup>156</sup> *Widmar v. Vincent*, 454 U.S. 263, 265, 269, 277 (1981).

<sup>157</sup> See *id.* at 265.

<sup>158</sup> See *id.* at 270–71, 273.

<sup>159</sup> *Wallace v. Jaffree*, 472 U.S. 38, 40, 60–61 (1985) (holding that "a period of silence for meditation or voluntary prayer" violated the Establishment Clause).

<sup>160</sup> *Id.* at 40, 60; *id.* at 89 (Burger, J., dissenting) ("Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes.").

<sup>161</sup> See *id.* at 41–42, 61 (majority op.).

<sup>162</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).

<sup>163</sup> See *id.* at 308–09, 312, 316–17.

<sup>164</sup> *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1012, 1014 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022) (describing Kennedy's "brief, silent prayer" and noting that the only reason for his suspension was "the risk of an Establishment Clause violation").

knows that you could potentially be praying, that violates the Establishment Clause.”<sup>165</sup>

**Dr. Kengor:** Maybe in church on a Sunday.

**Mrs. Rechtenbach:** Exactly, yes. That’s fine. Yes, if you’re in church on a Sunday, those two hours you’re allowed to pray. But outside of that—and especially on public property—you’re not allowed to.<sup>166</sup> But this policy would then think about, you know a Jewish teacher who wants to wear a yarmulke, that’s demonstrative. What about a Catholic teacher who is eating lunch, does the Sign of the Cross, and gives thanks for their meal? That’s demonstrative. A Muslim woman who wants to cover her hair—there are so many different things that this would impact not just for Christians, but for religion across the board. Thankfully, this case went all the way up to the Supreme Court once, was denied cert[iorari], went all the way back through the lower courts again, and the Supreme Court took it,<sup>167</sup> and thankfully [], in a very strongly worded opinion, [said] “no, that does not violate the Establishment Clause, and, in fact, you, the school Bremerton, are violating the Free Exercise Clause.”<sup>168</sup> You’re violating the Free Speech Clause; really they’re violating the Establishment Clause too by shutting down this teacher’s ability to silently pray on school property.”<sup>169</sup>

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<sup>165</sup> See *id.* at 1015–16, 1018, 1021 (noting that Kennedy’s prayers violated the Establishment Clause because they were “a demonstration necessarily directed at students and the attending public” and “readily observable demonstrative religious activity, while on-duty in the performance of his or her job, and in the presence of students”).

<sup>166</sup> The Ninth Circuit’s reasoning, taken to its logical extreme, would have had enormous ramifications for free speech and free exercise. Cf. Mallory B. Rechtenbach, *Personal Foul—Encroachment: How Kennedy v. Bremerton School District Blurs the Line Between Government Endorsement of Religion and Private Religious Expression*, 35 REGENT L. REV. 295, 332 (2023) (noting that the Ninth Circuit’s rule would include any and all demonstrative religious conduct in front of students); *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring) (concurring in the original denial of certiorari but expressing concern that the Ninth Circuit’s opinion could be read to require Kennedy to refrain from “any manifestation of religious faith,” even when he was off duty in the bleachers during a game); Jessalyn McAlister, Note, *Religious Flea-Flicker at the Fifty-Yard Line: Kennedy v. Bremerton School District and the Establishment Clause*, 13 HOUS. L. REV. ONLINE 1, 9 (2022) (discussing how the Ninth Circuit’s holding would apply equally to a teacher praying at lunch if the opinion had not explicitly excepted that scenario).

<sup>167</sup> *Kennedy*, 142 S. Ct. at 2419–21.

<sup>168</sup> See *id.* at 2433 (“Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment.”).

<sup>169</sup> *Id.*

**Dr. Kengor:** If I could pick up on that point, it's interesting in the *Everson* case. They say, "in the [opinion] of Jefferson."<sup>170</sup> Right? Well who cares about—I mean that is a letter to the Danbury Baptist of Connecticut, and there are probably about as many Baptists in Connecticut today as there were back then, by the way. But that's not in the Constitution,<sup>171</sup> and I remember when—I'll never forget this—I was speaking on the faith of Ronald Reagan at the National Presbyterian Church in D.C., which is the Church Reagan was a member of when he was President,<sup>172</sup> and at the end of this talk this elderly gentleman—very well dressed—came up to me with his wife. He had waited and waited, and he was so angry at me that he was literally shaking, and he accused me of bearing false witness in front of about two hundred people. And I said, "sir, what did I do?" And he said, "you never mentioned once that the words separation of Church and State are in the Constitution." And I said, "well, they're not."<sup>173</sup> And I walked through all of this with him. And I recited the First Amendment, "Government shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."<sup>174</sup>

And what happens with that? They take the Establishment Clause, and they blow it up and exaggerate it beyond what it was intended to mean, and then they completely ignore the Free Exercise clause.<sup>175</sup> I mean, you would think that there would be a balance here right? But there's the one taken to its highest possible extreme, and then the other is ignored there completely.<sup>176</sup> They've done this forever, and they still do it to this day<sup>177</sup>—you have to catch them on it. You have to. This is part of

<sup>170</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1946) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878))).

<sup>171</sup> See U.S. CONST. amend. I (merely providing that "Congress shall make no law respecting an establishment of religion"); see also William J. Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, ST. MARY'S L.J. 1, 2–3 (1984) ("[The] phrase ['separation of church and state'] does not appear in the Constitution . . .").

<sup>172</sup> PAUL KENGOR, *A POPE AND A PRESIDENT* 319–20 (2018).

<sup>173</sup> *Supra* note 171 and accompanying text.

<sup>174</sup> *Id.*

<sup>175</sup> See Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 UTAH L. REV. 1155, 1164–66 (2004) (noting how the Establishment Clause has encompassed many areas that should be addressed by the Free Exercise clause instead).

<sup>176</sup> See *id.* ("[Free exercise] has taken somewhat of a beating from judges rendering an 'expansive interpretation to the notion of "establishment," while at the same time ignoring the restrictions 'inflict[ed] on the associational aspects of free exercise.'" (quoting Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 678 (1992))).

<sup>177</sup> See *id.* at 1165 (observing the undue elevation of the Establishment Clause for the past decade and a half); see, e.g., Brief for Respondent at 40, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (No. 21-418) (attempting to use the Establishment Clause as a defense to a Free Exercise claim).

what all of you need to do—is learn this stuff and go out and fight these battles, and win some of them. You’re going to win some. You’re going to lose some.

The ACLU came out in favor of vax mandates of all things.<sup>178</sup> I couldn’t believe that one. They are trying to indoctrinate, and they really are trying to go after religion. They really are trying to undermine religious freedom, but they do it selectively.<sup>179</sup> They give certain groups a pass, other groups they don’t.<sup>180</sup> Have you ever seen the Steven Crowder video where he goes into a Muslim bakery in Dearborn, Michigan, and tries to order a wedding cake for his same-sex marriage ceremony?<sup>181</sup> The Muslim man says, “no we don’t we don’t do that.”<sup>182</sup> I asked a former student of mine who’s at ADF—this is probably about four years ago—if he knew of a single case in the country where a Muslim bakery or baker was being sued for refusing to provide a cake for a same-sex marriage. He said, we’ll get back to you on that. And he did not know of a single case, because they don’t want those guys.<sup>183</sup> They want the Christians. That’s who they’re coming after. That’s who they’re fighting.<sup>184</sup>

<sup>178</sup> David Cole & Daniel Mach, *Civil Liberties and Vaccine Mandates: Here’s Our Take*, AM. C.L. UNION (Sept. 2, 2021), <https://www.aclu.org/news/civil-liberties/civil-liberties-and-vaccine-mandates-heres-our-take>.

<sup>179</sup> See Montse Alvarado, *The ACLU Used to Defend Religious Freedom. Now, They Target Catholic Adoption Agencies*, USA TODAY (Oct. 2, 2020, 7:01 AM), <https://www.usatoday.com/story/opinion/voices/2020/10/02/aclu-religious-freedom-cases-beckett-catholic-adoptions-column/3571133001/> (chronicling the ACLU’s shift in its attitude towards religious liberty and its recent cases advocating against religious freedom). *But see Martin v. Houston*, AM. C.L. UNION, <https://www.aclu.org/cases/martin-v-houston> (June 18, 2018) (noting a case in which the ACLU represented a Christian pastor in a free exercise case utilizing the Religious Land Use and Institutionalized Persons Act); *Religious Liberty*, AM. C.L. UNION, <https://www.aclu.org/issues/religious-liberty> (last visited Feb. 25, 2023) (“The ACLU vigorously defends the rights of all Americans, from Christians to members of minority faiths, to practice their religion.”).

<sup>180</sup> See Alvarado, *supra* note 179; Robby Soave, *The ACLU Now Opposes Religious Freedom Because Christians Need It: The Sometimes Civil Liberties Union*, REASON (June 29, 2015, 9:01 AM), <https://reason.com/2015/06/29/the-aclu-now-opposes-religious-freedom-b/> (outlining the ACLU’s lack of impartiality and bias against Christianity).

<sup>181</sup> See Steven Crowder, *Hidden Cam: #GayWeddingCakes at Muslim Bakeries?*, YOUTUBE (Apr. 2, 2015), <https://www.youtube.com/watch?v=RgWihYAtan4>.

<sup>182</sup> *Id.* at 02:33–02:37 (showing Muslim baker refusing service, saying “No, no I don’t want it.”).

<sup>183</sup> Cf. Valerie Richardson, *Video Puts Muslim Bakeries, Florists in Gay-Rights Spotlight*, WASH. TIMES (Apr. 5, 2015), <https://www.washingtontimes.com/news/2015/apr/5/video-puts-muslim-bakeries-florists-in-gay-rights-/> (highlighting the total absence of complaints filed against Muslim bakeries for denying gay couples’ wedding cakes).

<sup>184</sup> Cf. Daniel Allott, *The ACLU Abandons Support of Religious Freedom*, WASH. EXAM’R (June 29, 2015, 3:18 PM), <https://www.washingtonexaminer.com/the-aclu-abandons-support-of-religious-freedom> (highlighting the ACLU’s inconsistent position on the Religious Freedom Restoration Act, supporting its use for protecting other religions but disavowing it when used by Christians to protect their religious beliefs on abortifacients and contraceptives—causes the ACLU now fights Christians on).

**Mr. Mitchell:** So, broad theme from history: Christians thrive under persecution.<sup>185</sup> If we look back to the early church, in many ways we've returned to the situation most like the early church in all of history—we're persecuted; we're a minority.<sup>186</sup> The culture is against us.<sup>187</sup> Until Constantine, you have thousands and thousands of martyrs in the Roman Empire.<sup>188</sup> The Christian Church was there. It was not an institution so much as it was a place of witness.<sup>189</sup> If you got baptized, you were going to also get your head chopped off fairly quickly.<sup>190</sup> So the Church then became for centuries an established institution, with power, with money, with influence, and the Christian churches became used to that situation for a long time,<sup>191</sup> and now that's been lost in many ways.<sup>192</sup> So, we're back to a situation where we find ourselves as Christians in a status of being in a persecuted minority.<sup>193</sup>

I would like to propose that this is actually a creative thing for Christians; that we have to find ways now to respond creatively. [In] My own experience, I grew up with parents who did not tell me I was free to do whatever I want. They *made* me go to a nondenominational Christian school that was founded in 1962 in direct response to the Supreme Court

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<sup>185</sup> See Keith Hopkins, *Christian Number and Its Implications*, 6 J. EARLY CHRISTIAN STUD. 185, 226 (1998) (noting that historical persecution actually helped Christianity grow).

<sup>186</sup> William Wolfe, *Yes, Christians Are Being Persecuted in America. Here's How We Can Respond*, CHRISTIAN POST (July 18, 2022), <https://www.christianpost.com/voices/yes-christians-are-being-persecuted-in-america.html>. While Christianity is still the predominant religion in the United States, by 2070 it will be a minority religion if current trends continue. Reem Nadeem, *Modeling the Future of Religion in America*, PEW RSCH. CTR. (Sept. 13, 2022), <https://www.pewresearch.org/religion/2022/09/13/modeling-the-future-of-religion-in-america/>. Currently, people identifying with no religion outnumber each individual sect of Christianity. See *supra* note 35 and accompanying text.

<sup>187</sup> See MARY EBERSTADT, *HOW THE WEST REALLY LOST GOD: A NEW THEORY OF SECULARIZATION* 7 (2013) (noting that Christianity has dramatically declined in Western culture and that Western culture is becoming increasingly hostile to Christianity).

<sup>188</sup> See HERBERT B. WORKMAN, *PERSECUTION IN THE EARLY CHURCH 199–201* (4th ed. 1923) (explaining that while the number of Christian martyrs is unknown, Christians in early Rome were in constant peril and endured ten distinct persecutions prior to Constantine).

<sup>189</sup> Xavier Becerra, *Divine Empowerment of the Early Church Movement and Rapid Growth in the Apostolic Age Exegetical Analysis of the Book of Acts*, 7 J. BIBLICAL PERSPS. LEADERSHIP 7, 12 (2017) (observing that early church growth was not an institutionalized movement).

<sup>190</sup> Cf. WORKMAN, *supra* note 188, at 63 (illustrating the penalties for conversion to Christianity in the Roman Empire: beheading was reserved for Roman citizens, while others were burned alive or fed to animals).

<sup>191</sup> See Bruce L. Shelley, *Church History in Brief*, CHRISTIAN HIST. 45 (no. 28) (1990) (recounting how the church in the twelfth century reached a “zenith of earthly power” and “was itself a kind of empire, a spiritual and earthly kingdom stretching from Ireland to Palestine”).

<sup>192</sup> See *supra* notes 186–187 and accompanying text.

<sup>193</sup> *Id.*



case, that outlawed prayer in schools.<sup>194</sup> The prayer that we prayed every morning at my school, Brookfield Academy, a Judeo Christian preparatory school. I still have it memorized. This is the prayer that the Supreme Court struck down in 1962: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our [beloved] country.”<sup>195</sup> That was the prayer that the Supreme Court said, “it’s not to be prayed.”<sup>196</sup> So in ’62—long before I was born—parents responded to that. We’re going to found a school where we say that prayer every morning, by golly! And we did so.<sup>197</sup> As I learned that history later, I said, “Wow!”

My father was a professor at Marquette University, where he taught English [], and he finally left because he [experienced a compromised] Christian environment at a nominally Catholic [] university.<sup>198</sup> He then became a professor, a teacher at Brookfield Academy, where he found people of faith, [] to respond in new ways. Can either of you share it from your experience, particularly with parents? How are parents responding? How do we respond and have an articulation? As you said Dr. Kengor, “Oh, what about tolerance, sir?” And then you throw that back at them a little bit. How have parents responded fruitfully and creatively to this very challenging situation?

**Mrs. Rechtenbach:** I think one of the actual blessings of COVID is that it woke a lot of parents up. For the first time parents were actually in the classroom per se, because the classroom was at the kitchen table on zoom.<sup>199</sup> Parents are working from home, and they’re hearing—wait a

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<sup>194</sup> See *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (finding school encouragement of prayer to be a violation of the Establishment Clause).

<sup>195</sup> See *id.* at 422.

<sup>196</sup> See *id.* at 424.

<sup>197</sup> See *History*, BROOKFIELD ACAD., <https://www.brookfieldacademy.org/about-ba/history> (last visited Jan. 25, 2023) (recounting the Academy’s inaugural outdoor assembly where teachers and students “proudly recited the New York Regents prayer, at the time the very prayer at the heart of the debate over prayer in public schools,” and declared that “[t]here would be no such debate” at the Academy).

<sup>198</sup> Compare *Catholic and Jesuit*, MARQ. UNIV., <https://www.marquette.edu/about/catholic-jesuit.php> (last visited Jan 25, 2023) (“Faith and spirituality are an important part of life at Marquette.”), with McAdams, *supra* note 122 (contending that Marquette is “certainly not a Catholic university” any longer).

<sup>199</sup> See Anya Kamenetz, *5 Things We’ve Learned About Virtual School in 2020*, NPR (Dec. 4, 2020, 5:00 AM), <https://www.npr.org/2020/12/04/938050723/5-things-weve-learned-about-virtual-school-in-2020> (discussing how parents have paid more attention to their children’s education since the surge in online schooling); Rachel E. Greenspan, *Teachers Are Attempting to Use Streaming Platforms Like Zoom for Kindergarten Classes. Here’s How They Say It’s Going*, INSIDER (Mar. 29, 2020, 11:57 AM), <https://www.insider.com/teachers-use-google-and-zoom-leaming-elementary-school-students-2020-3> (noting how many schools relied in large part on parents to facilitate their children’s education).

minute, what are you teaching my child? And they're hearing the CRT.<sup>200</sup> They're hearing the gender identity politics.<sup>201</sup> They're hearing all of this for themselves. And so there's really been an outpouring of criticism on the direction of education in this country in direct relation to COVID.<sup>202</sup> At ADF you see parents in all different areas, challenging these policies and really putting a lot on the line to do so.<sup>203</sup>

One of the cases I worked closely on is in Albemarle.<sup>204</sup> Another case here in Virginia, it's a CRT case and there's a group of parents who challenged the school's CRT curriculum,<sup>205</sup> and I was the one who was keeping our all of our files and records and going through the whole curriculum. So, I saw every single thing that is being taught in to these middle school students.<sup>206</sup> And then, after the case is filed, I'm the one seeing the emails and the threats that these parents are getting, and it is heart-wrenching and disgusting. One of the parents—she's just a wonderful single mom—and her son is half black and white and native American, and she got some of the most racist awful emails about the fact that she was challenging these policies because she didn't want her son to

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<sup>200</sup> See Zach Goldberg & Eric Kaufmann, *Yes, Critical Race Theory Is Being Taught in Schools*, CITY J. (Oct. 20, 2022), <https://www.city-journal.org/yes-critical-race-theory-is-being-taught-in-schools>; Melissa Moschella, *Critical Race Theory, Public Schools, and Parental Rights*, HERITAGE FOUND. (Mar. 24, 2022), <https://www.heritage.org/education/commentary/critical-race-theory-public-schools-and-parental-rights> (documenting the rise of critical race theory in school curricula across the country).

<sup>201</sup> See Laura Meckler, *Gender Identity Lessons, Banned in Some Schools, Are Rising in Others*, WASH. POST (June 3, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/06/03/schools-gender-identity-transgender-lessons/> (noting that gender identity lesson plans are increasingly common and that many states even require LGBTQ topics to be taught in schools).

<sup>202</sup> See Bianca Vázquez Toness & Jocelyn Gecker, *Online School Put US Kids Behind. Some Adults Have Regrets.*, ASSOC. PRESS (Oct. 21, 2022), <https://apnews.com/article/online-school-covid-learning-loss-7c162ec1b4ce4d5219d5210aaac8f1ae>.

<sup>203</sup> E.g., *Figliola v. Harrisonburg City Public School Board*, ALL. DEF. FREEDOM, <https://adflegal.org/case/df-v-harrisonburg-city-public-school-board> (last visited Jan. 7, 2023); *Ibañez v. Albemarle County School Board*, ALL. DEF. FREEDOM, <https://adflegal.org/case/ci-v-albemarle-county-school-board> (last visited Jan. 7, 2023); *Doe v. Madison Metropolitan School District*, ALL. DEF. FREEDOM, <https://adflegal.org/case/doe-v-madison-metropolitan-school-district> (last visited Jan. 7, 2023); *A.H. v. French*, ALL. DEF. FREEDOM, <https://adflegal.org/case/ah-v-french> (last visited Jan. 7, 2023).

<sup>204</sup> See *Ibañez v. Albemarle County School Board*, *supra* note 203 (describing lawsuit in Albemarle County).

<sup>205</sup> See *id.* (explaining that parents are suing the Albemarle County School Board “for enacting discriminatory policies and indoctrinating students in radical ideology”).

<sup>206</sup> The school's policy is readily available online. See *Policy: Anti-Racism*, ALBERMARLE CNTY. SCH. DIST., <https://www.k12albemarle.org/our-division/anti-racism-policy/policy> (last visited Jan. 14, 2022) (showing the Albemarle School District's policy of implementing “anti-racist curriculum” at every grade level).

be taught that he was oppressed because of his skin color.<sup>207</sup> To see these parents who are willing to publicly oppose these policies—when they know what’s going to happen, they know that now it’s difficult to go to the grocery store and their community. That they’re getting threatening emails. People are going out of their way to somehow find the email of, you know, a single mom who’s just trying to raise her child and, but they are willing to do it. We have parents all over the country who are calling and are saying, “You know what? I have to do something.”<sup>208</sup> I’ve talked to so many parents who have said I had a child who was acting strange at home, and I’m calling the school, saying, “Do you know anything? My child is acting depressed. They’re not talking to me, I know there’s something wrong, but I don’t know what it is. Do you know anything?” And the school saying, “No, we see nothing here,” and then later find out that the child has been socially transitioned at school.<sup>209</sup> The school is referring to her daughter as a male, has given the daughter a male name, [and] is in counseling with the school counselor for being transgender, and the mom has no idea. And so you have these parents who are saying, “I don’t care what it takes. I have to do something for my child.” So they’re putting a lot on the line—their reputations, their jobs—and I don’t know that you would have seen that several years ago,<sup>210</sup> and I think we’re getting even

<sup>207</sup> This theory of race relations is becoming increasingly mainstream. *See, e.g.*, Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions, and Exclusion, Separates Black and White America*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html> (asserting that throughout American history, black Americans have been oppressed through slavery, violent reprisals, and prejudiced public policy—resulting in today’s wealth gap between white and black Americans).

<sup>208</sup> *See* Kalyn Belsha et al., *Not Getting into It: How Critical Race Theory Laws Are Cutting Short Classroom Conversations*, CHALKBEAT (Dec. 17, 2021, 7:00 AM), <https://www.chalkbeat.org/2021/12/17/22840317/crt-laws-classroom-discussion-racism> (showing that in response to the debate about critical race theory in schools, parents have complained to school boards and increasingly challenged books in school libraries); *see, e.g.*, Tyler Kingkade & Nigel Chiwaya, *Schools Facing Critical Race Theory Battles Are Diversifying Rapidly, Analysis Finds*, NBC NEWS (Sept. 13, 2021, 4:30 AM), <https://www.nbcnews.com/news/us-news/schools-facing-critical-race-theory-battles-are-diversifying-rapidly-analysis-n1278834> (showing that in the last few years parents in at least 220 school districts have pushed back against diversity and equity initiatives stemming from critical race theory principles); *see also* cases cited *supra* note 203 and accompanying text.

<sup>209</sup> *See, e.g.*, Katie J.M. Baker, *When Students Change Gender Identity, Should Schools Tell Their Parents?*, N.Y. TIMES (Jan. 22, 2023), <https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html> (providing numerous examples of children whose schools hid their gender transitions from their parents).

<sup>210</sup> *See* JODY L. HERMAN ET AL., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES 1, 5–6, 13 (June 2022), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/> (asserting that the population of transgender-identified youth ages 13 to 17 have skyrocketed from 10% to about 18% of the transgender population in the United States); *see, e.g.*, Mary Margaret Olohan, *Vermont*

more people who are willing to publicly oppose these policies and this indignation.<sup>211</sup> And I think the more people that are public about it, it gives more people the courage to then step out and do something too.

**Mr. Mitchell:** Dr. Kengor?

**Dr. Kengor:** Tertullian, one of the Church fathers, said “The blood of the martyrs is the seeds of the faith.”<sup>212</sup> And of course, Jesus said, “if you want to follow me, pick up your cross.”<sup>213</sup> We are supposed to suffer in this world.<sup>214</sup> We’re supposed to be persecuted. This is the way it’s supposed to be.<sup>215</sup> Consider it an honor to suffer with Christ on these things.<sup>216</sup> But the more the persecution takes place, and the more the indoctrination takes place. Mallory’s right; it’s really been three issues. I’d say COVID, CRT, and the gender stuff.<sup>217</sup> I could tell you then, in my

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*School District Suspends Father of a Girl Who Pushed Back Against Biological Male in Her Locker Room*, DAILY SIGNAL (Oct. 18, 2022), <https://www.dailysignal.com/2022/10/18/vermont-school-district-suspends-father-of-girl-who-pushed-back-against-biological-male-in-her-locker-room/> (recounting the story of a father who lost his coaching job for expressing concerns on Facebook about a transgender student being in the girls’ locker room).

<sup>211</sup> See, e.g., Elizabeth Heckman, *Idaho School Board Shuts Down Parents, State Senator Objecting to Transgender Locker Rooms*, FOX NEWS (Jan. 13, 2023, 10:30 AM), <https://www.foxnews.com/media/idaho-school-board-shuts-down-parents-state-senator-objecting-transgender-locker-rooms> (showing that parents and some state senators have been voicing opposition and outrage over some transgender policies at school board meetings and on the national news); LUKE BERG, HOW SCHOOLS’ TRANSGENDER POLICIES ARE ERODING PARENTS’ RIGHTS 1, 6 (Mar. 2022) (indicating that other parents have expressed opposition to school transgender policies by going so far as filing lawsuits against school boards in Wisconsin, California, Florida, Maryland, and Virginia).

<sup>212</sup> See Quintus Septimus Florens Tertullianus, *Tertullian’s Apology on Behalf of the Christians*, in *The Apology of Tertullian and the Meditations of the Emperor Marcus Aurelius Antonius* 1, 143 (Wm. Reeve & Jeremy Collier trans., 1889) (translating from Latin: “But do your worst, and rack your inventions for tortures for Christians—it is all to no purpose; you do but attract the world and make it fall the more in love with our religion; the more you mow us down, the thicker we rise; the Christian blood you spill is like the seed you sow, it springs from the earth again, and fructifies the more.” (emphasis added)).

<sup>213</sup> See *Matthew* 16:24 (“Then Jesus said to his disciples, ‘If anyone would come after me, he must deny himself and take up his cross and follow me.’”).

<sup>214</sup> See *John* 16:33 (asserting that “in this world, [Christians] will have trouble”); *1 Peter* 4:12 (exhorting his readers not to “be surprised at the painful trial you are suffering”); John MacArthur, *The Glory of Christian Suffering*, Blue Letter Bible (Apr. 9, 2004), [https://www.blueletterbible.org/Comm/macarthur\\_john/bible-introductions/1peter-intro.cfm](https://www.blueletterbible.org/Comm/macarthur_john/bible-introductions/1peter-intro.cfm).

<sup>215</sup> See *2 Timothy* 3:12 (“In fact, everyone who wants to live a godly life in Christ Jesus will be persecuted . . .”).

<sup>216</sup> See *1 Peter* 4:13–16 (explaining that Christians should rejoice and praise God when they suffer for the name of Christ).

<sup>217</sup> See, e.g., Sarah Mervosh & Giulia Heyward, *The School Culture Wars: ‘You Have Brought Division to Us’*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/08/18/>

community of Grove City, our local Grove City Christian Academy—they are bursting at the seams with enrollment.<sup>218</sup> They just got flooded with applications the last two or three years.<sup>219</sup> Parents are responding by sending their children to private religious schools.<sup>220</sup> You can open these private schools, start these schools, give them a place to go. Also home schooling; home schooling is taking off even more [sic].<sup>221</sup> Indeed, I talk to so many parents now who are home schooling, who didn't do it before, because they didn't think they could do it before. But having the child home on zoom and watching what was going on, they thought, "I could do this, this isn't that bad. I could handle this." And then they started doing it, and it's become very successful.<sup>222</sup> Regrettably, it has caused a lot of people to abandon public schools all together,<sup>223</sup> and it can make public schools even worse, but it's also not the duty of your eight-year-old to save the local public school, right? It could get so bad. It's your child's sole education that you're dealing with here, and you might have to bring the

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us/schools-covid-critical-race-theory-masks-gender.html (noting that after virtual schooling due to COVID schools became "the eye of a storm" as issues like mandatory masking, gender identity, and critical race theory surged); Goldberg & Kaufmann, *supra* note 200 (showing evidence that schools are teaching critical race theory and gender ideology without showing alternative viewpoints); Ruth Graham, *Christian Schools Boom in a Revolt Against Curriculum and Pandemic Rules*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/us/christian-schools-growth.html> (showing that some parents removed their students from public schools after virtual schooling revealed to parents that students were learning about certain racial and gender ideologies).

<sup>218</sup> See *Profile*, GROVE CITY CHRISTIAN ACAD., <https://www.grovecitychristianacademy.com/about/profile> (last visited Jan. 19, 2023) ("Current enrollment is over 240 students and has been steadily increasing over the past five years."); Email from Dir of Dev., Grove City Christian Acad., to Regent Univ. L. Rev. (Feb. 13, 2023, at 8:45 AM) (on file with Regent University Law Review) (stating enrollment numbers over the last four academic years starting in fall 2019 were 188, 174, 242, and 292 respectively).

<sup>219</sup> See *Profile*, *supra* note 218 (showing that enrollment "has been steadily increasing over the past five years").

<sup>220</sup> See, e.g., Graham, *supra* note 217 (showing the increased enrollment in private religious schools, citing parental concerns over COVID-19 restrictions, critical race theory, and gender teachings in the curriculum).

<sup>221</sup> Brian D. Ray, *Homeschooling: The Research*, NAT'L HOME EDUC. RSCH. INST. (Sept. 15, 2022), <https://www.nheri.org/research-facts-on-homeschooling/> ("The homeschool population had been growing at an estimated 2% to 8% per annum over the past several years, but it grew drastically from 2019–2020 to 2020–2021.")

<sup>222</sup> See Casey Eggleston & Jason Fields, *Homeschooling on the Rise During COVID-19 Pandemic*, U.S. CENSUS BUREAU (Mar. 22, 2021), <https://www.census.gov/library/stories/2021/03/homeschooling-on-the-rise-during-covid-19-pandemic.html> (showing the rate of homeschooling doubled during the COVID-19 pandemic, from 5.4% of households to 11.1%).

<sup>223</sup> ADAM NEWMAN ET AL., SCHOOL DISRUPTED 2022: PART 1: PANDEMIC-DRIVEN DECLINE IN K-12 PUBLIC SCHOOL ENROLLMENT CONTINUES 3–4 (2022) (asserting that even after most public schools had reopened after COVID-19 closures, public schools have seen a 9% decrease in enrollment—more than four million students—from Spring 2021–2022). The data suggest that most students, approximately 3.7 million, left to enroll in charter schools, private schools, or homeschooling. *Id.* at 4.

child home and choose private education or home schooling, religious education rather than government schools—which is how education has been done historically throughout all of humanity.<sup>224</sup>

But yeah, the blood of the martyrs is the seed of the faith.<sup>225</sup> And in a way, the suffering that parents have seen in these schools, and what kids have gone through are spawning and creating more homeschooling, more classical Christian education.<sup>226</sup> And I bet, too, probably also influencing the applications that you're getting here to colleges, universities, law schools like this, where people say, "All right, I'm going to fight, and I'm going to go to Regent or wherever, and I'm going to learn what I need to learn to go out and win some of these battles."<sup>227</sup>

**Mr. Mitchell:** I want to pick up on this theme of parents waking up, that we need to be woken up as a church as people of faith within families, and I want to do a little historical detour here, Dr. Kengor. John Paul II was the catalyst in many ways for the people of Poland to wake up and to resist Marxism—at that time politically entrenched in the government of Poland under the Soviet bloc.<sup>228</sup> And in many ways, we're facing a greater

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<sup>224</sup> See J. Gary Knowles et al., *From Pedagogy to Ideology: Origins and Phases of Home Education in the United States: 1970–1990*, 100 AM. J. EDUC. 195, 200–01 (1992) (discussing the long history in Judeo-Christianity of family being the center of education and how that was reflected in Europe and North America in the 1700s); Robert Middlekauf, *Before the Public School: Education in Colonial America*, 62 CURRENT HIST. 279, 280 (1972) (discussing how many schools in Colonial America were founded and run by religious organizations).

<sup>225</sup> See Tertullianus, *supra* note 212, at 1, 143.

<sup>226</sup> See NEWMAN, *supra* note 223, at 5–7 (showing that during the pandemic homeschooling rose by 26% as parents removed their children from public schools because they were overwhelmingly concerned about the quality of education, and 7% cited concerns over social issues taught in curriculum); Christopher Perrin & Anika Prather, *The Post-COVID Classical-Education Boom*, NAT'L REV. (Sept. 22, 2021) (explaining that COVID-19 remote learning caused parents nationwide to discover their children's schools were failing to teach meaningful curricula and have sought out classical education as an alternative).

<sup>227</sup> See, e.g., *Regent University Celebrates the 2022 Year in Review*, REGENT UNIV. (Dec. 28, 2022) <https://www.regent.edu/news/regent-university-celebrates-the-2022-year-in-review/> (showing Regent University's undergraduate incoming freshman class is 10% larger than the year before); *College's Mission, Network Drive, and Increased Enrollment*, GROVE CITY COLL., <https://gcc.edu/Home/Student-Alumni-Stories-template/Student-Detail/colleges-mission-network-drive-increased-enrollment> (last visited Jan. 21, 2023) (reporting that despite the fact that nationwide overall undergraduate enrollment is down 4.9%, conservative Christian Grove City College has seen a nearly 20% larger incoming freshman class than the previous year, and a 17-year high in applications); Alexa Schwerha, *While Students Fless Public Universities, Christian Schools are Only Getting Bigger*, DAILY CALLER, <https://dailycaller.com/2023/01/07/college-students-christian-schools-covid-19/> (Jan. 7, 2023) (showing the recent general trend of increasing enrollment in Christian colleges and universities).

<sup>228</sup> Gracjan Kraszewski, *Catalyst for Revolution: Pope John Paul II's 1979 Pilgrimage to Poland and Its Effects on Solidarity and the Fall of Communism*, 57 POLISH REV. 35, 37, 39 (describing historical reflections on how Pope John Paul II's visit to Poland under Soviet control impacted public sentiment against Marxism—both in Poland and around the world).

Marxism today because we're kind of swimming inside it.<sup>229</sup> But John Paul II, can you—because I think for a lot of people, long enough now has passed that people maybe don't know the history of what happened—why was it significant that the Pope was from Poland? And what happened, particularly in 1981 to both him and Ronald Reagan, that led them to develop quite an extraordinary friendship? It's really the topic of your whole book, *The Pope and the President*.<sup>230</sup> So how were those two men brought together? Because both of them, I think, had a vision in which they said, "We need to wake people up. We need to speak the truth."<sup>231</sup> Reagan famously said at the Brandenburg Gate, "Mr. Gorbachev, tear down that wall."<sup>232</sup> And you know intellectuals laughed at Reagan.<sup>233</sup> But Reagan's legacy is still with us—that he had the courage to name something, to equip people to fight against it.<sup>234</sup> Both of these men, I think, we can learn much from their vision and courage. So, could you just share with us the friendship between Reagan and John Paul II and how that all came about?

**Dr. Kengor:** Yes, and I think "courage" is the key word there. John, Paul II's slogan in a way, was "be not afraid."<sup>235</sup> And when he was chosen in October, 1978, the previous Pope had served for thirty-three days, and then unexpectedly died, and he was chosen the first non-Italian pope in 455 years.<sup>236</sup> That's a long time—and the first Slavic Pope ever.<sup>237</sup>

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<sup>229</sup> Raju Das, *On The Communist Manifesto: Ideas for the Newly Radicalizing Public* 13 WORLD REV. POL. ECON. 209, 210–11 (2022) (noting that support for socialism and *The Communist Manifesto* is increasing in the United States, and positing that a growing number of the population are radicalizing).

<sup>230</sup> KENGOR, *supra* note 172, at 7–8.

<sup>231</sup> *Id.* at 128, 196 (showing President Reagan speaking out against communism and Pope John Paul II's commitment to truth and raising awareness about communist injustices).

<sup>232</sup> *Id.* at 453.

<sup>233</sup> See, e.g., Peter Robinson, "Tear Down This Wall": How Top Advisors Opposed Reagan's Challenge to Gorbachev—But Lost, PROLOGUE (2007), <https://www.archives.gov/publications/prologue/2007/summer/berlin.html>; Melissa De Witte, *Reagan's 'Mr. Gorbachev, Tear Down This Wall' Was Almost Left Unsaid, Recalls Former Speechwriter, Now Hoover Fellow*, STAN. NEWS (Nov. 6, 2019), <https://news.stanford.edu/2019/11/06/reagans-mr-gorbachev-tear-down-this-wall-was-almost-left-unsaid/>.

<sup>234</sup> See, e.g., Lou Cannon, *Ronald Reagan: Impact and Legacy*, MILLER CTR., <https://millercenter.org/president/reagan/impact-and-legacy> (last visited Apr. 12, 2023); Burton Yale Pines, *The Ten Legacies of Ronald Reagan*, HOOVER INST. (Apr. 1, 1989), <https://www.hoover.org/research/ten-legacies-ronald-reagan>.

<sup>235</sup> KENGOR, *supra* note 172, at 182.

<sup>236</sup> *Id.* at 177–78.

<sup>237</sup> *Id.* at 178.

**Mr. Mitchell:** And from behind the Iron Curtain.<sup>238</sup>

**Dr. Kengor:** From behind the iron curtain—Ronald Reagan was floored by this. Reagan was, Aleksandr Solzhenitsyn was, and so were the Soviets.<sup>239</sup>

**Mr. Mitchell:** Bad day in Moscow when the Polish pope got elected.

**Dr. Kengor:** Yes, Reagan said, “I can’t believe it. They picked a Pope from Poland.”<sup>240</sup> The heart of the Communist bloc.<sup>241</sup> The only country in the Communist block where the Soviet war on religion had totally failed.<sup>242</sup>

Karol Wojtyla, John Paul II<sup>243</sup> couldn’t believe it. He said, “What are they doing? The Pope is supposed to be Italian. They can’t pick a Pole. They pick me.”<sup>244</sup>

**Mr. Mitchell:** And a little bit of background. Wojtyla had been a university professor for much of his life.<sup>245</sup>

**Dr. Kengor:** Right.

**Mr. Mitchell:** He had taught young people, and they were not allowed to openly practice their faith.<sup>246</sup> So, he took them camping and canoeing where they went out in the woods, and they prayed, and they

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<sup>238</sup> See *id.* at 181–83 (recounting that the Pope was a citizen of a communist country, Poland, and performed his duties throughout countries under communist control, such as appointing representatives to high-level posts, broadcasting Vatican radio, and becoming the first pope to ever visit a communist country).

<sup>239</sup> See generally GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 258, 279 (1st ed. 1999) (showing worldwide media response to a non-Italian Pope so dissimilar to his predecessors, and the Soviets being shocked that Karol Wojtyla was selected as Pope).

<sup>240</sup> KENGOR, *supra* note 172, at 191–93.

<sup>241</sup> See *id.* at 178 (referring to Pope John Paul II’s native Poland as “the heart of the Communist Bloc”).

<sup>242</sup> Frank Dinka, *Sources of Conflict Between Church and State in Poland*, 28 REV. POL. 332, 347 (1966) (comparing the growth of the Catholic Church in Poland against other Soviet Bloc states); see also KENGOR, *supra* note 172, at 200–02 (“In fact, our souls contain exactly the opposite of what they wanted. They wanted us not to believe in God, and our churches are full.”).

<sup>243</sup> KENGOR, *supra* note 172, at 178.

<sup>244</sup> See *id.* at 182 (recording Cardinal Wojtyla’s general reaction to being elected as Pope); STANISLAW DZIWIŚ, A LIFE WITH KAROL 64 (2007).

<sup>245</sup> See WEIGEL, *supra* note 239, at 122 (showing a timeline of Father Karol Wojtyla’s life as a professor from 1953, when he began lecturing, until 1961, when he gave his last lecture on ethics).

<sup>246</sup> *Id.* at 59–60.



had Mass together, and they lived their faith together.<sup>247</sup> And within the school—he had been a student himself when he watched all of his professors get arrested in class, taken out to a truck and [were never seen again].<sup>248</sup> So, he had lived that himself. He had resisted by teaching young people, creatively, to resist.<sup>249</sup> And now that man, through God’s providence, was the Pope.<sup>250</sup>

**Dr. Kengor:** Yeah, and taught them moral theology, phenomenology, and natural law.<sup>251</sup> If Poland was wiped from the map from the year 1795 to 1918, and almost again under the Communists, and Karol Wojtyla said—and maybe America will never get this bad—the way that they preserve the nation’s identity was through culture, religion, and the arts, so the political authorities could try to wipe it off the map, but it still existed.<sup>252</sup>

**Mr. Mitchell:** So what happened to both Reagan and John Paul II in 1981, that was, I guess we could say a bad thing that led to a lot of good?

**Dr. Kengor:** It’s a crazy story. Reagan was shot.<sup>253</sup> March 30, 1981, outside of the Washington Hilton, about two-thirty in the afternoon, walking out after giving a speech to the AFL-CIO, and John Hinckley is out there with a gun, fires several shots, hit Reagan right near the heart, just a few centimeters from the main aortal valve.<sup>254</sup> He probably should have bled to death. They rushed him off to the hospital—George Washington University Hospital—and he miraculously survived; needed

<sup>247</sup> *Id.* at 102–04.

<sup>248</sup> *Id.* at 54 (recounting “the Kraków Special Action,” the day 184 academics and professors from Karol Woktyla’s university were arrested by Nazis and taken to Sachsenhausen concentration camp where many of them died).

<sup>249</sup> *Id.* at 98–100.

<sup>250</sup> *Biographical Profile: John Paul II*, HOLY SEE, <https://www.vatican.va/content/john-paul-ii/en/biografia.index.html#biografia> (last visited Feb. 1, 2023); KENGOR, *supra* note 172, at 41.

<sup>251</sup> See HOLY SEE, *supra* note 250; KENGOR, *supra* note 172, at 113 (noting that, among other things, Pope John Paul II was versed in phenomenology).

<sup>252</sup> *History of Poland*, INTOPOLAND, <https://www.intopoland.com/poland-info/history-of-poland.html> (last visited Feb. 1, 2023) (detailing Poland’s evolution from freedom in 1918, Soviet control in the 1940s, to freedom from Soviet control in the 1980s); Anna Wellisz, *Pope John Paul II and the Theology of the Nation*, HUNGARIAN REV. (Sept. 7, 2020) [https://hungarianreview.com/article/20200921\\_pope\\_john\\_paul\\_ii\\_and\\_the\\_theology\\_of\\_the\\_nation](https://hungarianreview.com/article/20200921_pope_john_paul_ii_and_the_theology_of_the_nation) (noting Pope John Paul II’s belief that Poland’s culture has enabled it to survive through its various trials).

<sup>253</sup> *Assassination Attempt*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, <https://www.reaganlibrary.gov/permanent-exhibits/assassination-attempt> (last visited Jan. 25, 2023).

<sup>254</sup> See *id.*; David S. Broder, *Reagan Wounded by Assailant’s Bullet*, WASH. POST (Mar. 30, 1981), [https://www.washingtonpost.com/local/reagan-wounded-by-assailants-bullet-prognosis-is-excellent-3-others-shot/2011/12/09/gIQA\\_VusviO\\_story.html](https://www.washingtonpost.com/local/reagan-wounded-by-assailants-bullet-prognosis-is-excellent-3-others-shot/2011/12/09/gIQA_VusviO_story.html).

a lot of transfusions of blood.<sup>255</sup> They initially thought he wasn't even hit—that's what ABC news reported.<sup>256</sup> So that was March 30, 1981.<sup>257</sup> And then, just several weeks after that, May 13, 1981, John Paul II was shot in St. Peter's Square, by a Muslim Turk name Akmet Ali Agca, and he just missed the main abdominal artery.<sup>258</sup> He probably should have bled to death. They both believed—they came together, June 17, 1982, at the Vatican, and they met for about an hour alone, one-on-one in the Vatican library.<sup>259</sup> I talked to two people that Reagan immediately talked to as soon as he left the meeting, so I knew what they said. There's [usually] a Vatican note taker in on the meeting, but the records are sealed for seventy-five years.<sup>260</sup> So, 2057 is when they'll be released.<sup>261</sup> But they said to one another that they believe that God had spared their lives for a special purpose which was to take on and defeat atheistic Soviet Communism when no one thought that was possible.<sup>262</sup>

**Mr. Mitchell:** I want to read a little quote from your book about this meeting in 1982. This is Reagan to the Holy Father. He said, "one cannot meet a man like Your Holiness [John Paul II] without feeling that a world that can produce such courage and vision out of adversity and oppression, is capable, with God's help, of building a better future."<sup>263</sup> And I think that just embodies—we're in a situation of great adversity, great oppression as Christians. We can now, with God's help, build. This will get better

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<sup>255</sup> See *Assassination Attempt*, *supra* note 253; Lawrence K. Altman, *Doctor Says President Lost More Blood Than Disclosed*, N.Y. TIMES (Apr. 3, 1981), <https://www.nytimes.com/1981/04/03/us/doctor-says-president-lost-more-blood-than-disclosed.html#:~:text=But%20Dr.,Reagan's%20chest> (indicating that Reagan needed eight units of blood after the shooting).

<sup>256</sup> Carrie Hagen, *The Media Learned Nothing After Misreporting the Reagan Assassination Attempt*, SMITHSONIAN MAG. (Aug. 11, 2016), <https://www.smithsonianmag.com/history/media-learned-nothing-after-misreporting-reagan-assassination-attempt-180960091/> (noting that ABC news reported that Reagan was not struck during the attack).

<sup>257</sup> *Assassination Attempt*, *supra* note 253.

<sup>258</sup> Jay Dyer, *Pope John Paul II Assassination Attempt*, UNITED PRESS INT'L (1981), <https://www.upi.com/Archives/Audio/Events-of-1981/Pope-John-Paul-II-Assasination-Attempt>.

<sup>259</sup> Carl Bernstein, *The Holy Alliance: Ronald Reagan and John Paul II*, TIME (Feb. 24, 1992), <https://content.time.com/time/subscriber/article/0,33009,974931,00.html>.

<sup>260</sup> Erin Blakemore, *Step into the Vatican's Secret Archives*, HIST., <https://www.history.com/news/step-into-the-vaticans-secret-archives> (Mar. 18, 2021) (noting that the Vatican Archives are sealed for seventy-five years).

<sup>261</sup> See *id.*

<sup>262</sup> See Bernstein, *supra* note 259; see also Gene Zubovich, *Russia's Journey from Orthodoxy to Atheism, and Back Again*, RELIGION & POL. (Oct. 16, 2018), <https://religionandpolitics.org/2018/10/16/russias-journey-from-orthodoxy-to-atheism-and-back-again/> (discussing the development and control of atheism in the Soviet Union from the 1910s until the late 1980s).

<sup>263</sup> KENGOR, *supra* note 172, at 300.

because of this. We're going to be stronger as Christians. We're going to be more articulate as educators. So, they both were like, you know, full speed ahead. We're going to keep witnessing courageously.<sup>264</sup>

**Dr. Kengor:** And they were told again and again by their advisors—Reagan was told, “don’t call the Soviet Union an evil empire.”<sup>265</sup> “Don’t say ‘Mr. Gorbachev, tear down this wall.’”<sup>266</sup> John Paul II was told, “You can’t go to Poland period, including for your first trip.”<sup>267</sup> And he said, “I’m going to Poland.”<sup>268</sup> And you know they did those things, and they changed the world through courage.<sup>269</sup> Be not afraid.<sup>270</sup>

**Mr. Mitchell:** What can we take from their collective witness? As you did the research for your book and many other books, what do you feel? Where does Reagan’s heart still beat today that the spirit that he had of how we resist this, of how we take on the lie that we’re surrounded with?

**Dr. Kengor:** I say, through these students, through the school, through ADF, right? The entire history of man is this battle of dour combat between the forces of good and forces of evil.<sup>271</sup> That’s the way it is. Whatever age that you’re in, in 1918 fighting World War I and the

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<sup>264</sup> See, e.g., WEIGEL, *supra* note 239, at 844–45, 847 (noting, among various accomplishments, Pope John Paul II’s reinvigoration of the Catholic Church and role in the defeat of communism); Lee Edwards, *Ronald Reagan and the Fall of Communism*, HERITAGE FOUND. (Mar. 8, 2010), <https://www.heritage.org/report/ronald-reagan-and-the-fall-of-communism> (detailing how Ronald Reagan was instrumental in the downfall of communism).

<sup>265</sup> ROBERT SCHLESINGER, WHITE HOUSE GHOSTS 325, 327–28 (2008) (noting advisers’ and governmental officials’ concern over the strong anti-communist language contained in Reagan’s “evil empire” speech).

<sup>266</sup> Peter Robinson, “Tear Down This Wall” How Top Advisers Opposed Reagan’s Challenge to Gorbachev—But Lost, NAT’L ARCHIVES (2007), <https://www.archives.gov/publications/prologue/2007/summer/berlin.html>.

<sup>267</sup> See WEIGEL, *supra* note 239, at 300–01 (noting John Paul II’s first pilgrimage to Poland after his inauguration and Soviet resistance to the visit).

<sup>268</sup> See *id.* at 300–01, 304–05 (discussing Pope John Paul II’s desire to return to Poland).

<sup>269</sup> KENGOR, *supra* note 172, at 540.

<sup>270</sup> Philip Kosloski, *Here’s Why John Paul II Said “Do Not Be Afraid”*, ALETEIA (Oct. 22, 2020), <https://aleteia.org/2020/10/22/heres-why-john-paul-ii-said-do-not-be-afraid/> (noting that “Be Not Afraid” was one of Pope John Paul II’s most used phrases).

<sup>271</sup> SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION OF THE CHURCH IN THE MODERN WORLD, at para. 37 (1965).

Kaiser;<sup>272</sup> World War II, fighting the Nazis;<sup>273</sup> Cold War fighting the Communists;<sup>274</sup> and today it's whatever battles that we're fighting for today. Religious freedom for the right not to have your child change his or her gender, or get on transgender transitioning hormones, or whatever it takes.<sup>275</sup> The right to home school your kids.<sup>276</sup> So, whatever generation you're in, you always have these battles, and you just can't be afraid. I don't want to be there before the pearly gates someday, and Jesus says, "well, why didn't you stand up for me here? Why did you deny me at this

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<sup>272</sup> *U.S. Entry into World War I, 1917*, OFF. HISTORIAN, <https://history.state.gov/milestones/1914-1920/wwi> (last visited Jan. 25, 2023) (indicating that, just prior to 1918, America was preparing for war against Germany and Kaiser Wilhelm II); Nick Milne, *The 'Rape of Belgium' Revisited*, WORLD WAR I CENTENARY (Aug. 22, 2013, 5:15 PM), <http://ww1centenary.oucs.ox.ac.uk/memoryofwar/the-rape-of-belgium-revisited/> (detailing just some of the evil atrocities committed by Germany in World War I).

<sup>273</sup> *U.S.-Soviet Alliance, 1941-1945*, OFF. HISTORIAN, <https://history.state.gov/milestones/1937-1945/us-soviet> (last visited Jan. 25, 2023) (indicating that World War II was fought against Nazi Germany); Elizabeth Svoboda, *Unearthing the Atrocities of Nazi Death Camps*, SCI. AM. (Apr. 30, 2016), <https://www.scientificamerican.com/article/unearthing-the-atrocities-of-nazi-death-camps/> (detailing the design of Nazi concentration camps used to massacre Jewish people in World War II).

<sup>274</sup> *U.S.-Soviet Relations, 1981-1991*, OFF. HISTORIAN, <https://history.state.gov/milestones/1981-1988/u.s.-soviet-relations> (last visited Jan. 25, 2023) (indicating that the Cold War was a faceoff between the United States and communist countries); Doug Bandow, *Three Decades Ago the Soviet Union Collapsed: The Evil Empire No Longer Could Hold Human Liberty in Check*, CATO INST. (Dec. 17, 2021), <https://www.cato.org/commentary/three-decades-ago-soviet-union-collapsed-evil-empire-no-longer-could-hold-human-liberty> (noting many of the atrocities committed by the Soviet Union through its various leaders including Stalin, Khrushchev, and Brezhnev).

<sup>275</sup> See, e.g., Jeff Johnston, *Florida Parents Sue School for Helping Teen 'Transition' Without Their Knowledge or Consent*, DAILY CITIZEN (Dec. 3, 2021), <https://dailycitizen.focusonthefamily.com/florida-parents-sue-school-for-helping-teen-transition-without-their-knowledge-or-consent/> (describing a lawsuit parents filed over a school's attempt to hide their daughter's gender-identity transition); Ashe Schow, *School Nurse Suspended After Revealing Child on Puberty Blockers, Others Identifying as Non-Binary Without Parents' Knowledge*, DAILY WIRE (Apr. 2, 2022), <https://www.dailywire.com/news/school-nurse-suspended-after-revealing-child-on-puberty-blockers-others-identifying-as-non-binary-without-parents-knowledge> (reporting on a school's punishment of a nurse who revealed that the school was intentionally hiding students' gender identity transitions from their respective parents); see also S. Ernie Walton, *Gender Identity: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 REGENT U. L. REV. 219, 222-23 (2021) (noting that parents across the United States have pushed back against school-instituted gender identity policies).

<sup>276</sup> See, e.g., *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (holding that parents have the right to decide the education of their children without unreasonable interference); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."); see also *Troxel v. Granville*, 530 U.S. 57, 72-73, 75 (2000) (holding that there is a fundamental right to rear one's own children).

moment?”<sup>277</sup> He puts it up on a big screen in the cloud and plays it, and I put my head down in embarrassment, and say, “well, you know Jesus, I didn’t want to be called a hater on Twitter.” And He says, “Oh, well meet Perpetua and Felicity, who were eaten by lions in the Colosseum.”<sup>278</sup> Here, look at their cloud, what they went through when their bodies were ripped to shreds by wild beasts. And you didn’t want to be called a hater on Twitter. Well, that’s pretty pathetic.”<sup>279</sup>

You have to have courage and fight these battles. And by the way, whichever position you take, someone’s not going to like it. So, you might as well stand for what’s right. You’re going to get attacked, no matter what, unless you just choose a job where you don’t get involved in any of these major battles, and sit around and watch baseball in the evening. You’re gonna be in these battles. So, stand for what’s right.

**Mr. Mitchell:** Ms. Rechtenbach, can you weigh in with your experience with ADF of how adversity has brought people together who might not otherwise have met and have led to great things happening?

**Mrs. Rechtenbach:** Yes, I think what’s really interesting is there are several cases that ADF has where you’ve got a group of parents or teachers<sup>280</sup> who didn’t even know each other before this case came about. And through these policies happening, they all start meeting, and they start talking, and then they start going to school board meetings, and they start advocating.<sup>281</sup> And if I’ve seen anything, it’s, [that] you don’t get in the way of a mom. I think that’s where they went wrong is they went after

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<sup>277</sup> *Revelation* 21:21 (describing John’s account of Heaven’s pearly gates); *Matthew* 10:33 (“But whosoever shall deny me before men, him will I also deny before my Father which is in heaven.”).

<sup>278</sup> See FREDERIC PALMER, *HERETICS, SAINTS AND MARTYRS* 178, 198–99 (recounting how two martyrs, Perpetua and Felicity, were thrown to wild beasts).

<sup>279</sup> See *Matthew* 10:22–23 (calling Christians to faithfully share their faith, despite the guaranteed persecution and hate that will follow them).

<sup>280</sup> *E.g.*, Deborah Figliola, *Community Prospective: Why a Group of Teachers and Parents Have Filed Suit Against Harrisonburg City Public Schools*, *CITIZEN* (June 14, 2022), <https://hburgcitizen.com/2022/06/14/community-perspective-why-a-group-of-teachers-and-parents-have-filed-suit-against-harrisonburg-city-public-schools/>; Complaint for Declaratory, Injunctive, and Additional Relief at 2, 19–20, *Figliola v. Sch. Bd. of Harrisonburg*, No. 22-1304 (Va. Cir. June 1, 2022) (indicating that Alliance Defending Freedom is lending legal assistance in the matter).

<sup>281</sup> See, *e.g.*, Figliola *supra* note 280 (noting a group of parents who, after discussing their concerns with a school over its gender identity affirming policy and asking it to withdraw the policy, filed suit in attempt to protect their rights and their children); Tyrone Turner, *How Loudoun County Schools Ended up at the Center of Virginia’s Election*, *NPR* (Oct. 26, 2021), <https://www.npr.org/local/305/2021/10/26/1049266808/how-loudoun-county-schools-ended-up-at-the-center-of-virginia-s-election> (highlighting the decisive role parental rights played in Virginia’s gubernatorial election following publicized school board meetings and protests addressing critical race theory and gender identity policies in public schools).

the kids,<sup>282</sup> and I think now you've got all these moms who are willing to throw themselves in front of any train that is coming at their kid. And so they don't care. They don't care who they have to challenge. They don't care what anybody says about them. But what's really great to see is these groups of parents come together, and you'll have parents and teachers from all different walks of life. In Harrisonburg, you've got one teacher who has three grown children, one of whom had gender identity issues and was able to get through them with the help of her mom and our church and counseling. And now the school saying, "No, you have to lie to parents if their children have that exact same issue."<sup>283</sup> And then you've got parents who have small children that they're terrified that the school is going to transition their children without their knowledge.<sup>284</sup> So, you've got these people that have come together and become like family. They start supporting each other, and it's really just wonderful to see. At ADF, there was a client summit, and so you had all these clients challenging various laws from across the country all come together. Whether it's bakers challenging things,<sup>285</sup> or we have Laurie Smith, who's going to the Supreme Court here in the next couple of months.<sup>286</sup> To see all of these people come together who are unafraid, and are willing to stand their ground, and are willing to not even just put their name on a filing, but are willing to go out and speak, and are willing to say, "No, this is what I believe, and I don't care what you say, and I'm going to stand by it," is incredibly inspiring, and it's great to see that. For so many years, we had all of these people on the other side using the courts.<sup>287</sup> *Lawrence v. Texas*

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<sup>282</sup> *E.g.*, Ricard v. USD 475 Geary Cnty, KS Sch. Bd., No. 5:22-cv-04015, at 1–2\* (D. Kan. May 9, 2022) (providing an example of litigation over a school's policy of forcing employees to affirm a child's preferred gender pronouns regardless of parental knowledge or consent); *see also School Board Scraps Policy After ADF Lawsuit*, ALL. DEFENDING FREEDOM (Dec. 22, 2022), <https://adfllegal.org/article/school-board-scraps-policy-after-adf-lawsuit> (noting that the lawsuit was settled after the school board rescinded one of its offending policies).

<sup>283</sup> Complaint for Declaratory, Injunctive, and Additional Relief at 2, 19–20, *Figliola*, No. 22-1304 (Va. Cir. June 1, 2022).

<sup>284</sup> *Attorneys Sound off on Teachers Transitioning Kids Without Parental Consent: 'Playground, Not Pronouns'*, WCCS RADIO (Jan. 25, 2023), <https://www.wccsradio.com/rss/attorneys-sound-off-on-teachers-transitioning-kids-without-parental-consent-playground-not-pronouns/> (noting the nationwide debate between school systems and attorneys who represent the interests of parents).

<sup>285</sup> *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1723 (2018).

<sup>286</sup> Transcript of Oral Argument at 1, 303 Creative LLC v. Elenis, No. 21-476 (U.S. Dec. 5, 2022) (noting that oral arguments were held on December 5, 2022). The Regent University School of Law Symposium took place on October 8, 2022, less than two months away from when oral argument for 303 Creative was scheduled to be argued.

<sup>287</sup> *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (developing the constitutional right to birth control); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (developing a constitutional right to abortion); *Lawrence v. Texas*, 539 U.S. 558, 572, 574–75, 578 (2003) (developing a constitutional right to homosexual sex); *Obergefell v. Hodges*, 576 U.S. 644, 663–66 (2015) (developing a constitutional right to gay marriage).

was a setup.<sup>288</sup> They purposely set up the case so that they could take it to the Supreme Court.<sup>289</sup> You had all of them challenging and getting all of these new constitutional rights through the courts.<sup>290</sup> And on the right, I think it took us a while to take that initiative,<sup>291</sup> and that’s why I have so much respect for ADF and then other organizations too who said, “No, we need to defend what we believe, and we need to defend what the Constitution actually says, and the acts that the Constitution actually protects.”<sup>292</sup> And so now you’ve got all these people from various walks of life who are unafraid and challenging these publicly.<sup>293</sup>

**Mr. Mitchell:** So it sounds like you’re saying there’s a need for Christian lawyers who would be educated at a good Christian law school to be leaders in our culture.

**Mrs. Rechtenbach:** Yes!

**Mr. Mitchell:** Regent, I feel in many ways, is a place where people have been brought together by what we’re all going through. [Attorney] General Ashcroft was here this week and taught, and he said several times to us, “Look around. You have a great opportunity here. You’re never going to be in a more supportive environment of passionate intellectuals young people, love for the law, love for Christ.” So, you have the stage here. You have the floor with a group of young future lawyers. Can each of you give your perspective to us, or what advice you’d give us?

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<sup>288</sup> Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1465–66, 1494–97 (2004) (detailing how the inconsistencies of the underlying facts in *Lawrence v. Texas* could be explained by a scheme to challenge laws against homosexuality in the Supreme Court).

<sup>289</sup> *Id.*

<sup>290</sup> See sources cited *supra* note 287.

<sup>291</sup> See, e.g., *Rosenburger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837 (1995) (protecting the free speech rights of religious students); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (protecting the free speech rights of religious organizations to meet on public property).

<sup>292</sup> See, e.g., *Who We Are*, ALL. DEFENDING FREEDOM, <https://adfllegal.org/about-us/who-we-are> (last visited Jan. 16, 2023) (describing the constitutional guarantees that ADF focuses on and noting that “[t]hese guarantees cannot depend on cultural popularity or political power”); *About Us*, FEDERALIST SOC’Y, <https://fedsoc.org/about-us> (last visited Jan. 16, 2023) (“The society seeks both to promote an awareness of [constitutional] principles and to further their application through its activities.”); *About the American Center for Law and Justice*, AM. CTR. L. JUST., <https://aclj.org/our-mission/about-aclj> (last visited Feb. 4, 2023) (explaining the ACLJ’s “mandate to protect religious and constitutional freedoms”).

<sup>293</sup> See, e.g., *303 Creative LLC v. Elenis*, 385 F. Supp. 3d 1147, 1151–52 (D. Colo. 2019) (showing a website designer’s suit against a Colorado Agency on First Amendment grounds); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015) (showing a bakery owner’s suit against a commission’s decisions regarding owner’s refusal to sell a wedding cake based on sexual orientation).

Or can you guide us? And how do we take up the torch as it were, and continue this fight?

**Dr. Kengor:** Well, you know, when Kirk talked about conserving and preserving, that's not a passive process.<sup>294</sup> I mean, you have to be active and conserving and preserving, so you cannot just sit back.<sup>295</sup> If I may invoke my mother-in-law, she was never political, and she tells the story all the time. At one point about the late '80's or early '90's, she looked around and saw what had happened with *Roe v. Wade*<sup>296</sup> and all these other issues and decided she'd better get involved in trying to stop these things. So, you have to go out and fight. You can't just sit back. And it's not fun to be called names, right? But develop a thick skin. You're going to have to do it, and I've seen a number of people, the first time they get attacked, they sort of crawl under a rock, and that's it.<sup>297</sup> They get very defensive. They start apologizing. By the way, I've noticed this: when you get defensive and start apologizing, man, that's when they really pounce.<sup>298</sup> I'll say all the time, "I'll apologize if I made a mistake." I always do that. But when you sort of double down and come back to them if you haven't made a mistake: "Oh, yeah, I said that. That's exactly what I mean," then they sort of back off, and they go find someone that they can

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<sup>294</sup> Allen Mendenhall, *Russell Kirk on Higher Education*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Jan. 8, 2020), <https://www.jamesgmartin.center/2020/01/russell-kirk-on-higher-education/>.

<sup>295</sup> See G.K. CHESTERTON, *ORTHODOXY* 182 (Floating Press 2008) (1908) (describing conservatism as an active process of preservation so that the object of preservation does not deteriorate over time).

<sup>296</sup> 410 U.S. 113, 164–65 (1973) (holding that abortion cannot be regulated by the state during the first trimester and limiting the restrictions that a state can place on abortion after that point).

<sup>297</sup> See, e.g., Money Watch, *Bon Appetit Editor Adam Rapoport Resigns over Halloween Costume Photo*, CBS NEWS (June 11, 2020), <https://www.cbsnews.com/news/adam-rapoport-photo-bon-appetit-editor-resigns-halloween-costume/> (describing the resignation of Adam Rapoport in detail and referring to a few others who also resigned in response to cancel culture).

<sup>298</sup> See, e.g., Taylor Mooney & Justin Sherman, *How "Cancel Culture" Changed These Three Lives Forever*, CBS NEWS (Aug. 13, 2020), <https://www.cbsnews.com/news/cancel-culture-changed-lives-forever-cbsn-originals/> (providing an example where things continued to get worse after the cancelled person apologized).



bully.<sup>299</sup> Because they are bullies, they really are.<sup>300</sup> And when you show some backbone, the bully usually backs off.<sup>301</sup> So, you go out there and change the world in a positive way.

Columbus Day is Monday I think.<sup>302</sup> They're going after—I think of when I was first a student at the University of Pittsburgh, in the late 1980's, as I was a pre-med major. The first course that I took was a required Western Civ. course. That course isn't required anymore. Now they have a required diversity course, but I used to go to Shenley Park and sit under this giant statue of Christopher Columbus and read my Western Civ. text. I went to Shenley Park about a year ago, with my family to take them there, and I looked up. I was aghast. The statue of Columbus was completely covered with this big white thing like it was bound and gagged; like you would see of a statue of Stalin in a Soviet Union or Saddam Hussein in a modern Iraq.<sup>303</sup> People are trying to literally cancel the founders of this country.<sup>304</sup> What kind of a culture and people tear down statues of the guy who discovered it? Kind of an amazing thing, regardless of whether or not he had certain flaws.

But, the people who capitulate to think to such things, and just let them rip down your statues, and we're not even talking about statues of Confederate soldiers here, right? But people like Columbus, people like

<sup>299</sup> See, e.g., Kyle Smith, 'Don't Apologize': Ricky Gervais Takes on Verbal Terrorism, NAT'L REV. (Aug. 16, 2019), <https://www.nationalreview.com/2019/08/ricky-gervais-takes-on-verbal-terrorism-dont-apologize/> (discussing how apologizing is not enough because people involved in cancel culture "want blood"); Mae Abdulbaki, *Golden Globes Host Ricky Gervais Explains Why He Won't Apologize for His Jokes*, CINEMABLEND (Jan. 15, 2020), <https://www.cinemablend.com/television/2488578/golden-globes-host-ricky-gervais-explains-why-he-wont-apologize-for-his-jokes> (stating that a person should not apologize because that would erode freedom of speech and lead towards an Orwellian dystopia).

<sup>300</sup> See Tyler McCarthy, *Ricky Gervais Likens Cancel Culture to 'Road Rage,' Talks the 'Misunderstanding' of Accountability*, FOX NEWS (Dec. 8, 2020), <https://www.foxnews.com/entertainment/ricky-gervais-cancel-culture-road-rage-accountability> (sharing some of Ricky Gervais's comments on cancel culture and likening it to "road rage," saying "[w]hat they're not allowed to do is to bully other people into not going to see you").

<sup>301</sup> See, e.g., A CHRISTMAS STORY (Warner Bros. 1983) (depicting the scene where Ralphie beats up his bully, Scott Farkus, and Scott's co-bully ran away after the first pushback from Ralphie).

<sup>302</sup> Columbus Day in 2022 was on Monday, October 10. *Federal Holidays*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/federal-holidays/#url=Historical-Data> (last visited Feb. 4, 2023).

<sup>303</sup> Marcie Cipriani, *Judge Rules Christopher Columbus Statue in Schenley Park Can Come Down*, ABC WTAE, <https://www.wtae.com/article/christopher-columbus-statue-schenley-park-can-come-down-judge-rules/41521582> (Oct. 4, 2022) (depicting in the embedded video associated with the article the statute of Christopher Columbus completely covered in white plastic material).

<sup>304</sup> Annie Gowen, *As Statues of Founding Fathers Topple, Debate Rages over Where Protesters Should Draw the Line*, WASH. POST (July 7, 2020), [https://www.washingtonpost.com/national/as-statues-of-founding-fathers-topple-debate-rages-over-where-protesters-should-draw-the-line/2020/07/07/5de7c956-bfb7-11ea-b4f6-cb39cd8940fb\\_story.html](https://www.washingtonpost.com/national/as-statues-of-founding-fathers-topple-debate-rages-over-where-protesters-should-draw-the-line/2020/07/07/5de7c956-bfb7-11ea-b4f6-cb39cd8940fb_story.html).

Frederick Douglass, Abraham Lincoln.<sup>305</sup> So stand up for what's right, and be not afraid.

**Mr. Mitchell:** Ms. Rechtenbach?

**Mrs. Rechtenbach:** So Kristen Waggoner, who went here to Regent, and is now the CEO of ADF, who I have so much respect for, she always says, “if not now, when? And if not us, who?”<sup>306</sup>

And that to me is something that I remind myself frequently, and I think that we have to say “No, now is the time.” We can't wait. We can't let these things get entrenched into our culture, into our laws, into the regulations, and we have to challenge them. And you can't think of somebody else will do that. No, you can do that. And it doesn't matter where you are; even if you're not going into Constitutional litigation, you're going to come across these things in big law, in firms doing business things. It doesn't matter where you are, these are going to hit you right in the face. And in law school, I was working for a federal judge—I was doing Blackstone at the time—and he came up to me one day and said, “I was at a meeting with a bunch of other Federal judges, and I mentioned that I had a Blackstone fellow, and another judge told me that that you're part of a hate group, and that you're here to infiltrate my chambers, and that I have to be worried because you could try to like leak things. You're here to try to influence the chambers. And I sat there for a second like, “How does one respond to that?” So, I just said a prayer, and said this is what Blackstone is all about,<sup>307</sup> and this is what I believe, and I'm here to work, and I'm here to learn, and I'm definitely not trying to infiltrate your

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<sup>305</sup> Cipriani, *supra* note 303; Seth Voorhees, *RPD Investigating After Frederick Douglass Statue in Aqueduct Park Topped*, SPECTRUM NEWS, <https://spectrumlocalnews.com/nys/rochester/community/2021/09/16/police--frederick-douglass-statue-in-aqueduct-park-topped> (Sept. 16, 2021); Rachel Elbaum, *Portland Protesters Tear Down Statues of Abraham Lincoln, Theodore Roosevelt*, U.S. NEWS, <https://www.nbcnews.com/news/us-news/portland-protesters-tear-down-statues-abraham-lincoln-theodore-roosevelt-n1242913> (Oct. 12, 2020).

<sup>306</sup> See *Kristen Waggoner '97*, REGENT ALUMNI, <https://www.regentalumni.org/s/832/22/interior.aspx?sid=832&gid=1&calcid=3851&calpgid=252&pgid=252&ecid=5443&cid=0&cid=5169> (last visited Feb. 4, 2023); *Kristen K. Waggoner: CEO, President, and General Counsel*, ALL DEFENDING FREEDOM, <https://adflegal.org/biography/kristen-k-waggoner> (last visited Feb. 4, 2023); cf. David Gunn, *If Not Us, Who? If Not Now, When?*, VT. LEAGUE CITIES & TOWNS, <https://www.vlct.org/if-not-us-who-if-not-now-when> (last visited Apr. 10, 2023) (noting that the quoted portion is attributed to several people over the past couple thousands of years and is regularly used by many politicians and legal thinkers.).

<sup>307</sup> The mission statement of the Blackstone Legal Fellowship is “to bring together the best Christian law students from around the United States, train them in legal theory and practice, equip them with the professional skills and networks to thrive in the legal profession, and inspire them to reimagine their careers as a way of serving God.” BLACKSTONE LEGAL FELLOWSHIP, <https://blackstonelegalfellowship.org/> (last visited Jan. 21, 2023).

chambers, whatever that means. He had a lot of respect for that, and he said, “I really appreciate you taking the time to share this with me, and next time that somebody says that, I now can share what Blackstone is all about, and I can defend you better.” And so I think, just being open and upfront about what you believe, but also doing it in a way that is firm, yet kind. At ADF, they say a lot, “sing the song sweetly.”<sup>308</sup> And I remember that frequently, too, when I get into debates with people or if I’m speaking at a less than friendly environment, and I think that has a lot to do with it. But this is the time to put on your armor.<sup>309</sup> This is the time to strengthen yourself when you’re in this type of community where you can discuss these ideas openly, and so you can really solidify what you believe and what you know, and then go out into the world and don’t stay in that bubble so that you can influence other people, and you can influence our culture.<sup>310</sup>

**Dr. Kengor:** If I could add there: charity, kindness, be a happy warrior, and show them that you don’t hate. And have a smile on your face. Have fun while you’re doing it, and I think it goes a long way.

**Mr. Mitchell:** One of the principles here at Regent that is, I think, so important that we understand that law is a calling.<sup>311</sup> That we are called by the Lord ultimately to serve him in the law. Whatever each of us has; our unique background, our unique gifts, our unique strengths. Could either of you share—maybe on a more personal level—a way in which you’ve experienced that sense of a calling in your life? And perhaps maybe if there was a moment of adversity where you doubted it, and how that strengthened you. I just think that’s kind of an open question. But I’d love to hear your own experiences.

**Mrs. Rechtenbach:** My story is long and unique. But, at eighteen years old, right after high school, I went to NYU, which was my dream school. I always wanted to live in New York, and within a few weeks, I started getting sick, and within a few months I couldn’t walk in the hospital; [was] completely incapacitated, and we found out I had got West

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<sup>308</sup> See Family Research Council, *Pray Vote Stand Townhall: The Way Forward*, YOUTUBE (Feb. 16, 2021), [https://www.youtube.com/watch?v=MFcy\\_1gahL8](https://www.youtube.com/watch?v=MFcy_1gahL8) (showing the then-CEO of Alliance Defending Freedom describe another person as exemplifying “singing the song sweetly”).

<sup>309</sup> See *Ephesians* 6:11 (“Put on the full armor of God, so that you can take your stand against the devil’s schemes.”).

<sup>310</sup> See *Vision & Mission*, REGENT UNIV., <https://www.regent.edu/about-regent/vision-mission/> (last visited Jan. 21, 2023) (“Christian Leadership to Change the World.”).

<sup>311</sup> Regent University, *Regent Law Celebrates 25 Years: Law is more than a Profession. It’s a Calling*, YOUTUBE (May 3, 2012), [https://www.youtube.com/watch?v=w\\_kmwqNfsQc](https://www.youtube.com/watch?v=w_kmwqNfsQc).

Nile virus. It turned into encephalitis an infection in my brain and damaged my brain, and then paralyzed my stomach, so I couldn't eat, so I was being fed by tubes for years. So, I took a very circuitous path to get to law school, because for years I was in and out of hospitals and surgeries, getting a pacemaker in my stomach to help it be able to digest food better. So, I spent years in bed and eventually got well enough that I could start taking a couple of online classes. I basically finished my undergrad online from bed, but I did meet my husband at the mock trial team. That was the one thing I did on campus was mock trial and end up meeting my husband. Within weeks I was in the hospital again, and he's like helping me change my IV bags, and I'm like, "you don't have to be here." He's like, "Nope, I'm here."

So, God really brought beauty from ashes for me, and then [I] went to law school, and I did 1L over two years because I was still pretty sick. We joked that I did the independent study version of law school because I basically sat in bed with my books and I read it, and then I would kind of show up for the exam, and everyone's like, "Who are you? Do you go here?" God was really faithful, and He got me through it and helped me get well enough that—I didn't know through law school if I would be well enough to be able to even work as a lawyer after law school, but it was always what I felt called to, and I had always had a passion for the Constitution and the first amendment.

I was joking out here because, as a child, I'd beg my parents to take me to Williamsburg because I loved the colonial times and founding of the country,<sup>312</sup> and I dressed in a full colonial outfit at seven years old. And so it was something I always loved, and so I always wanted to be a lawyer, and I always wanted to work at ADF. That was always my dream, and I didn't know if I would get well enough, and God was faithful, and God got me through it and then provided opportunities for me to work, and you know, I still have issues with my health, but God is faithful, and has gotten me through it, and has put me in a place where He redeemed all the years that I lost of being in bed and being sick and being in pain. And He redeemed that with my fantastic husband, who is a lawyer, and has supported me so much, and has redeemed it with opening the door for me to do what I love. And being able to live that that dream So, God is faithful, and He absolutely—even in the moment when you don't know why you're dealing with something; when you don't know why you have a certain adversity or pain in your life, I guarantee you God will use it. Just allow[] Him to use it, and allow His will to be done.

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<sup>312</sup> See *History of Colonial Williamsburg*, COLONIAL WILLIAMSBURG, <https://www.colonialwilliamsburg.org/learn/about-colonial-williamsburg/history/> (last visited Feb. 6, 2023).

**Dr. Kengor:** I don't know that I can top that, but I will say for me, it also began in a hospital. I was a premed major at the University of Pittsburgh, in the late 1980's. I worked for the organ transplant team at the University of Pittsburgh, and that was what I was going to do. I was going to go into transplantation. I worked for the [assistant] to Thomas Starzl, who was the pioneer of the procedure.<sup>313</sup> We did ninety percent of the world's transplants,<sup>314</sup> and I worked every Christmas Day, so I could do my rounds in Children's Hospital because I felt almost like I should identify with the suffering that those kids and their parents went through. And I just had this kind of crisis of calling, and I was also attracted to the field of international relations—foreign policy. It was right when the Cold War was ending—the Berlin wall was falling.<sup>315</sup> So I split my major between biochem, biophysics, and political science of all things, and I was trying to decide which career path to take. I was agnostic, if not atheist, and I would walk home from Children's Hospital and Presbyterian University Hospital in Oakland, to my apartment, and I would pass the church, and I would go in there, and I would in agony just look up, look up at the church, at the sky and say, God, if you're really there, tell me what I'm supposed to do. What am I supposed to do? And I must have had those moments for about a year. I never heard a voice. I never heard a calling. The process of discerning God's will is really difficult. It's very tricky, and be very careful with that. I've had students at Grove City College who came up to me and said that God had chosen this particular person for them to marry, and then they were divorced a few years later. It's hard to know what God's will is, and oftentimes you don't get that voice from the heavens. You usually don't get it. It is very rare in history that it happens that you hear a literal voice.<sup>316</sup> "This is what you should do, my son," right?

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<sup>313</sup> *Official Dr. Thomas E. Starzl Web Site: Statement of Impact*, UNIV. OF PITT., <https://www.starzl.pitt.edu/impact/impact.html> (last visited Feb. 6, 2023) (stating that Dr. Starzl was the pioneer of liver transplant and pushed back against the norm of his time that liver transplant was impossible).

<sup>314</sup> Cf. Bernd H. Markus et al., *Kidney Transplantation in Pittsburgh: Experience and Innovations*, *CLINICAL TRANSPLANTATION* 141, 141, tbl. 1 (1987) (listing the number of transplants that occurred in 1986 and claiming that the University of Pittsburgh had become a major transplant center); Clyde F. Barker & James F. Markmann, *Historical Overview of Transplantation*, *COLD SPRINGS HARBOR PERSPS. IN MED.* 1, 10–11, 14–15 (2013) (describing the history of Dr. Starzl's discovery of successful transplant procedures, his involvement in further research and development of the procedures through the mid to late-1900s, and his awards); *Organ Transplantation Capital of the World*, UNIV. OF PITTSBURGH, <https://www.225.pitt.edu/story/organ-transplantation-capital-world> (last visited Feb. 6, 2023) (claiming that Pittsburgh is the organ transplantation capital of the world).

<sup>315</sup> *Cold War Timeline*, TITAN MISSILE MUSEUM, <https://titanmissilemuseum.org/about/cold-war-timeline/> (last visited Feb. 6, 2023) (dating the fall of the Berlin Wall to 1989 and the end of the Cold War to 1991).

<sup>316</sup> *Compare Acts 9:1–20* (telling the story of Saul being directly spoken to by God, who commanded Saul to stop persecuting Christians), *with William Wilberforce*, WILBERFORCE

But now I go to that same church with my wife and my eight kids, and I go in there, and I sit down. I think, “all right. I think this is what I was called to do. I was called to go in this direction.” But I had to fight through it. I had to go through it, and it was never, always all that clear along the way. But if you try to do what’s right and what’s good. What was that quote from John Paul II, that I had? “The only true freedom, the only freedom that can truly satisfy, is the freedom to do what we ought, as human beings created by God, according to His plan.”<sup>317</sup> It can be hard to know what that plan is. But if you’re faithful, then perhaps you can move in the in the right direction.

**Mr. Mitchell:** It’s so encouraging to hear your personal testimony of how you were there in difficult moments. God led you, and that that became a catalyst for some new step. Very briefly, how I got to Regent was Dean Bachman was speaking on a podcast after her experiences on January 6 on Capitol Hill,<sup>318</sup> and I had never really heard of Regent, and after that I called up Dean Walton. And that’s how I [found] myself here. So that experience of praying for a long time like, “God, what’s the next step in my life?” Then God’s providence acts, and we’re always responding to that in newness.

I want to go back to John Paul [II] and Reagan because I think they were both extraordinary men. Obviously called by God in in history. They were men for that moment of time, and they both had a sense that the challenges that they faced, and which brought them together, were the occasion for the Lord to do great things.<sup>319</sup> I want to read a brief sentence here from John Paul II, when he came to Washington, D.C. in 1979, to the same school that had gone through all these upheavals in the 1960’s, and he said we stand for academic freedom. “True academic freedom is always [sic] seen in relation to the finality of [the academic enterprise, which looks to] the [total] truth of the human person.”<sup>320</sup> And if we are faithful to the truth of who God is, who He created us to be, and then to form young people, to witness in the family, in our schools, to what is true, God’s going

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SCH., <https://www.wilberforceschool.org/updated-about-us/william-wilberforce> (last visited Feb. 25, 2023) (describing how William Wilberforce felt called by God—but did not expressly hear a vocal command—to fight against slavery).

<sup>317</sup> See John Paul II, *supra* note 26 and accompanying text.

<sup>318</sup> The Eric Metaxas Show, *Michele Bachmann*, LISTEN NOTES, at 11:08 (Jan. 12, 2021), <https://www.listennotes.com/podcasts/the-eric-metaxas/michele-bachmann-muEf3TArd84/>.

<sup>319</sup> See KENGOR, *supra* note 172, at 461 (describing how both Pope John Paul II and President Ronald Regan felt they were called to do the Lord’s work in light of their assassination attempts).

<sup>320</sup> Pope John Paul II, Address of His Holiness John Paul II to the Catholic University of America (Oct. 7, 1979).

to bless us. And that's going to resonate with people who maybe are for whatever reason, confused or ignorant, who don't know.

Same theme here with Reagan. Again, Dr. Kengor, this is from your book. This is when he spoke at [] Notre Dame in 1981, just four days after John Paul II had been shot in St. Peter's Square.<sup>321</sup> To the Notre Dame Commencement, Reagan says:

When it's written, the history of our time won't dwell long on the hardships of the recent past. But history will ask—and our answer will determine the fate of freedom for a thousand years—did a nation born of hope lose hope? Did a people forged by courage find courage wanting? Did a generation steeled by hard war and a harsh peace forsake honor at the moment of a great climactic struggle for the human spirit?<sup>322</sup>

And as Cardinal, John Paul II had come to Philadelphia in 1976 when he was still this unknown Polish [bishop], and he spoke to a congress of Christians.<sup>323</sup> And he said we're facing this extraordinary clash between what he called the church and the anti-church.<sup>324</sup> Between a false something that appears good, but is not—that will deceive us—and we must be ever more courageous. So the three things Reagan says here: this is a battle, we need hope and courage and honor, so that spirit that they both embody here of: “this challenge is going to make us greater. It's going to lead to greater things happening than if there had been no challenge.”<sup>325</sup> And I feel like you're both experiencing from your own professional work, but also your personal [stories,] that that's always true.

**Dr. Kengor:** Yeah, Reagan said [that] it's [in] moments of crisis that we learned that “we're spirits, not animals.”<sup>326</sup> And you know there's a time and a place, it means destiny, and you have to struggle to do what is right. But ultimately you have to choose to do what is right, and that

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<sup>321</sup> See *Pope John Paul II Shot*, HISTORY, <https://www.history.com/this-day-in-history/pope-john-paul-ii-shot> (last visited Feb. 6, 2023) (identifying May 13, 1981, as the day of the attempted assassination); Ronald Reagan, Address at Commencement Exercises at the University of Notre Dame (May 17, 1981) (giving a speech four days after the assassination attempt on Pope John Paul II).

<sup>322</sup> Address at Commencement Exercises at the University of Notre Dame, *supra* note 321.

<sup>323</sup> See Eugene Kusielewicz, *Visit of Cardinal Wojtyla*, 31 KOSCIUSZKO FOUND. NEWSL. 8 (1976); Sharon Kabel, *Catholic Fact Check: Cardinal Karol Wojtyla and the Final Confrontation*, SHARON KABEL, <https://sharonkabel.com/post/cardinal-wojtyla-and-final-confrontation/> (Jan. 29, 2021) (showing that Cardinal Wojtyla made this statement in New York on September 4, 1978, although it is mistakenly attributed to something he said in Philadelphia).

<sup>324</sup> Kusielewicz, *supra* note 323, at 11.

<sup>325</sup> See KENGOR, *supra* note 172, at 461.

<sup>326</sup> See Ronald Reagan, A Time for Choosing (Oct. 27, 1964) (quoting Winston Churchill).

definition of academic freedom by John Paul II—to violate human dignity would not be a proper exercise of academic freedom.<sup>327</sup>

**Mr. Mitchell:** Any final thoughts for us Ms. Rechtenbach?

**Mrs. Rechtenbach:** You know, adversity breeds strength and perseverance,<sup>328</sup> and so I always go back to the Bible and say—I look at that as a positive. Whenever we face our culture yelling at us and telling us that we’re wrong, or racist, or evil, or haters, whatever it may be, that’s how you know you’re on the right path a lot of times in our current culture. It’s just exciting to be here to see so many people who are interested in fighting back against this, and at times I think you can feel like you’re out there alone, and you’re not.<sup>329</sup> And so, having so many people here and having this community is incredibly important, and it’s exciting to know that we’ve got a new crop of people coming to join us in the fight.

**Dr. Kengor:** And remember again, Jesus said you will be persecuted. You will carry your cross.<sup>330</sup> So you are expected to do that in this life. So, when it happens, don’t cower and run away and drop the cross, and think “I didn’t get into this for suffering, man.” Right? I mean, that’s what you’re supposed to do, that’s what you’re going to go through period. Accept it.

**Mr. Mitchell:** Amen. I know we’re all so deeply grateful that you’ve come to be with us today. Thank you both. Won’t you join me in thanking our speakers?

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<sup>327</sup> See POPE JOHN PAUL II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE OF THE SUPREME PONTIFF JOHN PAUL II ON CATHOLIC UNIVERSITIES para. 4 (1990) (declaring that the Catholic universities need to “proclaim[] the meaning of truth” so that “freedom, justice and human dignity are [not] extinguished”).

<sup>328</sup> See *James* 1:2–4 (“Consider it all joy, my brothers and sisters, when you encounter various trials, knowing that the testing of your faith produces endurance. And let endurance have its perfect result, so that you may be perfect and complete, lacking in nothing.”).

<sup>329</sup> See *Who We Are*, ALL. DEFENDING FREEDOM, <https://adflegal.org/about-us> (last visited Feb. 6, 2023) (boasting over 4,600 network attorneys); *What is Blackstone*, BLACKSTONE LEGAL FELLOWSHIP, <https://blackstonelegalfellowship.org/what-is-blackstone/> (last visited Feb. 6, 2023) (claiming almost 2,300 fellows around the world); *Employment Statistics*, REGENT L., <https://www.regent.edu/school-of-law/careers/employment-statistics/> (last visited Feb. 6, 2023) (noting 3,578 J.D. graduates from Regent Law around the world).

<sup>330</sup> See *Matthew* 5:11 (“Blessed are ye, when men shall revile you, and persecute you, and shall say all manner of evil against you falsely, for my sake.”); *Matthew* 16:24 (“Then said Jesus unto his disciples, If any man will come after me, let him deny himself, and take up his cross, and follow me.”).



## THE WOKE WORLD: WHERE IS EDUCATION TODAY?

### *Distinguished Panelists\**

**The Honorable Alice Batchelder:** First of all, I'm really, really pleased to be here at Regent. It's my first time here, although I've certainly been hearing a lot about Regent over the years. It occurs to me that maybe I should tell you my first actual experience with Regent, which was probably fourteen or fifteen years ago. I was one of many judges who served as judges of the huge moot court competition that is hosted at William and Mary.<sup>1</sup> They don't tell you until you get there that they're not going to pay your transportation. But, anyway, that was the year that William and Mary had removed the cross from the chapel, which was something that I found extraordinary.<sup>2</sup> I judged in this competition—many other judges did. They had the big banquet at the end, and they announced the winners of the briefing competition and the oral advocacy competition, and there at William and Mary, where they had removed the cross from the chapel, Regent won both.<sup>3</sup> I was just laughing at my banquet table, and some of the other people at my table didn't understand why I was getting such a kick out of this, but I thought it couldn't have been more right.

That first panel that you just heard is a hard panel to follow, but this panel is going to focus on the challenges presented by the landscape of education today. Those challenges are, I'm sure you all recognize, legion.<sup>4</sup>

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\* The Honorable Alice M. Batchelder is a federal appellate judge on the United States Court of Appeals for the Sixth Circuit.

Tyson Langhofer is Senior Counsel and Director of the Center for Academic Freedom at Alliance Defending Freedom.

Coke Morgan Stewart is the Virginia Deputy Attorney General for Health, Education, and Social Services.

Kurt Kreassig is the Dean of the School of Education at Regent University.

<sup>1</sup> See *About the Spong Tournament*, WM. & MARY L. SCH., <https://law.wm.edu/studentlife/studentorganizations/spong/about/index.php> (last visited Jan. 15, 2023).

<sup>2</sup> See *A Movement to Defend and Honor William & Mary's Honor*, SAVE THE WREN CROSS (2006), <http://www.savethewrencross.org/facts.php> [<http://web.archive.org/web/20070913145141/>] (noting that the cross was first removed in 2006).

<sup>3</sup> See *Awards and Honors*, REGENT L., <https://www.regent.edu/school-of-law/about-regent-law/awards-honors/#moot-court-competitions> (last visited Feb. 6, 2023).

<sup>4</sup> For examples of challenges in modern education, see generally *Why Is Critical Race Theory Dangerous for Our Kids?*, MARSHA BLACKBURN U.S. SENATOR TENN. (July 21, 2021), <https://www.blackburn.senate.gov/2021/7/why-is-critical-race-theory-dangerous-for-our-kids>, about children who are depressed or ashamed of being white because of CRT curriculum in schools, and Katie Reilly, *'This Isn't Just About a Pronoun.'* *Teachers and Trans Students Are Clashing Over Whose Rights Come First*, TIME (Nov. 15, 2019, 6:00 AM), <https://time.com/5721482/transgender-students-pronouns-teacher-lawsuits/>, about multiple teachers have filed lawsuits concerning school policies that required them to use students' preferred pronouns.

We will also be focusing on how we can respond to those challenges with a coherent vision that builds both on faith—which is essential to this institution and to this audience, obviously<sup>5</sup>—and reason, which is essential to education itself.<sup>6</sup> Today’s educational landscape presents some critical questions, including this huge—at least, I think this one is huge: Does education today recognize objective truth, or have we been captured by the idea of “your truth,” which we see very often? Another big question is whether it is still true today that the religious freedom of Christians, at least in the classroom, is protected by the First Amendment.<sup>7</sup>

Another is whether science and consensus are coterminous.<sup>8</sup> Those are just a few of the big questions which confront education today. There are many, many more.

We are so fortunate to have these three distinguished panelists who have real-world experience in confronting these challenges. I have the somewhat daunting task of directing some questions to them in a variety of areas, and then, like all of you, I will get to benefit from their knowledge and experience. So, we’re going to start out by having each of them give us just a few minutes of opening remarks. And I guess I don’t know. Do I do age before beauty? Do I do ladies before men?

Why don’t I start with Tyson?

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<sup>5</sup> *Philosophy & Mission*, REGENT L., <https://www.regent.edu/school-of-law/about-regent-law/philosophy-mission/> (last visited Jan. 15, 2023).

<sup>6</sup> See *Philosophy of Education*, STAN. ENCYCLOPEDIA PHIL. (Oct. 7, 2018), <https://plato.stanford.edu/entries/education-philosophy/> (explaining that throughout history, philosophers have considered reason and education to be coextensive and concurrent).

<sup>7</sup> See U.S. CONST. amend. I (prohibiting the establishment of religion and guaranteeing freedom of religious expression). For important Supreme Court cases addressing the rights of students to freely exercise their religions, see *Engel v. Vitale*, 370 U.S. 421, 422–23, 425 (1962), holding that a school-mandated prayer violated the Establishment Clause, *School District of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963), holding that state-mandated readings from the Bible in school violated the Establishment Clause, *Wisconsin v. Yoder*, 406 U.S. 205, 207, 213 (1972), holding that requiring Amish to attend public school beyond the eighth grade violated the Free Exercise Clause, and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 626, 629, 641–42 (1943), holding that recitation of the Pledge of Allegiance with no exceptions for Jehovah’s Witnesses with religious objections was unconstitutional.

<sup>8</sup> Compare Yehoshua Socol et al., *Interests, Bias, and Consensus in Science and Regulation*, DOSE-RESPONSE: INT’L J., Apr.-June 2019, at 1, 2 (claiming that consensus has no place in science because it prevents scientists from seeing flaws in theories), and Ethan Siegel, *What Does ‘Scientific Consensus’ Mean?*, FORBES (June 24, 2016, 11:00 AM), <https://www.forbes.com/sites/startswithabang/2016/06/24/what-does-scientific-consensus-mean/?sh=702a67b6bae9> (explaining that challenges to scientific consensus must be brought to refine theories), with Robert Sanders, *Scientific Consensus: Why Should We Accept It?*, FUTURISM (Sept. 25, 2016), <https://futurism.com/what-is-scientific-consensus> (contending that scientific consensus is valuable because it signals to the public that a majority of scientists, using different methods, have reached the same conclusion on a scientific theory).

**Mr. Tyson Langhofer:** I don't know what that says about your choice.

**Hon. Alice Batchelder:** You choose.

**Mr. Langhofer:** It's great to be back here at Regent, especially this room. This room has one of my favorite memories from law school. Specifically, I remember judging a moot court competition when I was a 3L. Professor Hernandez was the chief judge, and a couple of my classmates were sitting there. And the individual that was getting ready to come argue—she was very nervous, as we all are when we are doing our first argument—and she walks up and looks down and looks up and says, “Father God.” She had clearly been praying. I think she meant, “Mr. Chief Justice,” and Professor Hernandez says, “Well, I've been called a lot of things, but ‘Father God’ is not one of them.” But we can all, I think, remember praying beforehand—just do that in your head, not verbally.

We've heard a lot about the travails facing education, and I've been at ADF about seven years, leading the Center for Academic Freedom where we defend the rights of students and faculty.<sup>9</sup> I'm trying to get my arms around, you know—what the current generation—what are they motivated by? What do they move by? What's influencing this change that I've seen since I've been in education? One of the things that I talk a lot about is this notion that our educational institutions have exchanged their original mission of the pursuit of truth for the pursuit of social justice.<sup>10</sup> And it's a perverted view of social justice.<sup>11</sup> Every institution that was founded typically in education, historically, has been around this pursuit of truth to understand the world as it is.<sup>12</sup> But now most educational

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<sup>9</sup> *Tyson Langhofer*, ALL. DEFENDING FREEDOM, <https://adflegal.org/biography/tyson-langhofer> (last visited Feb. 5, 2023); see *Who We Are*, ADF CTR. FOR ACAD. FREEDOM, <https://centerforacademicfreedom.org> (last visited Jan. 16, 2023).

<sup>10</sup> See Jonathan Haidt, *When Truth and Social Justice Collide, Choose Truth: Why I'm Resigning from My Professional Society*, CHRON. HIGHER EDUC. (Sept. 23, 2022), <https://www.chronicle.com/article/when-truth-and-social-justice-collide-choose-truth?> (explaining that the ultimate purpose of universities is truth, but this has been usurped by social justice initiatives).

<sup>11</sup> See generally Heather Mac Donald, *The Social Justice Drive to Destroy American Education*, N.Y. POST (Dec. 11, 2019, 7:35 PM), <https://nypost.com/2019/12/11/the-social-justice-drive-to-destroy-american-education/> (espousing the opinion that progressive policymakers have turned social justice into political advocacy); Thaddeus Williams, *Social Justice: Breakup or Breakthrough?*, GOSPEL COAL. (Apr. 5, 2021), <https://www.thegospelcoalition.org/article/carson-easter-poem/> (contrasting social justice from a biblical worldview with social justice from a secular worldview).

<sup>12</sup> See Brian Bird, *Rediscovering the Truth-Seeking Mission of Universities*, UNIV. AFFS. (Oct. 29, 2020), <https://www.universityaffairs.ca/opinion/in-my-opinion/rediscovering-the-truth-seeking-mission-of-universities/> (claiming that the primary purpose of all

institutions have embraced this version of social justice: it's not to understand the world, but to change the world through the pursuit of social justice.<sup>13</sup> That has profound implications, right? When you think about ignoring truth through the pursuit of justice—truth and justice are inseparable.<sup>14</sup> We have to first, as a society, find truth, and then we can pursue justice. But what we see today—through many of the things that we'll talk about, whether it be CRT, whether it be transgender ideology, whether it be through the role of parents—we have jettisoned truth, and instead, pursued this feel-good version of social justice.<sup>15</sup>

We'll be able to talk about a lot of the cases and how I see this play out in the real world, but I'll just give one brief example in this opening. I recently represented a teacher in rural Kansas, where I'm from, who had been suspended for referring to a student using the student's last name rather than the preferred name and pronoun.<sup>16</sup> We challenged this policy because it [not only] forced teachers to use preferred names and pronouns, but it also provided that they could not reveal this information to the parents unless the student specifically consented.<sup>17</sup> We had an evidentiary hearing on a preliminary injunction and put the principal on the stand and ask the principal, "Is there any list of preferred pronouns? Is there any kind of approved list?"

"No. No approved list."

"Okay. Well, have you heard of the fae/vaer pronouns?"

"No, never heard of that."

"Well, that's where you identify as partially human, partially feline.<sup>18</sup> Would my teacher or my client have to use those pronouns?"

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universities is to impart knowledge and seek truth); *cf. A Renewed Focus on Truth-Seeking*, CTR. FOR ADVANCEMENT TEACHING (Jan. 15, 2021, 9:30 AM), <https://teaching.fsu.edu/tips/2021/01/15/a-renewed-focus-on-truth-seeking/> (declaring that universities should be more intentional about truth-seeking to develop global citizens).

<sup>13</sup> See Haidt, *supra* note 10 (explaining that universities are diverting their purpose from truth-seeking to promoting social justice across the nation).

<sup>14</sup> To see how this is especially notable from a biblical worldview, see *Isaiah* 59:15, stating that the Lord sees truth is lacking and is displeased because there is no justice, and *Jeremiah* 4:2, proclaiming that the Lord glories in those who live in truth and justice.

<sup>15</sup> See, e.g., *What Does Social Justice Mean?*, HUM. RTS. CAREERS, <https://www.humanrightscareers.com/issues/what-does-social-justice-mean/> (last visited Jan. 16, 2023) (explaining that today's social justice demands equity, as in equal outcomes, rather than equal opportunity).

<sup>16</sup> *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB, slip op. at 1–2 (D. Kan. May 9, 2022).

<sup>17</sup> *Id.* at 1.

<sup>18</sup> See generally Ezra Marcus, *A Guide to Neopronouns*, N.Y. TIMES, <https://www.nytimes.com/2021/04/08/style/neopronouns-nonbinary-explainer.html> (Sept. 18, 2022) (explaining that a neopronoun is "a word created to serve as a pronoun without expressing gender, like 'ze' and 'zir' . . . [or] 'kitten/kittenself'").

“Yes, but we definitely have a conversation with that student if that came up.”<sup>19</sup>

I’m like, “Well, how would you have a conversation?” You don’t even know what it means, first of all. Second of all, who are you to question this gender identity under your theory? There’s no framework, right?<sup>20</sup> And the judge had a lot of questions for the school’s attorney. One of them was “You have a parent-teacher conference where the parent and the student are both present. You have to use the legal name and biological pronoun with the parent but the preferred name and pronoun with the student. What do you call the student in that meeting?”<sup>21</sup> Blank look on the attorney’s face. “Uh, you don’t have to use a name at all. You can just say, ‘student.’”<sup>22</sup> The judge was like, “You’re going to get through a whole meeting saying, ‘hey, student,’ ‘your student,’ you know? That’s going to raise questions with the parents, right?”<sup>23</sup>

But we have jettisoned truth, and we’re making up these rules on the fly.<sup>24</sup> This same school district had a policy which said that parents are full partners in education.<sup>25</sup> So I asked the principal, “This is your policy, right? Full partners in education, right? But you have a white notebook that says preferred names, and the student signs that and says ‘Please don’t tell my parents about this.’ You’re treating parents as the enemy.”<sup>26</sup> That’s the framework. When you stop pursuing truth, and you pursue this warped version of justice, and you try to separate truth and justice, you’re going to end up in the place where we’re at today. Which is a very confused world where you have the highest rates of depression and anxiety in K-12 students that we’ve ever seen.<sup>27</sup>

**Hon. Alice Batchelder:** Thank you, Tyson. Coke?

<sup>19</sup> Transcript of Motion for Preliminary Injunction at 74, Ricard v. USD 475 Geary Cnty., Kan. Sch. Bd. (No. 22-4015-HLT).

<sup>20</sup> See *id.* at 74–75 (showing that there were inconsistencies in the school’s policies and procedures for accommodating students’ chosen names and pronouns).

<sup>21</sup> For the particular phrasing used by the court, see *id.* at 116.

<sup>22</sup> See *id.* at 116–17.

<sup>23</sup> See *id.* at 117.

<sup>24</sup> See Douglas Groothuis, *The Biblical View of Truth Challenges Postmodernist Truth Decay*, 26 THEMELIOS 11, 12–13 (2000) (explaining that postmodernists have abandoned the idea of absolute, objective truth, and this new idea of truth pervades modern culture).

<sup>25</sup> Ricard v. USD 475 Geary Cnty., KS Sch. Bd., No. 5:22-cv-04015-HLT-GEB, slip op. at 6 n.8 (D. Kan. May 9, 2022).

<sup>26</sup> Transcript of Motion for Preliminary Injunction, *supra* note 19, at 75, 82 (showing that Langhofer highlighted the discrepancies in the school’s policy respecting children’s preferred pronouns and disclosing this to parents).

<sup>27</sup> See Lydie A. Lebrun-Harris et al., *Five-Year Trends in US Children’s Health and Well-Being, 2016-2020*, JAMA PEDIATRICS, July 2022, at 3–4, <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2789946> (stating that rates of anxiety and depression among school-aged children increased from 2016 to 2020).

**Deputy Attorney General Coke Morgan Stewart:** It's so great to be here and see so many of my former students. If I taught you, would you raise your hand? Wow, look at that, that's really exciting! I was thinking about my first experience at Regent, and it was actually at this very conference. I can't remember if it was 2019 or earlier. My father had been an adjunct faculty member here,<sup>28</sup> and I grew up in Virginia Beach, so I'd always kind of heard a lot about the great things that Regent was doing, but I hadn't really physically been on campus and heard from the teachers. I was so moved and impressed by my experience at that symposium. I particularly remember so many different speakers. But I think I remember Dean Walton talking about human trafficking and trying to get engaged with the community and protect people who are victims of human trafficking from prosecution and being pardoned.<sup>29</sup> It's such an amazing confluence of ideas, and it wasn't anything that was really breaking along political lines. It was just really seeking to do right by the community, and I was so impressed by that experience. That just was kind of the first moment of my re-engagement with Regent. I was so honored to be able to teach here and meet so many of you, and I'm so proud of everything that Dean Lingo is doing. I'm so honored to have had the opportunity to teach with him, and for him to mentor me. So, thank you for having me back.

My role, as many of you know, is—there are four Deputy Attorney Generals in the State of Virginia, and they have different roles.<sup>30</sup> We have a criminal deputy, we have a deputy that does general civil litigation, we have someone who does operations, and my role is over health, education, social services, and child support enforcement.<sup>31</sup> I remember after the election, some folks had approached me about serving in the administration. I remember saying to my family, “The one role I definitely would not want to be involved in would be the deputy for HESS, as they call it—health, education, and social services.” I said, “Affirmative action, CRT, abortion; I don't want my name in the newspapers. I want to serve, but that's just going to be too intense.” And that's ultimately the position

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<sup>28</sup> *Judge Henry Coke Morgan, Jr.*, H.D. OLIVER FUNERAL APARTMENTS, INC., <https://www.hdoliver.com/obituaries/Judge-Henry-Coke-Morgan-Jr?obId=24786806> (last visited Jan. 18, 2023).

<sup>29</sup> Deputy Attorney General Stewart was referring here to the Journal of Global Justice and Public Policy's Symposium held at Regent University. *Spring Symposium – Slavery to Bravery: Human Trafficking from A to Z*, J. GLOB. JUST. & PUB. POL'Y, <https://jgpp.regent.edu/event/spring-symposium-slavery-to-bravery-human-trafficking-from-a-to-z/> (last visited Jan. 27, 2023).

<sup>30</sup> *About the Office*, OFF. ATT'Y GEN., <https://www.oag.state.va.us/our-office/about-the-office> (last visited Jan. 25, 2023).

<sup>31</sup> *Senior Leadership*, OFF. ATT'Y GEN., <https://www.oag.state.va.us/our-office/senior-leadership> (last visited Jan. 26, 2023); see *Assistant Attorney General*, OFF. ATT'Y GEN., <https://www.oag.state.va.us/15-about/careers/2404-assistant-attorney-general-00602> (last visited Feb. 27, 2023) (noting that the Assistant Attorney General of Health, Education, and Social Services is also responsible for child support enforcement).

that was offered to me.<sup>32</sup> And now, looking back on it, I wouldn't have it any other way because of the importance of these issues to the state.

If you want to go back in a time machine—and I don't know how many of you are political junkies like I am—maybe you remember the debate between Terry McAuliffe and Glenn Youngkin when they were talking about issues with school.<sup>33</sup> Do you remember what Terry McAuliffe said? He said, “I don't think parents should be telling schools what they should teach.”<sup>34</sup> And if you were watching that, I think there was some muted applause,<sup>35</sup> depending on who was present for the debate. But I remember also feeling this, just, gasp. Mentally, I was just so thrown back by that statement. I don't even think that they knew at the time the importance that those words would have. In a later article before the election, the Hill—which I don't think is a particularly conservative publication—said, “Those [ten] words—deserving of a top listing in the Hall of Fame of Political Blunders—may prove to be the turning point in a race in which McAuliffe was expected to cruise to victory, especially since Joe Biden won the,” what they refer to Virginia as a “blue state by more than [ten] points on his way to the presidency in 2020.”<sup>36</sup> So, for those of you who are following Virginia politics, there probably is no greater issue in the political landscape right now, really, than education and parents' rights, and I'm so excited to be part of that in support of what the Attorney General and the Governor are trying to do.<sup>37</sup> I made a few notes of what I

<sup>32</sup> *Senior Leadership*, *supra* note 31.

<sup>33</sup> *Virginia Gubernatorial Debate*, C-SPAN (Sept. 28, 2021), <https://www.c-span.org/video/?514874-1/virginia-gubernatorial-debate>.

<sup>34</sup> *Id.* at 30:10.

<sup>35</sup> *Id.* at 30:04.

<sup>36</sup> Joe Concha, *Education Blunder Igniting Suburban Parents Driving McAuliffe Panic in Virginia*, HILL (Oct. 28, 2021, 12:30 PM), <https://thehill.com/opinion/campaign/578885-education-blunder-igniting-suburban-parents-driving-mcauliffe-panic-in/>.

<sup>37</sup> See Matthew Barakat & Sarah Rankin, *Youngkin Looks to Root Out Critical Race Theory in Virginia*, AP NEWS (Feb. 15, 2022), <https://apnews.com/article/education-richmond-race-and-ethnicity-racial-injustice-virginia-8ad5da65b9cb05265f2b8081c41827cd> (noting that Governor Youngkin's first action as governor was to sign an executive order aimed at removing controversial theories from classrooms); Lexi Lonas, *Youngkin Delivers on Education Campaign Promises One Year into Governorship*, HILL (Oct. 11, 2022, 6:00 AM), <https://thehill.com/blogs/blog-briefing-room/news/3679166-youngkin-delivers-on-education-campaign-promises-one-year-into-governorship/> (explaining that Governor Youngkin aimed to improve education by passing an education spending bill and increasing choice about masks in schools); Anna Bryson, *Youngkin Administration Pushes School Choice Through Education Savings Accounts*, RICHMOND TIMES-DISPATCH (Jan. 5, 2023), [https://richmond.com/news/local/education/youngkin-administration-pushes-school-choice-through-education-savings-accounts/article\\_08b7f9aa-89ff-57d9-a45d-e52b81b2110b.html](https://richmond.com/news/local/education/youngkin-administration-pushes-school-choice-through-education-savings-accounts/article_08b7f9aa-89ff-57d9-a45d-e52b81b2110b.html) (describing Governor Youngkin's continued dedication to education by establishing a school choice program); Hannah Natanson & Justin Jouvenal, *Va. Supreme Court Dismisses Lawsuit Against Youngkin's Mask-Optional Order on Technical Grounds*, WASH. POST (Feb.

think some of the most significant issues facing Virginia are right now, and when we started, it was definitely school closures and masking due to the pandemic,<sup>38</sup> and now the impact of those policies on students and their education and their mental health.<sup>39</sup> Obviously, parents' rights in school, including sexually explicit materials, and now transgender policies, and then kind of equity, affirmative action, and discrimination against Asian students in our public school system, I would say, are some of the top three issues.<sup>40</sup> Obviously, many of you heard on the first day of the new administration, on January 15, the Governor issued numerous executive orders dealing with education,<sup>41</sup> and one of the first actions of the Attorney General was to issue an opinion that said that public colleges and universities in Virginia could not require that students obtain the COVID vaccine.<sup>42</sup> Previously, that had been a requirement to attend school at most of the public colleges and universities in the state, despite the fact that their authority is limited in the Virginia code as to what vaccinations they can require as public institutions.<sup>43</sup> So it's an exciting time in

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7, 2022, 2:33 PM), <https://www.washingtonpost.com/education/2022/02/07/va-supreme-court-dismisses-lawsuit-against-youngkins-mask-optional-order/> (explaining that the Virginia Attorney General won a case against a challenge to the mask-optional order, albeit on technical grounds).

<sup>38</sup> See Lonas, *supra* note 37 (noting Governor Youngkin made masks optional in schools); Glenn Youngkin, *Glenn Youngkin: Parents Matter in Education – Virginia Election Will Decide Fate of Students, Schools*, FOX NEWS (Nov. 1, 2021), <https://www.foxnews.com/opinion/virginia-parents-student-schools-youngkin-glenn>.

<sup>39</sup> See Youngkin, *supra* note 38 (explaining that student achievement in school dropped dramatically during the COVID-19 pandemic); Matt Hawrilenko et al., *The Association Between School Closures and Child Mental Health During COVID-19*, JAMA NETWORK OPEN, Sept. 2021, at 5, 7 (finding that older children receiving remote schooling had worse mental health outcomes than those attending school in-person).

<sup>40</sup> See Robert Kubica, *Let's Talk About Sex: School Surveys and Parents' Fundamental Right to Make Decisions Concerning the Upbringing of Their Children*, 51 VILL. L. REV. 1085, 1088–89 (2006) (sexually explicit materials); S. Ernie Walton, *Gender Identity Ideology: The Totalitarian, Unconstitutional Takeover of America's Public Schools*, 34 REGENT U. L. REV. 219, 261–62 (2021–2022) (transgender policies); Cory R. Liu, *Affirmative Action's Badge of Inferiority on Asian Americans*, 22 TEX. REV. L. & POL. 317, 330 (2018) (affirmative action and discrimination against Asian students).

<sup>41</sup> *Governor Glenn Youngkin Signs 11 Day One Executive Actions*, GOVERNOR OF VA. (Jan. 15, 2022), <https://www.governor.virginia.gov/news-releases/2022/january/name-918519-en.html>; see, e.g., Va. Exec. Ord. No. 1 (2022) (prohibiting public education on Critical Race Theory and establishing parental rights to access information on the materials used for instruction).

<sup>42</sup> *Legality of Pub. Inst. Requiring COVID-19 Vaccination*, 4 Op. Att'y Gen. Va. 1, 3 (2022).

<sup>43</sup> *Compare Legality of Pub. Inst. Requiring COVID-19 Vaccination*, Op. Att'y Gen. Va. 1, 4 (2021) (opining that universities may require the COVID vaccine to keep their campuses safe), with VA. CODE ANN. § 23.1-800(B)–(C) (LEXIS through ch. 22 of the 2022 Spec. Sess. I) (enumerating vaccines—not including the COVID vaccine—that schools must require for attendance).



Virginia. I'm so proud to be here as part of this conference, and to see all you all again. Thank you so much.

**Hon. Alice Batchelder:** Is it ok if I call you . . . .

**Dean Kurt Kreassig:** Kurt, please.

**Hon. Alice Batchelder:** Good. Thank you. That works.

**Dean Kreassig:** Great to see everybody. And looking around, not only am I outnumbered, but I'm looking around at all the young people who might not yet have kids in public schools or private schools or what have you. You reflect on your own experience, or there was parochial, private, or public school. What you're going to hear today is a common theme. I think that all of us have a moral imperative to better our public schools for the fate of our country. Our country's success is intertwined with the success of our public schools.<sup>44</sup> And I want you to keep that in mind throughout today's presentation and beyond because whether you agree or don't agree, it still matters for our country, and my responses today are going to be from a practitioner's orientation—whether a school principal, maybe a school board member, a classroom teacher. So, I'm going to bring a different perspective to the dialogue. Thank you.

**Hon. Alice Batchelder:** Thank you. Thank all three of you.

Kurt just mentioned some of you aren't, maybe, old enough yet to have children. None of you are as old as I am. I'm looking back on an awfully long time on what's going on in education and just in our country and in the world in general. I tried to order some supplements the other day to keep immune from a lot of other things and the person on the other end was trying to persuade me about how I should subscribe to the auto-ship program. I said, "Ma'am, when you're seventy-eight, you don't subscribe to the auto-ship program." I have a lot of years to look back on, and I'm particularly interested in primary and secondary education at this point because there really is a focus in the educational world and the rest of the current world on our children—the young ones.<sup>45</sup>

So, starting with Tyson, you've already talked about one case, but you have considerable experience in defending parental rights in America—particularly with regard to public schools. So I would ask you, what rights do parents have respecting their children who attend public schools? What

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<sup>44</sup> See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 782–84 (1985) (emphasizing the role of public education in developing politically adept members of society).

<sup>45</sup> See Walton, *supra* note 40, at 277–79 (enumerating controversial policies that affect public school curricula from "kindergarten through twelfth grade").

do you think is the best approach to litigating those rights? One thing that kind of comes to mind is, are we talking substantive due process here—which Clarence Thomas doesn’t believe exists<sup>46</sup> and I tend to agree with him—or privileges and immunities?<sup>47</sup> Law students love to talk about all of this. The question is: how should we be approaching it? I know that was three questions, but I know you’ll sort through them.

**Mr. Langhofer:** Well, that could be the subject of an entire panel of an hour for sure, but it’s a great question because it’s one that I don’t recall having been discussed in my growing-up times. There wasn’t a real discussion on parental rights. It was kind of just an understanding about it. Of course, they have those rights.<sup>48</sup> And now, it is a huge conflict.<sup>49</sup> Most schools, like Geary County, where I was litigating, would have a policy that says, “Sure, parents are full partners in education.”<sup>50</sup> They know if they have something different, the parents would be like “Oh, this is a problem. What do you mean I don’t have a say?”<sup>51</sup> But, unfortunately, the case law is not very well developed on parental rights. As Judge Batchelder acknowledges, the case law in—*Troxel v. Granville*—is a case that discusses it.<sup>52</sup> Then the *Meyer v. Nebraska*<sup>53</sup> and *Pierce v. Society of*

<sup>46</sup> See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2300–01 (2022) (Thomas, J., concurring) (quoting *Johnson v. United States*, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring)) (“[S]ubstantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution.’”).

<sup>47</sup> Earlier Supreme Court jurists debated whether the proper method of incorporating the Bill of Rights against state government is through the Fourteenth Amendment’s Privileges or Immunities Clause rather than its Due Process Clause. Compare *Slaughter-House Cases*, 83 (1 Wall.) U.S. 36, 96 (1872) (Field, J., dissenting) (arguing that the purpose of the Privileges or Immunities Clause was to prevent state governments from violating the rights enumerated in the Bill of Rights), and *Saenz v. Roe*, 526 U.S. 489, 521–22 (1999) (Thomas, J., dissenting) (asserting that the *Slaughter-House Cases* destroyed the meaning of the Privilege or Immunities Clause), with *id.* at 78–79 (finding that the Privileges or Immunities Clause only pertained to national rights and did not extend the protections of the Bill of Rights to the actions of individual states).

<sup>48</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1971).

<sup>49</sup> See, e.g., *Virginia Gubernatorial Debate*, C-SPAN (Sept. 28, 2021), <https://www.c-span.org/video/?514874-1/virginia-gubernatorial-debate>, at 30:10 (recording Terry McAuliffe, as Virginian gubernatorial candidate, stating, “I don’t think parents should be telling schools what they should teach.”).

<sup>50</sup> See *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB, slip op. at 11 n.8 (D. Kan. May 9, 2022).

<sup>51</sup> See David Aaro, *McAuliffe Criticized Online After Saying He Doesn’t Believe Parents Should Tell Schools What to Teach*, FOX NEWS (Sept. 29, 2021, 2:54 AM), <https://www.foxnews.com/politics/mcauliffe-receives-criticism-believe-parents-should-tell-schools-teach> (expressing parents’ incredulity at the suggestion that they might have no involvement in their children’s education).

<sup>52</sup> 530 U.S. 57, 66 (2000) (describing a general right to parent).

<sup>53</sup> *Meyer*, 262 U.S. at 399 (finding that the Due Process Clause protects the right to “establish a home and bring up children”).

*Sisters*.<sup>54</sup> Those are kind of the only main cases on parental rights and they do essentially reference substantive due process.<sup>55</sup> That's why you see the *Meyer* case, and *Troxel*, and so forth—they're very divided opinions.<sup>56</sup> They're very divided. We know that parents have a fundamental right, and the Supreme Court has recognized parenting as a fundamental right.<sup>57</sup> But it's not mentioned in the Constitution. It just isn't there. Specifically, the right to parent.<sup>58</sup>

So, courts are trying to figure out how to deal with that, and because the Supreme Court has not been clear about it, the district courts have gone all different ways; from rational basis, to intermediate, to strict scrutiny.<sup>59</sup> It is a difficult issue to litigate, but when it comes to the issues that we're specifically litigating, we can ground our arguments in other arguments as well. One of the issues is the right to participate in the decisions about whether your child is going to transition to another gender.<sup>60</sup> What will they be called at school? Both their actual name and their pronouns? What sex are you going to treat them as? The vast majority of schools today, if they've adopted a policy, most of them will have some vague reference to: "You should let the child decide whether you're going to tell the parents."<sup>61</sup> Either they'll have that specifically

<sup>54</sup> 268 U.S. 510, 534–35 (1925) (expanding parental rights to include the right of parents to "direct the upbringing and education of children under their control").

<sup>55</sup> See Susan E. Lawrence, *Substantive Due Process and Parental Rights: From Meyer v. Nebraska to Troxel v. Granville*, 8 J.L. & FAM. STUD. 71, 72–73 (2006) (presenting these cases as the only Supreme Court opinions that set the limits of constitutional parental rights under the Due Process Clause).

<sup>56</sup> See, e.g., *Troxel*, 530 U.S. at 66, 68, 75–76, 80–81, 91–95 (listing the Justice's differing opinions regarding the scope of parental rights, including the majority's affirmation that parental rights exist but do not extend to grandparents and Justice Scalia's dissenting assertion that the parental rights doctrine should not be further developed beyond its *Meyer-Pierce* scope).

<sup>57</sup> *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes [among others] the right[] . . . to direct the education and upbringing of one's children . . .").

<sup>58</sup> See, e.g., Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 66 (2020) ("The Court created parent[al] rights . . . without the benefit of any specific language in the Federal Constitution.").

<sup>59</sup> Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 128–29, 140–41 (2018) (noting instances where the U.S. District Courts have applied rational basis, intermediate, and strict scrutiny in parental rights cases in the absence of an overarching standard from the Supreme Court).

<sup>60</sup> See Walton, *supra* note 40, at 261–62 (asserting the state's facilitation of gender transition in public schools violates parents' constitutional right to make decisions regarding their children).

<sup>61</sup> See, e.g., N.J. DEPT OF EDUC., TRANSGENDER STUDENT GUIDANCE FOR SCHOOL DISTRICTS §§ 2, 4, <https://www.nj.gov/education/safety/sandp/climate/docs/Guidance.pdf> (asserting the school's policy that there is no duty to inform parents of or obtain parental consent concerning a transgender student's identity); MADISON METRO. SCH. DIST.,

written out or they will say that specifically. So, we're challenging those policies because, one, is that now implicates teachers' rights because teachers are being forced to lie.<sup>62</sup> In my case, I represented Pam Ricard.<sup>63</sup> When she emailed a parent, she had to use their legal name and biological pronoun.<sup>64</sup> But when she referred to the student, she had to use the preferred name and pronoun.<sup>65</sup> She felt like that was lying, being deceptive to the parents.<sup>66</sup> These are middle school girls who are going through clearly very difficult times, and the parents are being cut out completely.<sup>67</sup> There's some deception there. We've argued free speech arguments there.<sup>68</sup> We're like, "You can't force teachers to lie to parents," and we've been successful there.<sup>69</sup> As parents on the parental rights side, we are relying on cases like *Meyer* and *Troxel*, where they've said there is a fundamental right to parenting but they haven't really developed what

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GUIDANCE & POLICIES TO SUPPORT TRANSGENDER, NON-BINARY & GENDER-EXPANSIVE STUDENTS 9 (2018), <https://resources.finalsite.net/images/v1625663725/madisonk12wius/m5x6tox6rhrufthykn30/guidancebooklet.pdf> (mandating that school staff in Madison, Wisconsin, obtain transgender and non-binary students' authorization before disclosing their gender identity to their parents); MICH. STATE BD. OF EDUC., STATE BOARD OF EDUCATION STATEMENT AND GUIDANCE ON SAFE AND SUPPORTIVE LEARNING ENVIRONMENTS FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING (LGBTQ) STUDENTS 5 (2016), <https://www.michigan.gov/-/media/Project/Websites/mde/2016/09/15/SBStatementonLGBTQYouth.pdf?rev=83c59267fc5f46a8ba30061969f91359> (explaining that disclosure of gender identity to a transgender student's parents will be examined on a case by case basis); CULVER CITY, CAL. UNIFIED SCH. DIST., TRANSGENDER STUDENTS, PRIVACY AND FACILITIES § 2 (2014), <https://www.ccusd.org/pdf/policies/> (indicating that teachers must use a transgender student's legal name when conversing with parents unless the teachers have first obtained student permission).

<sup>62</sup> See, e.g., *Doe v. Madison Metro. Sch. Dist.*, 976 N.W.2d 584, 588–89 (Wis. 2022) (demonstrating the concern that some teachers are “deceiving parents by using different names and pronouns around parents than at school”).

<sup>63</sup> *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB (D. Kan. May 9, 2022).

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Compare Why Are So Many Females Coming Out As Trans/Nonbinary?*, GENDER HEALTH QUERY, <https://www.genderhq.org/increase-trans-females-nonbinary-dysphoria> (last visited Feb. 17, 2023) (claiming that girls in the early stages of puberty may be more likely to struggle with gender dysphoria than their male counterparts due to angst about their changing bodies), and Myeshia Price-Feeney et al., *Understanding the Mental Health of Transgender and Nonbinary Youth*, 66 J. ADOLESCENT HEALTH 684, 687–88 (2020) (revealing that fifty-four percent of transgender youth considered suicide and eighty-three percent suffered from depression in the last year), with Walton, *supra* note 40, at 257–58 (discussing active school policies that deliberately obstruct parents' access to information about their child's gender identity).

<sup>68</sup> *Ricard*, slip op. at 6–7 (declining to address the teacher's asserted free speech argument that the school's policy coerced her to act dishonestly).

<sup>69</sup> See *id.* at 4, 8, 15–16.

that looks like or even the standard.<sup>70</sup> That's what we're trying to do is develop some additional case law—some frameworks around that. There is a big debate, even in the conservative community, over the substantive due process grounding of parental rights.<sup>71</sup> It's a debate that needs to be had, and I think different people could come to different conclusions. But I think what most people can understand is that there is a fundamental right to parent.<sup>72</sup> You have to have the right to be able to interact with your children on those important things. So, we need to figure out what does that look like. And with CRT, as you heard Mallory talk about a little bit earlier, we're challenging on behalf of parents where their children are being told your parents are racist, because they're white, or your religion is oppressive, because you're Christian.<sup>73</sup> They create these wrong principles about who they are intrinsically, and that's violating the parents' rights to be able to dictate these strong underlying beliefs that the parents want to inculcate.<sup>74</sup>

So, the short answer is, it is a little bit murky area of law that still needs some developing. But there is enough grounding in these current Supreme Court cases that we believe we can successfully say: "You can't transition the child without the parents' rights, and you cannot inculcate a racist and religiously hostile curriculum—which tells certain kids they're not welcome because of the color of their skin or because of their religious beliefs."<sup>75</sup>

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<sup>70</sup> *Meyer v. Nebraska*, 262 U.S. 399–400 (1923) (listing the right to raise children as among the liberties ensured for Americans without describing the right particularly); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing a general right to parent).

<sup>71</sup> *Compare Troxel*, 530 U.S. at 66, 68 (upholding but declining to expand parental rights), *with id.* at 91–92 (Scalia, J., dissenting) (asserting that parental rights should not have been grounded in the theory of substantive due process).

<sup>72</sup> *Id.* at 66.

<sup>73</sup> See *Why Is Critical Race Theory Dangerous for Our Kids?*, MARSHA BLACKBURN U.S. SENATOR TENN. (July 12, 2021), <https://www.blackburn.senate.gov/2021/7/why-is-critical-race-theory-dangerous-for-our-kids> (citing an example of a student who was ashamed of being white because of the CRT curriculum being taught in school); Lance Izumi, *Parents Revolted Against Critical Race Theory. They Won*, FOX NEWS (Jan. 18, 2023, 8:00 AM), <https://www.foxnews.com/opinion/parents-revolted-against-critical-race-theory-how-they-won>.

<sup>74</sup> For more discussion on parental rights related to strong underlying beliefs, see Emily J. Brown, *When Insiders Become Outsiders: Parental Objection to Public School Sex Education Programs*, 59 DUKE L.J. 109, 125 (2009), positing that parents' constitutional rights include discretion regarding how to discuss controversial issues and foundational values, and *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1971), establishing the parental right to direct the religious upbringing of children.

<sup>75</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that parents, not schools, have the authority to decide what constitutes their children's "upbringing"); *Epperson v. Arkansas*, 393 U.S. 97, 106–07 (1968) (holding that schools may not teach a curriculum that promotes or opposes religion); see also Steven Siegel, *Ethnocentric Public School Curriculum in a Multicultural Nation: Proposed Standards for*

**Hon. Alice Batchelder:** Thank you. Kurt, you have to deal with this on a more every day, practical level.

**Dean Kreassig:** Absolutely. Well, let me just say that what Mallory said in the last panel about COVID—and parents, now, pay more attention to who’s directing the moral and ethical orientation of their children or their child—has come into play lately.<sup>76</sup> Boards and various organizations have created difficult policies for teachers and children to follow. There’s no question about it, and the golden key for student improvement and school improvement in this country is parent involvement.<sup>77</sup> Parents have to be involved. For those of you who are younger and don’t have kids yet, there are two types of parent involvement. First, there’s the stage-setting.<sup>78</sup> That’s typically when you have a youngster who’s not in school yet, and you’re talking about the value of education, or you’re yourself in law school—you’re sitting at the table doing work, and the child is watching.<sup>79</sup> You do work, and you’re able to explain, “This is my homework.” Then you have the traditional involvement for parents—which is part of the parents’ rights—to come in and observe the curriculum being taught, comment on textbooks, inspect

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*Judicial Review*, 40 N.Y. L. SCH. L. REV. 311, 316–17, 319–20 (1996) (asserting that curriculum that promotes the superiority of any race “has no place in the public schools”).

<sup>76</sup> See Alyson Klein, *Pandemic Parents Are More Engaged. How Can Schools Keep It Going?*, EDUC. WEEK (Sept. 14, 2021), <https://www.edweek.org/leadership/pandemic-parents-are-more-engaged-how-can-schools-keep-it-going/2021/09> (reporting that the opportunity of at-home learning provided parents with greater awareness of what their children were learning during the COVID-19 pandemic).

<sup>77</sup> See Linda L. Schlueter, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY’S L.J. 611, 613–14 (2001) (“[P]arent involvement increases student achievement and self-esteem.”).

<sup>78</sup> See Angel L. Harris & Keith Robinson, *A New Framework for Understanding Parental Involvement: Setting the Stage for Academic Success*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. 186, 189 (2016) (describing “stage-setting” as a theory of parental involvement in education in which parents express the importance of education and thereby increase the student’s academic achievement).

<sup>79</sup> See *id.* (explaining that “[s]tage-setting reflects parents’ messages about the importance of schooling and the overall quality of life they create for their children”). The core components of stage-setting are met when a parent does schoolwork in front of a child because it both communicates the importance of education and creates a home environment conducive to learning. See *id.*

homework.<sup>80</sup> Those rights are pretty robust,<sup>81</sup> but we want to make sure that they continue to be robust and even more so.

But one of the things I want to think about is, how do we incorporate civility and parent rights? Because what we hear from teachers in the field—Christian teachers in the field—is they feel so much pressure that they’ve done something wrong because some groups are so loud about the rights or what have you.<sup>82</sup> So as a group, what are those things that we can do to soften that a little bit and have more civility in the conversation? And that’s one of the areas that’s on my plate now with our teachers that we put in the field.

As stakeholders, again, it’s important that we all have a voice in the upbringing of our students.<sup>83</sup> But one thing I want to read to you is a quote that I came across: “public schools are among the few unifying institutions with the potential to help solder together a diverse rising generation of Americans ready and equipped to live together, solve problems and help build a better nation.”<sup>84</sup>

So, parents have the right to come in and inspect things that their child is doing.<sup>85</sup> They have a legal and moral obligation to do that.<sup>86</sup> But

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<sup>80</sup> See *id.* at 189, 192 (describing traditional parental involvement as parents “reading to the child, helping with homework, [] meeting with teachers,” and other related activities); *Pierce*, 268 U.S. at 534–35 (explaining that parents have the right “to direct the upbringing and education of children under their control”).

<sup>81</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that parents have an essentially plenary right to “establish a home and bring up children”); *Pierce*, 268 U.S. at 534–35 (invalidating an act for obstructing parents’ rights to control their children’s “upbringing and education”).

<sup>82</sup> *Compare Day of Silence*, GLSEN (Apr. 14, 2023), <https://www.glsen.org/day-of-silence> (advertising a national protest movement advocating for LGBTQ rights in schools), and Kiara Alfonseca, *Teachers Protests Bill Targeting Critical Race Theory, Race Education*, ABC NEWS (Aug. 26, 2021, 6:02 AM), <https://abcnews.go.com/US/teachers-protest-bills-targeting-critical-race-theory-race/story?id=79642784> (explaining that many teachers and students protested legislation that would remove CRT from the curriculum), with Jill Waggoner, *3 Christian Teachers Share About Their Work in Public Schools*, BIBLICAL RECORDER (Sept. 29, 2022), <https://www.brnow.org/news/3-christian-teachers-share-about-their-work-in-public-schools/> (explaining that teachers feel “single[d] out,” and like they are “walking on eggshells” because their Christian beliefs are unpopular in public schools).

<sup>83</sup> Anne Sliwka & David Istance, *Parental and Stakeholder ‘Voice’ in Schools and Systems*, 41 EURO. J. EDUC. 29, 29 (2006) (explaining that parents are stakeholders in their children’s education); S. Wilder, *Effects of Parental Involvement on Academic Achievement: A Meta-Synthesis*, 88 EDUC. REV. 377, 387 (2014) (finding a positive correlation between parental involvement in education and academic success).

<sup>84</sup> Suzanne Nossel, *Parents Should Have a Voice in Their Kids’ Education But We’ve Gone Too Far*, TIME (Sept. 20, 2022, 3:11 PM), <https://time.com/6215119/parents-rights-education-gone-too-far/>.

<sup>85</sup> See *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 534–35.

<sup>86</sup> See, e.g., VA. CODE ANN. § 22.1-279.3 (LEXIS through ch. 22 of the 2022 Spec. Sess. I) (“Each parent of a student enrolled in a public school has a duty to assist the school in enforcing the standards of student conduct and compulsory school attendance.”); Hannah

prior to COVID, I think it was—not necessarily parents shirked that responsibility a little bit—it was just not that great.<sup>87</sup> In fact, traditionally, if you think about it, parents are more involved in elementary school, right?<sup>88</sup> If you remember, your parent was involved when you were in elementary school, waned a little bit in middle school, and then was almost nonexistent at times in high school.<sup>89</sup> That’s actually almost flipped where we have more involvement now at the high schools.<sup>90</sup> So that’s something to consider, too. Is that a positive thing for a student? If you’re a high school student, do you want mom and dad there? Yes, you want them advocating for you.

So, my message is, what can we do to bring civility back into that conversation so that our teachers feel comfortable and they’re not fleeing the classroom? The principals can sit down and engage and be trained as they’re training for principals on this, or teachers and parents to come together. PTA meetings are not attended like they used to be.<sup>91</sup> Open houses are not attended like they used to be.<sup>92</sup>

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Xu, *What Should Parents Do for Their Children – A Philosophical View of Parental Obligation*, 11 OPEN J. PHIL. 427, 427–28, 431 (2021) (asserting that to give “their children . . . a reasonable expectation of a decent life . . . parents are obligated to provide their children with an adequate moral education”).

<sup>87</sup> Cf. Bho B. Balayar & Michael R. Langlais, *Parent Support, Learning Performance, and Socioemotional Development of Children and Teenagers During the COVID-19 Pandemic*, 3 FAM. J. 174, 178, 182 (2021) (explaining that parental involvement in their children’s education increased after the COVID-19 pandemic, therefore, implying that parents participate more in education when they have greater access to information about the contents of the curriculum).

<sup>88</sup> See JULIA MERLIN, NAT’L CTR. FOR EDUC. STATS., *PARENTAL INVOLVEMENT IN U.S. PUBLIC SCHOOLS IN 2017–18* (2021) (illustrating that middle schools generally experience less wide-spread parental engagement than primary schools, and high schools, even less).

<sup>89</sup> *Id.*

<sup>90</sup> Although the increase in high school students’ parents involvement has not caused their participation to exceed that of parents with young grade-school students, the increase has been significant. Alyson Klein, *Pandemic Parents Are More Engaged. How Can Schools Keep It Going?*, EDUC. WEEK (Sept. 14, 2021), <https://www.edweek.org/leadership/pandemic-parents-are-more-engaged-how-can-schools-keep-it-going/2021/09> (explaining that teachers reported higher rates of K-12 parental involvement since the COVID-19 pandemic).

<sup>91</sup> Compare Michael Slater Cline, *An Analysis of Parent-Teacher Association Membership and Attendance* (1964) (M.A. thesis, Central Washington University) (on file with Central Washington University Library) (showing that 18.4 to 3.1 percent of parents attended PTA meetings at schools with a mean number of 796 students in 1963), with Michael Gaskell, *We Used Technology to Increase Attendance at PTA Meetings* (Oct. 11, 2018), <https://www.eschoolnews.com/2018/10/11/we-used-technology-to-increase-attendance-at-pta-meetings/> (explaining that 1.3 percent of parents attended PTA meetings in a school of 1,250 students in 2018).

<sup>92</sup> Cf. Timo Nieuwoudt, *How to Boost Attendance at Your Schools Next Open House*, INSIGHTS (Oct. 6, 2022), <https://insights.digistorm.com/en-us/boost-school-open-day-attendance> (indicating that school closures and other COVID-era policies greatly limited recent attendance of open houses); *Increasing Open House Attendance*, EDUC. WORLD, [https://www.educationworld.com/a\\_curr/strategy/strategy004.shtml](https://www.educationworld.com/a_curr/strategy/strategy004.shtml) (last visited Feb. 5,



I made a comment to an individual not too long ago. I was at an after-school function, and an executive for a school system came up, and the cat-calls began. I thought about how that individual felt. “Let me just get out of here. I’m not going to engage that.” So, what can we do with our society and our public to bring back the civility when we talk about parental rights?

**Hon. Alice Batchelder:** And Coke, as you address this, I wonder if perhaps you could give us your perspective from where you sit now on parents’ rights over the presentation of these kinds of materials as far as the state is concerned. I mean the parents who are saying, “I don’t want my child being indoctrinated in some of these sexually explicit ways and areas,”<sup>93</sup> and the transgender issue where there are some complaints that are coming to light about “my child wasn’t showing any of these problems until the school got all over her or him.”<sup>94</sup> Let’s have your perspective as an Attorney General.

**Deputy AG Stewart:** I think it’s obviously very important that parents and all of you understand what your rights are under state law. We spend a lot of time in law school and law schools can’t always dig into every single state’s law, so we talk about constitutional law and we talk about a lot of legal principles. But when the rubber hits the road, you need to understand what the laws are in your states. I’ll just share some information about Virginia state law. In the code of Virginia, a parent has a fundamental right to make decisions concerning the upbringing, education and care of their child.<sup>95</sup> That is in Virginia law. Virginia law

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2023) (implying that the increasingly busy schedules that families now have keep them from attending open houses).

<sup>93</sup> See, e.g., *Voters Against Obscene Books in Public Schools*, RASMUSSEN REPS. (Oct. 3, 2022), [https://www.rasmussenreports.com/public\\_content/politics/partner\\_surveys/voters\\_against\\_obscene\\_books\\_in\\_public\\_schools](https://www.rasmussenreports.com/public_content/politics/partner_surveys/voters_against_obscene_books_in_public_schools) (explaining that a majority of voters “believe books containing explicit sexual depictions of sexual acts . . . should not be present in public high school libraries”).

<sup>94</sup> See e.g., Jay Keck, Opinion, *My Daughter Thinks She’s Transgender. Her Public School Undermined My Efforts to Help Her*, USA TODAY (Aug. 13, 2019, 2:22 PM), <https://www.usatoday.com/story/opinion/voices/2019/08/12/transgender-daughter-school-undermines-parents-column/1546527001/> (explaining that a child did not show indications of gender dysphoria before she came out as transgender at her school, which affirmed her new gender identity despite her parents’ protests); Emilie Kao, *Yes, Schools Are Secretly Trying to ‘Gender Transition’ Kids, and It Must Be Stopped*, DAILY SIGNAL (Mar. 22, 2022), <https://www.dailysignal.com/2022/03/22/yes-schools-are-secretly-trying-to-gender-transition-kids-and-it-must-be-stopped/> (describing how a public school prevented a mother from getting the psychological help she wanted for her daughter’s gender dysphoria).

<sup>95</sup> VA. CODE ANN. § 1-240.1 (LEXIS through ch. 22 of the 2022 Spec. Sess. I).

provides many rights to parents with respect to their children.<sup>96</sup> They can't be denied. As you were saying, they can't be denied access to academic or health records if they're minor children.<sup>97</sup>

Just to give kind of a funny example, you can't even get a tattoo in the state of Virginia, if you're a minor, without your parent's permission.<sup>98</sup> Which I was delighted to hear, although, my son just turned eighteen. Parents have a lot of rights. Parents can object to immunizations required for school attendance if it conflicts with their religious tenets or practices, or if they have a statement from a physician saying that the particular medical intervention would be bad for their child's health.<sup>99</sup> Parents can opt a child out of the HPV vaccine in Virginia at the parents' sole discretion.<sup>100</sup> Parental consent is required in Virginia for COVID vaccinations for minors, and the COVID-19 vaccine is not a requirement for immunization for school attendance under Virginia law.<sup>101</sup> Parents have rights as to family life education in Virginia.<sup>102</sup> They have rights to review materials for bullying and suicide prevention.<sup>103</sup> So, there are quite a few rights.

But who is elected matters. The legislature in Virginia has been majority-Democrat for some time,<sup>104</sup> and there are other Virginia laws that are not as favorable that I think people should be aware of. For example, under Virginia law, a minor is deemed to be an adult for the purpose of consenting to four categories of treatment: STDs and infectious diseases; pregnancy, birth control, and family planning; outpatient substance-abuse care; and outpatient mental-health care.<sup>105</sup> Virginia law

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<sup>96</sup> See, e.g., *id.* (explaining that parents have "a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child"); *id.* § 22.1-207.2 ("Parents and guardians have the right to review the family life education program offered by their school division, including written and audio-visual educational materials used in the program. Parents and guardians also have the right to excuse their child from all or part of family life education instruction.").

<sup>97</sup> *Id.* § 20-124.6.

<sup>98</sup> *Id.* § 18.2-371.3.

<sup>99</sup> *Id.* § 22.1-271.2(C).

<sup>100</sup> *Id.* § 32.1-46(D)(3).

<sup>101</sup> See *id.* § 32.1-47.1 (explaining that parental consent is required for minor to receive vaccines); *id.* § 32.1-46(A) (listing the vaccine requirements for school attendance, which does not include a COVID-19 vaccine); Vaccine Requirements Under § 32.1-46(A), Op. Att'y Gen. Va. No. 22-058 (2022) (interpreting the absence of the COVID-19 vaccine from § 32.1-46(A) to mean that children are not required to receive that vaccine even if it were added to the CDC's childhood immunization schedule).

<sup>102</sup> VA. CODE ANN. § 22.1-207.2 (LEXIS through ch. 22 of the 2022 Spec. Sess. I) (explaining that parents have a "right to review the complete family life curricula, including all supplemental materials used in any family life education program").

<sup>103</sup> *Id.* § 22.1-207.2:1.

<sup>104</sup> See *Legislators*, VPAP.ORG, <https://www.vpap.org/general-assembly/legislators> (last visited Feb. 17, 2023) (showing that Virginia's Senate has been Democratically controlled for the past four years, while the House was Democrat from 2020-2021).

<sup>105</sup> VA. CODE ANN. § 54.1-2969(E) (LEXIS through ch. 22 of the 2022 Spec. Sess. I).

also says that a minor is deemed to be an adult for purposes of accessing or authorizing disclosure of medical records relating to those four categories of treatment, and they aren't age limited.<sup>106</sup> Now, as a practical matter, they probably are age limited because students are going to be of a certain age and maturity to potentially need to seek out these treatments. But now we're seeing in the news that there are advocacy groups that want to approach the children in the schools,<sup>107</sup> and they don't—if the students don't feel like they're getting the support of parents—they facilitate potential mental-health or medical treatment that the parents don't consent to.<sup>108</sup> My takeaway is: know your rights and know your state's law.

**Hon. Alice Batchelder:** Which is a huge takeaway. So, in the context of primary and secondary education, possibly, to respond to some of these problems, and others, might be school choice. At the risk of interjecting something personal here, I worry sometimes whether school choice is even going to survive. A number of years ago, my husband, who was in the Ohio legislature for roughly ever<sup>109</sup>—he was the guy who wrote the Ohio legislation that was at issue in *Zelman v. Simmons-Harris*,<sup>110</sup>

<sup>106</sup> *Id.* (including no minimum age for minors to be able to access and authorize disclosure of their medical records under this section).

<sup>107</sup> See, e.g., *Teaching About Gender Identity*, EDUCATORS 4 SOC. CHANGE, <https://educators4sc.org/topic-guides/teaching-about-gender-identity/> (last visited Jan. 21, 2023) (providing an example of an advocacy group, Educators 4 Social Change, advocating for schools to teach children about gender identity); *A Definition of Comprehensive Sexuality Education*, GUTTMACHER INST., [https://www.guttmacher.org/sites/default/files/report\\_downloads/demystifying-data-](https://www.guttmacher.org/sites/default/files/report_downloads/demystifying-data-) (last visited Mar. 8, 2023) (advocating for comprehensive sexuality education that would teach children about contraception, STIs, and masturbation, among other sexually explicit topics); Brittany Bernstein, *Kindergarten Students in Connecticut Learn about Being Transgender in Line with 'Social Justice Standards'*, NAT'L REV. (Nov. 15, 2021, 5:37 PM), <https://www.nationalreview.com/news/kindergarten-students-in-connecticut-learn-about-being-transgender-in-line-with-social-justice-standards/> (explaining that “social justice standards” are being taught to children in Connecticut public schools, including content about gender identity).

<sup>108</sup> See, e.g., *Complaint & Request for Jury Trial, Foote v. Town of Ludlow*, No. 3:22-cv-30041-MGM, 2022 WL 18356421, at 15–21, 24 (D. Mass. July 21, 2022) (explaining that public school faculty disregarded parents' intent to secure independent, professional help for their child and assisted the student in transitioning at school without informing them); Kao, *supra* note 94 (describing how a public school supported a student's gender transition when it found the mother's support to be inadequate).

<sup>109</sup> See *William Batchelder Dedicated Life to Public Service*, OHIO WESLEYAN UNIV. (2022), <https://www.owu.edu/alumni-family-friends/owu-magazine/spring-2022/william-batchelder-dedicated-life-to-public-service/> (noting that William Batchelder served in the Ohio Legislature for thirty-eight years).

<sup>110</sup> 536 U.S. 639, 645 (2002); OHIO REV. CODE ANN. §§ 3313.974–3313.979 (West 2023); see Gregory B. Bodwell, *Grassroots, Inc.: A Sociopolitical History of the Cleveland School Voucher Battle, 1992–2002* (2006) (Ph.D. dissertation, Case Western Reserve University) (on file with OhioLINK Electronic Theses and Dissertations Center) (listing William Batchelder as one of the state representatives responsible for “shaping [Ohio's] voucher proposal”).

and he always said he thought that was probably the most important thing that he had done while he was in the legislature. But he also said, as it was winding its way through the courts, and was clearly going to end up before the Supreme Court, he said to me one night “Al, I just keep having this recurring nightmare that I can see Justice Scalia sitting up there on the bench and saying, ‘Well, the idea here is okay, but who wrote this?’” Fortunately, it didn’t happen that way. But do any of you want to address the idea of school choice and whether it’s going to survive? And what is the importance of it in this context? And I was just thinking maybe I could start with Kurt, from a practitioner’s point of view here.

**Dean Kreassig:** Absolutely. First, I want you to know that I advocate for it for sure, and there’s all sorts of forms of school choice. You’ve heard of charter schools, vouchers, there are inter- and intra-district school choice.<sup>111</sup> In fact, Virginia Beach has the academies at the schools.<sup>112</sup> If you went to school here, maybe the Legal Studies Academy of First Colonial High School or Global Studies—that is a type of school choice.<sup>113</sup> But the matter here is school choice is a win-win—not only for the students but also the parents and school administration.<sup>114</sup> If you think about it, the big thing with school choice is funding.<sup>115</sup> Who’s going

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<sup>111</sup> See *Types of School Choice*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/> (last visited Jan. 21, 2023) (listing myriad forms of school choice, including charter schools (“independently run public schools”), school vouchers (scholarships given to parents to enhance school choice), and inter/intra district public school choice (districts allowing students to choose between multiple public schools in their district regardless of their ZIP Code)).

<sup>112</sup> See *Academies and Advanced Academic Programs*, VA. BEACH CITY PUB. SCHS., [https://www.vbschools.com/academic\\_programs/academies\\_and\\_advanced\\_academic\\_programs](https://www.vbschools.com/academic_programs/academies_and_advanced_academic_programs) (last visited Jan. 22, 2023) (listing Virginia Beach academies located at various high schools in the city, such as the Entrepreneurship and Business Academy at Kempsville High School, the Mathematics and Science Academy at Ocean Lakes High School, and others).

<sup>113</sup> *Id.*

<sup>114</sup> See Jude Schwalbach & James Selvey, *Here Are 10 Reasons School Choice Is Winning*, HERITAGE FOUND. (Jan. 24, 2019), <https://www.heritage.org/education/commentary/here-are-10-reasons-school-choice-winning> (lauding the various benefits of school choice for students, parents, and the school administration, such as ensuring school safety, providing options for impoverished students, increasing graduation rates, and saving taxpayer dollars).

<sup>115</sup> See Corey A. DeAngelis & Adrian Moore, *Lockdown Highlights Why We Should Fund Students Instead of School Systems*, YOUR OBSERVER (Aug. 12, 2020, 8:00 AM), <https://www.yourobserver.com/news/2020/aug/12/lockdown-highlights-why-we-should-fund-students-instead-of-school-systems/> (explaining that funding should go directly to students to afford them greater freedom in educational choice); *Types of Private School Choice Programs*, AM. FED’N FOR CHILD., <https://www.federationforchildren.org/school-choice-in-america/programs-and-eligibility/> (last visited Jan. 22, 2023) (listing examples of programs that make school choice possible through public funds, such as Voucher Programs, Educational Savings Account Programs, Scholarship Tax Credit Programs, and Tuition Tax Credit Programs).

to fund the school choice?<sup>116</sup> If a student decides to leave my school division or my school as a principal and go across town to another school—maybe a private school or what have you—does that money stay in the public school, or is it going to be funded in another way? School choice also is about local control,<sup>117</sup> and local control is not what it used to be a few years ago.<sup>118</sup> It's less now because of the inter- and intra-transitioning from school to school within school districts.<sup>119</sup> But still, if I am in a community, and I move to that community for a particular elementary school—which, by the way, that was the only choice you had for school choice back then.<sup>120</sup> If you wanted your kids to attend a school, you move to the ZIP code, or right down the road, so your child can go to that school.<sup>121</sup> Now it's different.

But with school choice, what if you move into that school area to be at that one neighborhood, and then a choice opens up and kids start leaving that school? What happens to your school? The verdict is still

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<sup>116</sup> *Compare How Are School Choice Programs Funded?*, EDCHOICE, <https://www.edchoice.org/school-choice/faqs/how-are-school-choice-programs-funded/> (last visited Jan. 22, 2023) (listing different avenues of school funding, such as Education Savings Accounts, School Vouchers, Tax-Credit Scholarships, Tax-Credit Education Savings Accounts, and Individual Tax-Credit and Deductions), with *The Debate Over School Choice*, CONST. RTS. FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-8-2-b-the-debate-over-school-choice> (last visited Feb. 17, 2023) (explaining that opponents of choice advocate for funding all schools rather than allowing some schools to be funded to the exclusion of others).

<sup>117</sup> See LINDSEY M. BURKE, *ADVANCING SCHOOL CHOICE AND RESTORING STATE AND LOCAL CONTROL OF EDUCATION THROUGH A-PLUS 4* (2017) (explaining that local control of educational funding enables states to implement their own school choice programs more effectively); *Why the Fight for School Choice Matters*, CEAM, <https://www.ceamteam.org/fight-school-choice-matters/> (last visited Jan. 22, 2023) (identifying how school choice programs put control in the most local form of governance, the family).

<sup>118</sup> Robert Rothman, *Historians Cite 'Steady Erosion' in Local Control*, EDUC. WEEK (Apr. 29, 1992), <https://www.edweek.org/education/historians-cite-steady-erosion-in-local-control/1992/04> (attributing the loss of local control in schools to an increase in factors like urbanization and federal education programs).

<sup>119</sup> Intra-district school transferring requires significant supervision by the district. See Adrian B. Talley, *School Choice: A Study of the Factors that Motivated Parents to Select the No Child Left Behind School Choice Provision* (2014) (Ed.D. dissertation, George Washington University) (ProQuest) (highlighting the intra-district school transfer procedure, which requires district oversight). This divests some degree of control from the individual schools that the students are transferring between. See *Types of School Choice*, *supra* note 111 (explaining that some inter/intra-district transfer options allow schools to retain enough control to give students living within the school's district enrollment preference, implying that others are not provided even this level of control).

<sup>120</sup> See *School Choice: A User Guide*, MIT PRESS READER, <https://thereader.mitpress.mit.edu/school-choice-a-user-guide/> (last visited Jan. 23, 2023) (“For over 200 years, the vast majority of American parents ‘chose schools’ by moving to neighborhoods with the best schools.”).

<sup>121</sup> *Id.*

out.<sup>122</sup> We don't know if it does skim off the top best students. We do not know. For students that don't have parents with social capital—what I mean by that is, you can find low-income areas, single parent working, maybe didn't finish school themselves, they might not have the social capital, the with-it-ness, or really the education to know what forms to fill out for school choice.<sup>123</sup> That child could be trapped in a poor-performing school. So, with school choice is going to come an education piece that will have to be done for the public, for the teachers and for the community, as we move forward. But school choice is something that's very positive,<sup>124</sup> and I think it can help. Students could be struggling in one environment, maybe a virtual environment, a hybrid may be a better fit.<sup>125</sup> It gives choice to teachers to try other schools, other cultures to be inculcated to something different, and also puts pressure on every school out there to perform.<sup>126</sup> Because if you're a principal or superintendent in the division,

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<sup>122</sup> See *How Does School Choice Affect Public Schools' Funding and Resources?*, EDCHOICE, <https://www.edchoice.org/school-choice/faqs/how-does-school-choice-affect-public-schools-funding-and-resources/> (last visited Mar. 6, 2023) (suggesting that public schools may benefit from school choice programs by having lower overall costs when they retain state funding allocated to students who choose another form of education); Amy Hawn Nelson, *School Choice: Many Options but Conclusions Elusive*, EDUC. NC (Sept. 22, 2016), <https://www.ednc.org/school-choice-many-options-conclusions-elusive/> (describing school choice literature as “inconclusive” and noting that the impact of one plan is highly dependent on its “specific policies”); Frederick M. Hess, *Does School Choice “Work”?*, NAT'L AFFS. (2010), <https://www.nationalaffairs.com/publications/detail/does-school-choice-work> (describing inconsistent and inconclusive research on school choice, particularly in terms of student performance).

<sup>123</sup> See Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 695 (2021) (discussing how low-income families may be “limited by structural conditions” in which they lack the resources and education to “navigate enrollment obstacles” for school choice programs).

<sup>124</sup> See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2111 (2002) (describing how ten voucher studies have found there are “academic benefits” to voucher programs, which comports with studies showing higher levels of “socioeconomic integration” within private schools when voucher programs are in place). *But see* James, *supra* note 123, at 690–92 (arguing that school choice opens the door for parents to make decisions based on the demographic makeup of the school, perpetuating segregation).

<sup>125</sup> Cf. Yvonne M. Dutton, et al., *Assessing Online Learning in Law Schools: Students Say Online Classes Deliver*, 96 DENV. L. REV. 493, 507–08 (2019) (explaining that stronger learning outcomes are present for some in hybrid environments and discussing the benefits to the format, such as creating greater flexibility and collaboration between students).

<sup>126</sup> See Ryan & Heise, *supra* note 124, at 2073–74, 2086 (describing how charter schools face “the threat of closure” for inadequate performance; moreover, school choice allows students to choose freely regardless of geographic location or other limitations); see also Mary Clare Amselem, *How School Choice Could Improve Life for Teachers*, DAILY SIGNAL (Feb. 6, 2023, 3:03 PM), <https://www.dailysignal.com/2016/01/26/how-school-choice-could-improve-life-for-teachers/> (asserting that school choice provides flexibility for teachers because charter schools can provide more advantageous salaries than public schools, and education savings account funds can provide compensation for services like tutoring and online teaching).

and there's a charter school that students are flocking to, that will put pressure on you to perform as well.<sup>127</sup> However, I'll caveat this with: there are no guarantees. The verdict is still out. Do school-choice options work? Do vouchers work? Do charter schools work? All these other variations we don't know because it distills down to one thing in the classroom, and that's the quality of the teacher.<sup>128</sup> You can have a better teacher in a very poor-performing school that is doing outstanding things for his or her class right then and there, and those students are getting the best education you can imagine. You can have a charter school with a teacher that is not there for the right reasons.

**Hon. Alice Batchelder:** Coke?

**Deputy AG Stewart:** Charter schools in Virginia—it's not really a viable path. We have very few charter schools in this state.<sup>129</sup> The decision whether or not to permit a charter school is basically handled by the local school board level, and not surprisingly, most local school boards don't really favor charter schools.<sup>130</sup> There are some legal issues about whether the Board of Education or the Department of Education in Virginia can take a more active role in the selection of charter schools.<sup>131</sup> So that's a big issue. I would say, personally, as a parent who sent my child both to public and private schools, I hear from a lot of private school parents that they are terrified of their private schools because if you are in public school, you can go to the school board meetings, you can pound on the table, you can be heard. Yes, you might be accused of being a domestic terrorist—

<sup>127</sup> See Ryan & Heise, *supra* note 124, at 2086 (explaining how school choice enables “schools . . . to compete on the basis of services”).

<sup>128</sup> See Noah B. Lindell, *Old Dog, New Tricks: Title VI and Teacher Equity*, 35 YALE L. & POL'Y REV. 189, 190, 194 (2016) (describing the measurable improvement that high teacher quality yields in education outcomes).

<sup>129</sup> See *What to Know About the Charter School Debate*, VPM NEWS (Feb. 6, 2023, 3:29 PM), <https://vpm.org/news/articles/28880/what-to-know-about-the-charter-school-debate> (noting that Virginia only has seven charter schools); *Charter Schools and Campuses by State by Year*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Feb. 6, 2023, 3:43 PM), <https://data.publiccharters.org/digest/tables-and-figures/charter-schools-year/> (showing that only five American jurisdictions states have fewer charter schools than Virginia, while twenty jurisdictions have over one hundred).

<sup>130</sup> See *What to Know About the Charter School Debate*, *supra* note 129 (“It's like asking McDonald's to decide whether . . . they want Five Guys to open up. It's never going to happen . . .”).

<sup>131</sup> See Katherine E. Lehnen, Comment, *Charting the Course: Charter School Exploration in Virginia*, 50 U. RICH. L. REV. 839, 855, 858–60 (2016) (explaining that Virginia's charter school law gives local school boards the exclusive authority to approve charter schools, and although it does require authorizers to report to the state Board of Education, the board cannot sanction but only confirm that statutory criteria are met).

and that's frightening,<sup>132</sup> but in private school, if you go to your school administration and you try and advocate for your views, your child can be separated from the school.<sup>133</sup> You can be excommunicated from the school community, and there are a lot of parents that we talk to who kind of are begging the state to get involved and set some kind of outer boundaries and what can happen in the private school.<sup>134</sup> That gets into a lot of issues. Maybe that's a good idea, maybe that's a bad idea.

Another quick statistic I'll give about school choice when it comes to the pandemic: in September 2020, ninety-two percent of Catholic schools had reopened at least in part<sup>135</sup>—I don't have the statistic for other private schools—but that was compared at the time with only forty-three percent of public schools.<sup>136</sup> It shows that I think it really is healthy to have a mix—to give people choices. And I think the pandemic more than anything really demonstrated that.

**Hon. Alice Batchelder:** Tyson?

**Mr. Langhofer:** As Kurt said, I think the issue of the success of charter schools, and the ultimate success in the battle of the constitutionality of charter schools, is still to be determined. I'm a big advocate of charter schools, and I do think that, ultimately, the argument is better that they are constitutional, and you do have the right to do that, and it's not somehow violating any rules.<sup>137</sup> The big obstacle in my mind

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<sup>132</sup> See John Malcom, *Are Parents Being Tagged as "Domestic Terrorists" by the FBI? Justice Department Needs to Show Its Cards*, HERITAGE FOUND. (Jan. 24, 2023, 7:52 PM), <https://www.heritage.org/crime-and-justice/commentary/are-parents-being-tagged-domestic-terrorists-the-fbi-justice> (describing how the National School Boards Association wrote a letter to President Biden claiming that disturbances in school board meetings by upset parents over "mask mandates and critical race theory curricula" are "equivalent to a form of domestic terrorism").

<sup>133</sup> Cf. James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C.L. REV. 1321, 1338–40 (1996) (noting the significant independence of private schools from state regulation, which allows them broad discretion in structuring enrollment contracts, giving parents less leeway to challenge school operations and teachings).

<sup>134</sup> See Eric A. DeGross, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 379–80 (2003) (arguing that states have an interest in regulating private schools to ensure students receive an adequate education and certain standards are met, which may not exclude certain disciplinary actions).

<sup>135</sup> KATHLEEN PORTER-MAGEE ET AL., NAT'L CATH. EDUC. ASS'N, *CATHOLIC SCHOOL ENROLLMENT BOOMED DURING COVID. LET'S MAKE IT MORE THAN A ONE-TIME BUMP* 7 (2022).

<sup>136</sup> See *id.*

<sup>137</sup> See Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PA. ST. L. REV. 43, 47–51 (2004) (discussing how state constitutional control provisions and statutory classifications of charter schools can create constitutional issues, but these



as I've followed the debate for quite a long time in the court systems is the public<sup>138</sup>—unfortunately, as attorneys, we'd like to think that the legal argument is all about the law, but it's not always. There is the kind of the public sentiment side, and I think there is more support now for the charter schools and for alternatives to public school systems.<sup>139</sup> Because of this, and I think that is going to impact ultimately the determination in the courts, because I think the argument on the other side is, "This is going to destroy public schools."<sup>140</sup> That's always been this big fear. The teachers' unions have said, "This will destroy public schools."<sup>141</sup> That's been a big fear that's been used there, and I think as people realize what the public schools are teaching and kind of the bankruptcy of a lot of that stuff, they might be okay with that now, and okay with other alternatives.

I'd lived in Arizona for three years. Arizona is a huge school choice state.<sup>142</sup> It just passed the first actual law that allows you to basically take your tax money and go to any school, essentially, and it's being challenged.<sup>143</sup> So we'll see what happens with that. But, in general, it was very popular there in Arizona—the school choice options there.<sup>144</sup> The

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concerns can be avoided through clear drafting to establish that the charter school operates under state-level supervision and control).

<sup>138</sup> Matt Barnum, *Critics of Charter Schools Say They're Hurting School Districts. Are They Right?*, CHALKBEAT (Jan. 29, 2023, 5:17 PM), <https://www.chalkbeat.org/2019/6/11/21108318/critics-of-charter-schools-say-they-re-hurting-school-districts-are-they-right> (addressing public controversy over charter schools due to a belief that they deprive school districts of resources).

<sup>139</sup> See *Public Favorability for Choice Reform Trends*, EDCHOICE, <https://www.edchoice.org/what-we-do/research/schooling-in-america-polling-dashboard-2/> (last visited Feb. 20, 2023) (showing largely increasing support among the general population of charter schools and other school choice programs over the last decade).

<sup>140</sup> See Jonathan P. Krisbergh, *Marginalizing Organized Educators: The Effect of School Choice and 'No Child Left Behind' on Teacher Unions*, 8 U. PA. J. LAB. & EMP. L. 1025, 1034 (2006) (describing concern that school choice will eventually eradicate public education since it pulls away funding from public schools and allocates it toward private institutions).

<sup>141</sup> See *id.* at 1034–35 (explaining how teacher unions consider school choice "public enemy number one" and have zealously fought against its implementation).

<sup>142</sup> See Nicole Stelle Garnett, *A Radical Step in the Right Direction*, CITY J. (Oct. 2, 2022), <https://www.city-journal.org/arizona-embraces-universal-school-choice> (discussing Arizona's extensive embrace of school choice); *Charter Schools and Campuses by State by Year*, *supra* note 129 (illustrating that Arizona has a total of 559 charter schools, which is the fourth most in the nation after California, Texas, and Florida).

<sup>143</sup> See Arizona Empowerment Scholarship Accounts Act, 2022 Ariz. Sess. Laws §§ 15-2401–15-2403; Laura Williams, *Take the Money and Run: Taxpayers in AZ Will Fund Students, Not Schools*, AM. INST. FOR ECON. RSCH. (July 26, 2022), <https://www.aier.org/article/take-the-money-and-run-taxpayers-in-az-will-fund-students-not-schools/> (describing Arizona's law that gives each school-aged child \$6500 of taxpayer money to be used toward any school of the parent's choosing notwithstanding criticism over the loss of public school funding).

<sup>144</sup> See *Do Residents of Arizona Support School Choice Policies*, EDCHOICE, <https://edchoice.morningconsultintelligence.com/reports/arizona.pdf> (Feb. 6, 2023) (illustrating that over seventy percent of parents of K-12 children support school choice policies in Arizona and at least sixty percent of all adults in Arizona support the policies).

charter school system [is] very robust, and they had really, really good results from them.<sup>145</sup>

So, I ultimately think that the charter school argument will prevail. It may be a little while still, but I think the public sentiment is moving that way, and I think you're seeing more and more alternatives—not just a single charter school, but lots of different alternatives,<sup>146</sup> and I think the parents need that. Frankly, the really sad part is the people that are most hurt by the lack of choice are the poor and underserved.<sup>147</sup> Yet, the teachers unions say, “Oh, we need to help those people.”<sup>148</sup> No, they're keeping them back.<sup>149</sup> The ones that can't afford to send their kid to private school. Many people cannot.<sup>150</sup> I can afford to homeschool because my wife can stay home. Many people cannot.<sup>151</sup> They need those choices,

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<sup>145</sup> See *National Charter School Law Rankings & Scorecard – 2022*, CTR. FOR EDUC. REFORM (2022), <https://edreform.com/wp-content/uploads/2022/05/ce-rcs-laws-scorecard-2022.pdf> (showing that Arizona's charter school system ranked first in the nation based on its charter authorizers, growth, operations, and equity).

<sup>146</sup> See James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 844 (2007) (discussing the growing popularity of private education and school choice options, like charter schools, private schools, magnet schools, alternative schools, and specialty schools); Jon England, *Parents Want Non-Traditional School Options*, LIBERTAS INST. (July 29, 2022), <https://libertas.org/education-empowerment/parents-want-non-traditional-school-options/> (describing the decline in traditional learning and the rise of asynchronous education, microschoools, homeschooling, and hybrid learning).

<sup>147</sup> Cf. Brian P. Marron, *Promoting Racial Equality Through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 BYU EDUC. & L.J. 53, 70 (2002) (“These choice proposals seek to grant . . . freedom to the impoverished citizens . . .”).

<sup>148</sup> See, e.g., Amanda Litvinov, *5 Ways Strong Educator Unions Help Public Schools*, NEA (Jan. 28, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/5-ways-strong-educator-unions-help-public-schools> (asserting that teachers unions are working to help underserved minority groups by bargaining for and demanding equal treatment in discipline policies and advanced class accessibility).

<sup>149</sup> See Joseph P. Viteritti, *Stacking the Deck for the Poor: The New Politics of School Choice*, BROOKINGS (June 1, 1996), <https://www.brookings.edu/articles/stacking-the-deck-for-the-poor-the-new-politics-of-school-choice/> (discussing how teachers unions have hindered disadvantaged students' ability to access a quality education by blocking attempts to strengthen school choice policies).

<sup>150</sup> See Psyche Pascual, *Should I Send My Child to a Private School?*, GREAT!SCHOOLS.ORG (Nov. 17, 2022), <https://www.greatschools.org/gk/articles/private-schools-parochial-schools/> (stating that enrollment in private schools has declined in recent years due to an increase in tuition, which averages \$19,100 nationwide); Richard J. Murnane et al., *Who Goes to Private School?*, EDUC. NEXT (Feb. 21, 2023, 8:31 PM), <https://www.educationnext.org/who-goes-private-school-long-term-enrollment-trends-family-income/> (demonstrating that private school enrollment among children from low-income families over the last half century has remained consistently around five percent, while the same statistic has steadily decreased among children from middle-income families, dropping from twelve percent in 1968 to only seven percent in 2013).

<sup>151</sup> See Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 104 (2016) (explaining that only well-off families can typically afford to homeschool, and single-parent or low-income families usually cannot, leaving them no choice other than public school).

and I think the public is asking for them more. I do ultimately think that's where we're going to move.<sup>152</sup> And these last several years have been a big—I think this is the biggest opportunity in my lifetime to push forward some of those things, and I've talked with some large charter school organizations in the country that are looking to capitalize on that.<sup>153</sup>

**Hon. Alice Batchelder:** Interestingly, just this week, I saw that the effort in Arizona to block any expansion of the school voucher system had failed.<sup>154</sup> They were not able to get the signatures on the petitions that they needed,<sup>155</sup> and I would be tempted to say, “Well, they failed for now, but that effort is probably not dead.” But on the other hand, it's interesting to see that the public wasn't interested in signing on to trying to block it from a referendum-type perspective.

**Mr. Langhofer:** Yeah, I'm not terribly surprised. Like I said, overall, I felt like there was a pretty broad support for school choice in Arizona, even though it was the most robust in the country.<sup>156</sup>

**Hon. Alice Batchelder:** Speaking as the grandparent of eight homeschooled grandchildren, I was tempted to move into homeschooling here, but I think instead, probably we should move on to the realm of higher education—education on the college and graduate level. One question that that comes to mind—and it's already been touched on both this morning in the first panel and certainly here—is whether teachers have a right not to use a student's preferred pronoun.

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<sup>152</sup> See *What States Passed School Choice Policies in 2022*, STATE POL'Y NETWORK (June 9, 2022), <https://spn.org/articles/what-states-passed-school-choice-policies-in-2022/> (suggesting that the nation is moving toward school choice by highlighting various states' recent school choice legislation on academic transparency and reviewing access to charter schools and scholarship programs).

<sup>153</sup> Cf. *'School Choice' Push Strengthens Voucher, Charter School Proposals Across the US*, AL.COM (Jan. 27, 2023, 9:16 AM), <https://www.al.com/news/2023/01/school-choice-push-strengthens-voucher-charter-school-proposals-across-us.html?outputType=amp> (stating that with the growing popularity of school choice, “school choice advocates are trying to capitalize on discontent with the public-school system”).

<sup>154</sup> See Bob Christie, *Huge Arizona School Voucher Plan in Effect After Foes Fail*, AP NEWS (Sept. 30, 2022), <https://apnews.com/article/business-education-arizona-doug-ducey-7ebd4c9149508e9875f47e67bdc0ef69>.

<sup>155</sup> *Id.* (stating that those attempting to block Arizona's school choice expansion law secured far fewer votes than the approximately 119,000 needed for their petition to prevent the law from taking effect).

<sup>156</sup> See *National Charter School Law Rankings & Scorecard – 2022*, *supra* note 145 (demonstrating that in 2022 Arizona's charter school program outranked every other state in the country); *Empowerment Scholarship Accounts*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/arizona-empowerment-scholarship-accounts/> (last visited Mar. 6, 2023) (describing how Arizona's education savings account scholarship program is the most “expansive” in the country).

I would have to say, this is a particularly hard issue for me. I started my adult life as an English teacher, and I know what pronouns are.<sup>157</sup> I think there are lots out there who don't know what pronouns are. But this is now descended all the way down to the elementary and secondary levels as well.<sup>158</sup> Very often this issue is being categorized as one of religious persuasion.<sup>159</sup> But I wonder if that's really fair or accurate. Whether maybe this is more a matter of objective truth, and a matter also of the First Amendment right to free speech.<sup>160</sup> Which brings me to another question—which I think we can kind of fold into this—to what extent can free exercise—that is your parents' right to say, “Look, you can't do this to my child, or make me do this, or prevent me from knowing that you're doing this with regard to pronouns,” for example—and free speech. How can those two things be separated or distinguished, or can they be? That's too many questions all rolled into one, but I know we'll be able to separate them out, and so I was thinking perhaps I would start with Tyson.

**Mr. Langhofer:** I first became aware of this issue back in 2016. It'd been about a year after *Obergefell*,<sup>161</sup> a year after I joined ADF. A professor

<sup>157</sup> See generally *Pronoun*, MERRIAM-WEBSTER DICTIONARY (rev. ed. 2022) (defining “pronoun,” first, as “any of a small set of words . . . that are used as substitutes for nouns or noun phrases . . .” and, second, as a “third person personal pronoun[] . . . that a person goes by”); Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021, 6:01 AM), <https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq> (providing a glossary of terms as they are used in modern parlance when discussing gender identity, including pronouns in reference to one's gender identity).

<sup>158</sup> See, e.g., *Elementary School Teachers Say 'No' to Parents' Wishes They Refer to Students by Pronouns Given at Birth*, FOX NEWS (May 12, 2022, 3:45 PM), <https://www.foxnews.com/media/elementary-school-teachers-parents-wishes-students-pronouns> (discussing how a group of elementary teachers stated that they would decline to call students by their pronouns given at birth if it conflicted with the student's wishes).

<sup>159</sup> See Gregory A. Smith, *Views of Transgender Issues Divide Along Religious Lines*, PEW RSCH. CTR. (Nov. 27, 2017), <https://www.pewresearch.org/fact-tank/2017/11/27/views-of-transgender-issues-divide-along-religious-lines/> (showing that Christians tend to think gender is determined at birth and those who are not religious think gender is not necessarily known at birth); Paige Smith, *Pronouns Spur Fight over Transgender, Religious Work Rights*, BLOOMBERG L., <https://news.bloomberglaw.com/daily-labor-report/pronouns-prompt-fight-over-transgender-religious-rights-at-work> (Feb. 18, 2020, 11:12 AM) (discussing litigation over whether public employees must honor people's pronouns or can choose not to for religious reasons).

<sup>160</sup> See Brett Kunkle, *Do Pronouns Matter?*, STAND TO REASON (Sept. 21, 2021), <https://www.str.org/w/do-pronouns-matter-> (arguing that Christians should not use preferred pronouns because pronouns reflect objective truth, and we are called to speak truth); *Meriwether v. Hartop*, 992 F.3d 492, 501, 511–12 (6th Cir. 2021) (holding that a university violated a professor's First Amendment right to free speech when it attempted to compel the professor to use a student's chosen pronouns).

<sup>161</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

called me and said, “Hey, Paul, I’ve got this issue.” There was no policy.<sup>162</sup> The school had a policy that basically just said, “Nondiscrimination. Can’t discriminate on any basis—race, religion, sexual orientation, gender identity,” but no pronouns.<sup>163</sup> But a student was demanding that he use male pronouns for female student. He said, “Look, I’ll use whatever name the student wants. I just want to avoid the pronoun. I don’t want to say something that I believe is untrue.” So, this particular professor, Dr. Meriwether, Shawnee State University, was a philosophy professor—professor of religion and philosophy, and specifically Aristotelian philosophy—the discovery of truth.<sup>164</sup> And he said, “I want to teach my students that there is absolute truth, and you can discover that. If they know that I am being forced to say something that I believe is untrue—objectively—I really undermine my entire teaching purpose.”<sup>165</sup> So, he grounded his objections in both his philosophical and his religious beliefs, and there was no really way to distinguish those. They were intertwined very clearly. He was trying to take the best approach he could. “I don’t want to offend the student. I don’t have any problem using whatever name, because I don’t know that there’s any truth in a name. But there’s truth in pronouns. I’m saying, this person is biologically that sex, so just don’t make me say that.” In 2016, we were able to resolve that.<sup>166</sup> In 2018, another issue [came up], and we were unable to resolve it.<sup>167</sup>

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<sup>162</sup> See Megan Henry, *Shawnee State to Pay Professor \$400,000 in Settlement of Student’s Preferred Pronouns*, COLUMBUS DISPATCH, <https://www.dispatch.com/story/news/2022/04/19/shawnee-state-pay-professor-400-000-settle-pronoun-lawsuit/7358716001/> (Apr. 19, 2022, 11:14 AM) (stating that “[t]here was no specific preferred pronoun policy” at the university). *But see Meriwether*, 992 F.3d at 498–99 (finding that the university informed its faculty via email that they must refer to students by their preferred pronouns and that it claimed this fell under the school’s existing policy against discrimination based on gender identity).

<sup>163</sup> See *Meriwether*, 992 F.3d at 500–01 (describing how the school’s policy prohibits discrimination based on gender identity, and gender identity is defined as a “person’s innermost concept of self as male or female or both or neither”).

<sup>164</sup> See *id.* at 498 ((detailing Dr. Meriwether’s twenty-five-year career at Shawnee State University and highlighting his contributions, including how he designed its bachelor’s degree program in Philosophy and Religion).

<sup>165</sup> See *id.*

<sup>166</sup> Plaintiff’s Verified Complaint at 15–17, *Meriwether v. Trs. of Shawnee State Univ.*, No. 1:18-cv-00753-SJD, 2020 WL 704615 (S.D. Ohio Feb. 12, 2020) (noting that after receiving notice of Shawnee State’s new policies for transgender students in 2016, Dr. Meriwether was informed by administration that there was no formal policy relating to transgender students outside of the non-discrimination policy); see *Meriwether*, 992 F.3d at 499 (explaining how the university adopted the pronoun policy that violated Dr. Meriwether’s religious beliefs back in 2016, but “Meriwether continued to teach students without incident” until 2018).

<sup>167</sup> See generally *Meriwether*, 992 F.3d at 499–501 (explaining the events, starting in 2018, that led Shawnee State University to suspend and terminate Dr. Meriwether’s employment for not referring to a biological male student with preferred female pronouns).

So, we had to sue, and because in this particular case, the student remained in class the entire time, got a good grade, didn't make a single other complaint against Dr. Meriwether—not a single one.<sup>168</sup> The only issue was “you use pronouns for other students, but you use my name only.” That created a hostile environment, and the school agreed and wrote a letter of discipline in his record, and said, “If you do this again you could get fired.”<sup>169</sup> So, we filed a lawsuit under [the] First Amendment—both free exercise and free speech and some other grounds—in [the] Southern District of Ohio.<sup>170</sup> We lost on a motion to dismiss—dismissed all of our claims.<sup>171</sup> We appealed that to the Sixth Circuit, and last year we got a great opinion from Judge Thapar on both free exercise and free speech grounds.<sup>172</sup>

So, it does implicate both. Let me go back and say, as we've talked about earlier, I think you know I've talked with Christians that have different opinions on whether you should use pronouns or not, you can maybe come to different conclusions here. That's not the argument. The argument is: should the Government be able to tell you that you must speak a specific word?<sup>173</sup> And most of my clients believe that this is an ideological choice. When you're saying that you get to choose your pronouns, you're saying that gender is fluid, that sex is not immutable. That's the message you're sending, and you're not doing it just at the university level, but this is now down all the way through K-12.<sup>174</sup> Kindergarteners, first-graders get to choose this; you think about the confusion that causes. Many teachers have conscientious objections.<sup>175</sup> I've

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<sup>168</sup> See *id.* at 500 (noting the student's excellent performance in Dr. Meriwether's class and that although the student did subsequently complain to administration about Dr. Meriwether's refusal to use female pronouns when calling on the student in class, there were no complaints on other grounds).

<sup>169</sup> See *id.* at 500–01 (explaining how Dr. Meriwether's solution of referring to the student without using pronouns resulted in a threat of termination from the administration, which eventually occurred).

<sup>170</sup> *Meriwether*, 2020 WL 704615, at \*1–2.

<sup>171</sup> *Id.* at 2–3.

<sup>172</sup> *Meriwether*, 992 F.3d at 498, 511–512, 517.

<sup>173</sup> See *id.* at 509–10 (raising a potential compelled speech issue); cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (explaining how “validity of the asserted power to force an American citizen publicly to profess any statement of belief, or to engage in any ceremony of assent to one, presents questions of power”).

<sup>174</sup> See CATHY RUSE, *SEX EDUCATION IN PUBLIC SCHOOLS: SEXUALIZATION OF CHILDREN AND LGBT INDOCTRINATION* 9, 12–14, 24, 26 (2020) (describing the efforts of influential groups such as the Human Rights Campaign and the National Education Association to infuse K-12 education with concepts like sexual orientation and gender identity and highlighting the many objections parents have to the ways schools promote these concepts).

<sup>175</sup> Teachers in elementary, middle, and high school often feel that acquiescing to their districts' pronoun policies would violate their sincerely held religious beliefs. See, e.g., *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-cv-04015-HLT-GEB, slip op. at 2–4 (D. Kan.

had non-Christians call me, and I've had Christians call me. They say the same thing, "I don't want to cause confusion, and I don't want to say something that I think is untrue." I think that is a bedrock principle—the First Amendment.

The government—Mallory mentioned *Barnette*<sup>176</sup>— that's one of the best articulations—"[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . ."<sup>177</sup> That's really the heart of the issue. It seems silly. This is a pronoun. Just this one little word, this pronoun, but it really strikes at the heart of who we are as Americans and what does our First Amendment really say. But the complexity of it is that you have the public. You have a government employer. They have more rights over employees.<sup>178</sup> Teachers have rights.<sup>179</sup> Parents have rights.<sup>180</sup> Students have rights.<sup>181</sup> The school has rights on curricular choices.<sup>182</sup> So there's a lot of competing rights that come in, and it tries to make it complex. But, ultimately, we believe that there is a good solution, that we can live in a pluralistic society where you cannot force teachers to say things they think are untrue, but they can still treat their students with dignity and respect.

**Deputy AG Stewart:** Can I jump in on this one?

**Hon. Alice Batchelder:** Please do. You were next on my list.

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May 9, 2022) (a middle school math teacher in Kansas); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 833–34 (S.D. Ind. 2020) (a high school music and orchestra teacher in Indiana); *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274, at \*1 (Va. Aug. 30, 2021) (an elementary school physical education teacher in Virginia).

<sup>176</sup> *Barnette*, 319 U.S. at 624.

<sup>177</sup> *Id.* at 642.

<sup>178</sup> The Government can restrict the speech of its employees when they speak in an official capacity more than it can the speech of private citizens, but government employees also have First Amendment protections that private employees do not enjoy, in that the government cannot fire them for their speech when they speak as citizens on issues of public concern. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022).

<sup>179</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (establishing the landmark holding that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Kennedy*, 142 S. Ct. at 2416, 2423 (protecting Coach Kennedy's First Amendment right to pray on the football field after games).

<sup>180</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (establishing that the rights of parents to teach and educate their children are "within the liberty of the [Fourteenth] Amendment"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (reaffirming the *Lochner* era principle that parents have the right and duty to raise and educate their children).

<sup>181</sup> See *Tinker*, 393 U.S. at 511, 513 (holding that students have constitutional rights to express their views as long as their speech does not "materially and substantially disrupt the work and discipline of the school").

<sup>182</sup> See *Bd. of Educ., Island Trees Union Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (affirming that local school boards have certain rights to set their own curriculums).

**Deputy AG Stewart:** I don't want to demoralize our audience, but I also think we need to be understanding of what's actually happening in the landscape right now when we're talking about truth and the right to be able to speak the truth. The definition of truth is changing before our eyes. People are changing the definition of words in the dictionaries. So, what is going to be cited against you is going to be evidence of "truth." The American Medical Association said in 2021 that the AMA—which should be looked to as a guiding source of medical consensus—has come out and said they are opposed to state legislation that would prohibit gender transition-related care for minors, including "mental health counseling, non-medical social transition, gender-affirming hormone therapy, and[] gender-affirming surgeries" for minors.<sup>183</sup> This is the American Medical Association. You have government docents—passports are changing, whether it's male, female, other.<sup>184</sup> This is all happening. So, to kind of answer the judge's question, is this really the realm of free expression? Is this about truth? And what are we trying to fight here? I believe in the current environment that religious expression may very well be the place to have these battles, because the definition of truth and science and words outside religious institutions is rapidly changing, and the silent majority is really not engaged in this discussion.<sup>185</sup>

**Hon. Alice Batchelder:** Before I turn this over to Kurt, that sort of implicates a question that I asked at the very outset, which is: are—in the current world—science and consensus coterminous? Are they the same thing? Because the AMA has rather indicated that they are, as you just pointed out. So, what do we do about that as parents?

**Deputy AG Stewart:** I don't have the right answer to it. I think what we can do, and what I think is a sign for optimism, is that organizations like the ABA or the AMA—they're not government institutions. They're professional organizations, and I think ever being looked at as more advocacy organizations. So, I think some of their influence in the public

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<sup>183</sup> Letter from Dr. James L. Madara, M.D., Chief Exec. Officer & Exec. Vice President of the Am. Med. Ass'n, to Mr. Bill McBride, Exec. Dir. of the Nat'l Governors Ass'n (April 26, 2021), <https://www.ama-assn.org/press-center/press-releases/ama-states-stop-interfering-health-care-transgender-children>.

<sup>184</sup> *E.g.*, Press Statement, Anthony J. Blinken, Secretary of State, U.S. Dep't of State, X Gender Marker Available on U.S. Passports Starting Apr. 11 (Mar. 31, 2022), <https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/>.

<sup>185</sup> See DAVID CLOSSON, BIBLICAL PRINCIPLES FOR POLITICAL ENGAGEMENT 1–2 (2022) (instructing believers on the best way to be engaged in the public sphere and warning that although Christians have the numbers to make a large political impact, those who do not apply the gospel to the issues of the day risk losing influence). See also PRESTON SPRINKLE, EMBODIED: TRANSGENDER IDENTITIES, THE CHURCH & WHAT THE BIBLE HAS TO SAY 59–62 (2021).



domain is lessening. These are being seen as more political.<sup>186</sup> But where we really have the opportunity to address this is in the ballot box. I mean, you have to vote for people so that you have balance in the state legislatures and balance in statewide elected officials. I'm not even saying it would be great if it were all Republican representatives or all Democrats. I think you need that—just like we have in the courtroom, right? You have to have that debate in the public square about what's happening, and I think the place that's really going to happen is in the state legislatures, where you can actually define terms as a matter of state law and move away from a lot of these professional associations.

**Hon. Alice Batchelder:** Kurt?

**Dean Kreassig:** Great points. I'm looking at this, also, as our country in regard to the family. So, I take a look at teachers right now. It's not the same as teaching twenty years ago where little William wanted to be called "Billy" or Tamara want to be called "Tam," or maybe even Edward said, "Please use my middle name." This is something totally different. Kids may not see that. But when we look at what our teachers have to do with the record keeping and everything like that. In fact, let me read you something from—this is the model policies for the treatment of transgender students in public elementary and secondary schools for the state of Virginia. It says, "When a student asserts that they have a name [or pronoun affirming their gender identity, school staff should abide by the student's wishes as to how to address the student . . . . A school employee's intentional and persistent refusal to respect a student's asserted name and pronoun is considered discriminatory."<sup>187</sup> And then it goes on to say, "In the situation where parents or guardians of a minor student (under [eighteen] years of age) do not agree with the student's request to adopt a new name and pronouns, school divisions will need to determine whether to respect the student's request [or] abide by the parent's wishes . . . ."<sup>188</sup> Can you imagine that? When we think about this, and we look at pronouns—and again, I think that the Christian front on

<sup>186</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267, 2279 (2022) (describing how in 1973, the ABA and AMA influenced the Court to read an unenumerated right to abortion into the Constitution but ultimately rejecting those lobbying efforts by overruling *Roe*).

<sup>187</sup> Here, Dean Kreassig was reading from the 2021 guidelines, which are no longer legally binding. VA. DEP'T OF EDUC., MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA'S PUBLIC SCHOOLS 5, 12 (2021). In 2022, Governor Youngkin's administration abandoned these guidelines and published new ones to counter the "cultural and social transformation in schools." VA. DEP'T OF EDUC., 2022 MODEL POLICIES ON THE PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA'S PUBLIC SCHOOLS 1 (2022).

<sup>188</sup> MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA'S PUBLIC SCHOOLS, *supra* note 187, at 13.

this is the family unit, really talking with kids early—we have as a nation, I think a lot of parents have—and I’ll use that word—“shirked” their responsibilities. They don’t engage the children in conversations at the dinner table anymore about their school day or what’s happening.<sup>189</sup> And you’d be surprised how many parents will come to meetings and have—they had no idea this was going on with their child.<sup>190</sup> That has to change. I think the fabric of who we are as families in our country has to change. To go back to raising kids and having those conversations, and really talking about Christ with kids early.<sup>191</sup> Because, again, the way I see this, when a teacher is forced to use pronouns, you are bearing false witness, and a child to make that determination—we’re seeing this now, where students who have transitioned early as youngsters now are transitioning back.<sup>192</sup> And you hear those stories. Now they are blaming Mom and Dad, “Why did you let me do this? Why didn’t you counsel me on this?” So, I think there’s a need in our country, more ever now for Christ, but also for good attorneys, like you, to find out where the best place is for this to be met.

**Hon. Alice Batchelder:** Which brings me to the next question that I wanted to throw out to you three, which is: we’re talking about free speech; does free speech—and I’m thinking particularly in terms now of the students, but for all of the various entities and constituencies we’ve been talking about—does that include the right of students and others to hear diverse or divergent views? And if it doesn’t include that right to hear, what impact does that have on education? One of the examples that comes to mind right now is in the in the field of medical education, where California—I’m sure you’re all aware now—has this wonderful new law

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<sup>189</sup> See Michelle Watson Canfield, *How to Talk with Your Daughter About Sexual Orientation, Gender-Identity, and Same-Sex Attraction*, FOCUS ON THE FAM. (Jan. 19, 2022), <https://www.focusonthefamily.com/parenting/how-to-talk-with-your-daughter-about-sexual-orientation-gender-identity-and-same-sex-attraction/> (describing the difficulties that keep many parents from talking about issues of gender and sexuality and providing biblical advice for Christian fathers to address those issues with their daughters); cf. David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC, Mar. 2020, at 56, 57 (examining the decline of the nuclear family and using the image of broken relationships around a dinner table).

<sup>190</sup> Loudoun County Public Schools, *10-22-2019 4th Tuesday School Board Meeting*, VIMEO, at 20:55 (Oct. 23, 2019), <https://vimeo.com/368135621> (livestreaming a school board meeting in Loudoun County, VA, where over 100 parents came to give comment, many of them were in response to the sexual content in public school libraries).

<sup>191</sup> See *Proverbs* 22:6 (exhorting parents to “[t]rain up a child in the way he should go,” according to Christ-centered principles, so that when that child grows up, “he will not depart from it”).

<sup>192</sup> See, e.g., Rikki Schlott, *‘I Literally Lost Organs:’ Why Detransitioned Teens Regret Changing Genders*, N.Y. POST (June 18, 2022, 9:01 AM), <https://nypost.com/2022/06/18/detransitioned-teens-explain-why-they-regret-changing-genders/> (mentioning the stories of people who transitioned as teenagers and explaining why they came to regret that decision).

where, if physicians disseminate, I'm quoting now, "false information that is contradicted by contemporary scientific consensus contrary to the standard of care," they can lose their licenses.<sup>193</sup> So what does that mean for the future of education in the medical and scientific fields? And maybe sort of attached to that, what impact that has on the future of Christianity and higher education? If we say that the right of free speech doesn't include the right to hear diverse views, what does that really mean? And I'm not picky on this one. Anybody jump in.

**Deputy AG Stewart:** I'll jump in for a moment. I do feel like we can take advantage of some of the activities that are happening on college campuses and in particular the new emphasis on diversity, equity, and inclusion. I know there are a lot of conservatives who want to stamp that out.<sup>194</sup> They want to remove the administrators and shrink their budgets<sup>195</sup> and, you know, question whether or not that's realistic. But maybe there's an opportunity to really leverage this discussion about DEI as the first panel discussed. I mean, what does DEI mean? And what does

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<sup>193</sup> See CAL. BUS. & PROF. CODE § 2270(a)(4) (current through 2023) (defining as unprofessional conduct the distribution of "misinformation and disinformation" about the COVID-19 vaccines); *id.* § 2234 (allowing the Medical Board of California to review the case of a doctor licensed in the state charged with unprofessional conduct). *Id.* § 2227(a)(1) (permitting revocation of one's license to practice medicine as a power of the Board in its review). Within a month of the law taking effect, it was enjoined by a Federal Judge in the Eastern District of California. *Høeg v. Newsom*, No. 2:22-cv-01980 WBS AC (E.D. Cal. Jan. 25, 2023).

<sup>194</sup> See, e.g., Exec. Order No. 13,950, Combating Race and Sex Stereotyping, 85 Fed. Reg. 60,683, 60,683–85 (Sept. 28, 2020) (stating that the purpose of the executive order from President Trump is to stop divisive race and sex based training in the federal government; "[I]t shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees."); CHRISTOPHER F. RUFO ET AL., ABOLISH DEI BUREAUCRACIES AND RESTORE COLORBLIND EQUALITY IN PUBLIC UNIVERSITIES 1–12 (2023) (providing model legislation that would eliminate DEI offices on campus, mandatory diversity trainings, mandatory diversity statements from faculty, and preference in admissions for protected categories like race); Adrienne Lu, *Race on Campus: Diversity Efforts Under Fire*, CHRONICLE HIGHER EDUC. (Jan. 31, 2023), <https://www.chronicle.com/newsletter/race-on-campus/2023-01-31> ("The diversity bureaucracy in higher education is under attack. In recent months, conservative critics have taken aim at the infrastructure built to promote and support diversity, equity, and inclusion in higher education, arguing that it is an attempt to indoctrinate students, a waste of tax dollars, and in some cases, illegal.").

<sup>195</sup> See, e.g., RUFO, *supra* note 194 (proposing model legislation specifically aimed at abolishing the DEI administrative apparatus of a public university: "Public or land-grant institutions of higher education in the state of [STATE] may not expend appropriated funds or otherwise expend any funds derived from bequests, charges, deposits, donations, endowments, fees, grants, gifts, income, receipts, tuition, or any other source, to establish, sustain, support, or staff a diversity, equity, and inclusion office or to contract, employ, engage, or hire an individual to serve as a diversity, equity, and inclusion officer.").

diversity mean? What is having a marketplace of ideas? Are veterans represented, are Christians represented, are rural and agricultural communities represented on these faculty committees and in hiring? And so, I think sometimes rather than trying to fight the efforts that are becoming parts of the structure of our educational institutions, we can use those structures to expand the dialogue in a way that's actually more inclusive. Inclusive in the way that we used to use that terminology.

**Hon. Alice Batchelder:** You mean diversity means more than just the surface things? Ideas?

**Deputy AG Stewart:** Also, in Virginia, again, to just talk a little bit about the structure of government. Really, these decisions are made by the boards that oversee these academic institutions, and the board members are appointed by the governor, and the governor can appoint about twenty-five percent of the board in a given year.<sup>196</sup> So just having board members in the room when these discussions are happening is such a change of the landscape in Virginia, and in another year, those four members will make up half, or in some cases a majority, of the governing boards for all of our public institutions in the state.<sup>197</sup> So that kind of dialogue is happening, and I think there is room for optimism in that regard.

**Hon. Alice Batchelder:** Kurt?

**Dean Kreassig:** I agree. Especially with the DEI initiatives that are out there. We do want children to grow up, understand, know viewpoints, and determine, based on their own values, what the best direction and decisions that they make. The way that it's been introduced and the way that it's been forced at times have caused people to say, "No, I don't want that. I don't want my child . . ." <sup>198</sup> But knowing about that, being educated

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<sup>196</sup> See VA. CODE ANN. § 23.1-1300(A) (LEXIS through ch. 22 of the 2022 Spec. Sess. I) (empowering the Governor of Virginia to appoint members of the governing boards of public universities to serve four-year terms); see, e.g., *Members as of July 1, 2022*, BD. OF VISITORS (July 1, 2020), <https://bov.virginia.edu/visitors-staff> (showing that four of the seventeen board members on the Board of Visitors of the University of Virginia were appointed by Governor Youngkin thus far).

<sup>197</sup> See *Members as of July 1, supra* note 196 (showing that by the end of 2023 eight of the seventeen board members will have been appointed by Governor Youngkin); *Board of Visitors*, CHRISTOPHER NEWPORT UNIV., <https://cnu.edu/whoweare/bov/> (last visited Mar. 9, 2023) (showing that in the fall of 2023, eight of the fourteen members of the Christopher Newport University Board of Visitors will have been appointed by Governor Youngkin).

<sup>198</sup> *Woke Schooling: A Toolkit for Concerned Parents*, MANHATTAN INST. (June 17, 2021), <https://www.manhattan-institute.org/woke-schooling-toolkit-for-concerned-parents> (outlining some of the ways DEI has been pushed on students and how parents have pushed back against it).

in various aspects of it, I think, is appropriate so that we can—as again, I go back to all of us living together, and everyone getting along and about that type of inclusivity. But what I’ve witnessed as things have rolled out in school systems have been dramatically different and very much offensive to many groups, not just white, but also black, also Asian—doesn’t matter your ethnicity. The way that some of these DEI things that roll out have been very, not only intrusive, but obviously embarrassing for us as a state or as a school system. So, I do think, knowing the viewpoints and DEI aspects is vital as kids grow up and start to interact and become professionals and whatever they choose to do.

**Mr. Langhofer:** Can I add something here real quick?

**Hon. Alice Batchelder:** Please.

**Mr. Langhofer:** I see this kind of on both sides in a lot of ways. We actually have multiple lawsuits going on kind of surrounding these issues one right now against SUNY Binghamton, where the Young America’s Foundation brought the Nobel Peace Prize-winning economist, Art Laffer, to campus to speak on the very controversial topic of tariffs.<sup>199</sup> Alright, tariffs. Can’t talk about tariffs, right? Well, the local College Progressives and a local Antifa group got together, and they stopped the event from happening.<sup>200</sup> And this college’s police just kind of walked away.<sup>201</sup> We follow the lawsuit against them under § 1983 grounds for violation of First Amendment rights and so forth.<sup>202</sup> But I had heard from so many parents saying, “My child just wanted to hear a discussion on these topics. He’s an economics major, and he can’t hear from a Nobel Peace Prize-winning economist, whether you like him or not?” This is now shut down by an Antifa group, and the school knew about it and told the police—I mean

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<sup>199</sup> *Young Am.’s Found. v. Stenger*, No. 3:20-CV-0822 (LEK/ML), 2021 WL 3738005, at \*3 (N.D.N.Y. Aug. 24, 2021). Art Laffer has not received a Nobel Prize in Economics; he did, however, receive the Presidential Medal of Freedom from President Trump in 2019. *Medal of Freedom*, WHITE HOUSE, <https://trumpwhitehouse.archives.gov/medaloffreedom/> (last visited Mar. 4, 2023).

<sup>200</sup> *Stenger*, 2021 WL 3738005, at \*2, \*4–5; see Shawn M. Carter, *Protesters Shut Down Another Event, Leading to Two Arrests and Outcry Online*, FOX BUS. (Nov. 19, 2019, 8:40 PM), <https://www.foxbusiness.com/lifestyle/antifa-protesters-shut-down-another-event-leading-to-two-arrests-and-outcry-online> (noting that the chairman of the College Republicans blamed antifa for the disruption of the event).

<sup>201</sup> *Cf. Stenger*, 2021 WL 3738005, at \*5 (noting that college progressives disrupted the event with megaphones and police did not effectively stop the counterdemonstrations and ushered Laffer out after a few minutes).

<sup>202</sup> See Complaint at 1, 25, *Stenger*, 2021 WL 3738005 (suing university officials under §§ 1983, 1985(3), and others for deprivation of the right of free speech); see also *Stenger*, 2021 WL 3738005, at \*7, \*9, \*13 (denying the university’s motion to dismiss after analyzing both § 1983 and § 1985).

here's how crazy it is. They knew that this was coming.<sup>203</sup> They met Art Laffer—eighty-two year old guy, who had just flown in across the country and met him at the airport and said, “Go back home. You're not going to be able to speak tonight.” And he said, “No, I'm coming to speak,” and they said, “Keep the car running,” and they did. Within a minute, he was moved off the stage.<sup>204</sup> Under their theory, we can't platform anybody that has a different viewpoint.<sup>205</sup> So they're stopping people from hearing it.

But on the other side, I currently represent some law students at the University of Idaho.<sup>206</sup> Christian Legal Society members who went to a moment of community in front of their law school to denounce an LGBTQ slur that was put on some chalkboard somewhere, and another student at the meeting asked them, “Hey, why do you as CLS require your members to sign a statement of faith on marriage being between one man and one woman?”<sup>207</sup> And one of them said, “Well, that's what the Bible says,” and she said, “No, it's not,” and he was like “Well, yes, it is.” And they had a little dialogue, and then they left.<sup>208</sup> They then had a meeting on Monday—a whole school meeting, an ABA meeting—and she raises her hand and says, “CLS is hateful, here's why blah blah blah.” Another CLS student raised his hand and said, “I disagree.” And they had a little discussion in this public meeting.<sup>209</sup> Four days later, all three of them receive a no contact order from their Title IX office, saying, “You cannot talk with this student indirectly or directly. If you're in a class with her, you have to sit across the room from her, and if you violate it, you're going to be kicked out of school.”<sup>210</sup> And when we went to argue the PI at the court, their argument was, “She has a right to be left alone.”<sup>211</sup> She had never asked them not to talk to them.<sup>212</sup> She had initiated the

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<sup>203</sup> *Stenger*, 2021 WL 3738005, at \*4 (explaining that, before the event, the University Police showed Laffer social media posts of planned disruption at his talk and warned him not to attend).

<sup>204</sup> *See id.* at \*4–5 (noting that security moved Laffer off stage within minutes of the event starting).

<sup>205</sup> *See id.* at \*2, \*4; Complaint, *supra* note 202, at 18 (asserting that another progressive campus group decried Laffer's economic theories as reinforcement of class stratification); *see also* Julia Musto, *Art Laffer Shouted Out of Campus Lecture by Protesters: They 'Clearly Don't Want Free Speech'*, FOX NEWS (Nov. 20, 2019, 9:27 AM), <https://www.foxnews.com/media/art-laffer-binghamton-university-free-speech-first-amendment-protesters> (noting that College Progressives expressed general disdain for Laffer and encouraged students to disrupt his lecture).

<sup>206</sup> *Perlot v. Green*, No. 3:22-CV-00183-DCN, 2022 WL 2355532 (D. Idaho June 30, 2022).

<sup>207</sup> *Id.* at \*3.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at \*4.

<sup>211</sup> *Id.* at \*10–11; *see also id.* at \*1 (clarifying that “PI” here means preliminary injunction).

<sup>212</sup> *Id.* at \*11.

conversation, and they didn't try to talk to her after that.<sup>213</sup> But the school was arguing that she has this right to be left alone, and they unilaterally issue this no contact order saying that she's got the right to be shielded from ideas that she essentially doesn't like, even though she'd asked the question.<sup>214</sup> So, these conversations are important.

Obviously, you're never going to go harass somebody. There are harassment laws.<sup>215</sup> I know if a person is harassing somebody because of their sex, we need Title IX for those reasons.<sup>216</sup> But there were no allegations of harassment here. It was simply, "I didn't like your response, and I don't want to hear that response again." And so, we're having to talk about that and try to figure out how do we live in this society and discuss these ideas that are . . . that are pretty controversial, but do it in a way that respects everybody's rights.

**Hon. Alice Batchelder:** You can't open a newspaper—well, I guess nobody really reads newspapers except people in my generation. But you know, get on your social media or just anywhere without seeing the extent to which some groups are being labeled hate groups merely because the positions and the ideas which they expound are not that the ones that are accepted right now.<sup>217</sup> It has worried me for a long time that it—as Coke was talking about the redefinition of terms in the dictionary—it has worried me for a long time that we are in danger of having the term “tolerance” be redefined to mean, “you will either accept my point of view and affirm it and further it or we will destroy you.” That's an alarming place to be, and I'm not sure we have completely reached that point, but I think we're in danger of it if we don't make some effort to see that tolerance doesn't become defined that way. I hope I don't sound overly pessimistic on this score. In the interest of being absolutely truthful and forthright, I would have to admit that sitting on my desk at all times is a

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<sup>213</sup> *Id.* at \*3, \*4 (noting that one plaintiff left a note on Doe's desk immediately after the first conversation but did not contact her after that).

<sup>214</sup> *Id.* at \*10.

<sup>215</sup> 20 U.S.C. §§ 1681–1683; *see also, e.g.*, 5 U.S.C. § 1692(d) (proscribing harassment in debt collection).

<sup>216</sup> 20 U.S.C. §§ 1681–1683; *see also* 34 C.F.R. § 106.45 (2021) (explaining the process for making a formal complaint under Title IX).

<sup>217</sup> *See* Jeff Johnston, *SPLC Continues to Label Conservative Christian Organizations as 'Hate Groups,'* DAILY CITIZEN (Mar. 9, 2022), <https://dailycitizen.focusonthefamily.com/splc-continues-to-label-conservative-christian-organizations-as-hate-groups/> (explaining how organizations supporting free speech have been categorized as hate groups by the Southern Poverty Law Center); *see also* CASSIE MILLER & RACHEL CARROLL RIVAS, S. POVERTY L. CTR., *THE YEAR IN HATE AND EXTREMISM 2021*, at 51, 54–55, 61 (2022) (including on the 2021 list of hate groups, for example, organizations such as Alliance Defending Freedom, American College of Pediatricians, American Family Association, and Family Research Council; the list also generally equates the parental rights movement with the anti-trans movement), <https://www.splcenter.org/sites/default/files/splc-2021-year-in-hate-extremism-report.pdf>.

small Eeyore who sits on a black crêpe-covered box. I had a law clerk many, many years ago who was a very, very liberal kid; great clerk, and I loved him. But he said to me one day, “Judge, I don’t want to be disrespectful, I really don’t, but you’re just an Eeyore. You just are.” And I said, “Yeah, what’s wrong with that?” I guess I subscribe to the “eleventh beatitude”: “Blessed is she who expects the worst, for she shall not be disappointed.” But I don’t like that beatitude very much.

Up until now, we certainly haven’t been shy here about addressing some hot-button issues, so, in our remaining time, let’s maybe hit a couple more which are—as lawyers always like to say—inextricably intertwined. To what extent do parents have a right to insist on, or object to, having some things taught in the schools? Now that obviously is the very broad question, but the more difficult one, I guess, is more specific. To what extent do parents have the right to object to the concepts, for example, of CRT being taught in the public schools? I’m going to start, I think, with Dean Kreassig on this one.

Kurt, first of all, what is CRT? And I will interject at this point that, when you start asking that question in the academic setting, it always kind of brings to mind the old wonderful Lincoln jury question, “How many legs does a donkey have if you call a tail a leg? Well, four. Because calling a tail a leg doesn’t make it one.”<sup>218</sup> And so, typically, when you ask about “what is CRT and is it being taught,” and the answer often is, “No, it’s not being taught. We just don’t do that here.”<sup>219</sup> They don’t call it that, but some of the things that it consists of are.<sup>220</sup> So what’s your experience with that?

**Dean Kreassig:** First, Critical Race Theory—let me emphasize theory and what a theory is. A theory is when a man or woman comes in, doesn’t have the full story, and puts things in that story so it makes

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<sup>218</sup> This quote is widely attributed to President Lincoln, but the exact identity of the animal is disputed. *Suppose You Call a Sheep’s Tail a Leg, How Many Legs Will the Sheep Have?*, QUOTE INVESTIGATOR (citing *What the President Said*, DAILY MILWAUKEE NEWS, Sept. 23, 1862, at 1), <https://quoteinvestigator.com/2015/11/15/legs/> (last visited Feb. 3, 2023) (describing the animal as a sheep); William Safire, *Calling a Tail a Leg*, N.Y. TIMES, Feb. 22, 1993, at A17 (recognizing the animal as a dog).

<sup>219</sup> See Bryan Anderson, *Critical Race Theory Is a Flashpoint for Conservatives, but What Does it Mean?*, PBS NEWS HOUR, <https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory> (Nov. 4, 2021, 9:18 AM) (“There is little to no evidence that critical race theory itself is being taught to K-12 public school students, though some ideas central to it, such as lingering consequences of slavery, have been.”).

<sup>220</sup> Joe Setyon, *Schools Swear They Don’t Teach CRT. They’re Lying.*, GOLDWATER INST. (Nov. 8, 2021), [https://www.goldwaterinstitute.org/schools-swear-they-dont-teach-crt-theyre-lying/?gclid=EAIaIQobChMIkKX1-Yn6\\_AIVzuzICh0rrwrZEAAYAiAAEgKFjvD\\_BwE](https://www.goldwaterinstitute.org/schools-swear-they-dont-teach-crt-theyre-lying/?gclid=EAIaIQobChMIkKX1-Yn6_AIVzuzICh0rrwrZEAAYAiAAEgKFjvD_BwE).



sense.<sup>221</sup> Just like the theory of evolution; it's a theory. A lot of people forget when they say CRT, they forget about that word—"theory." This is a hot-button issue, but make no mistake about it; racism is plain evil. It is evil, but critical race theory is a legal and academic framework that asserts that the America, our country—the founding of our country—is based on institutions that systemically are biased, racist against black individuals and at times other races.<sup>222</sup> A lot of our students, a lot of our Ph.D. and Ed.D. students, come to our school thinking that CRT is social justice. They want to change the world, and they think, "I'm going to do my dissertation on social justice. I'm going to spend two years researching this," and the first thing we say is, "Let's back up a second. Let's take a look at it. Go back to the original source and read CRT, and can you ground CRT biblically?" Personally, I can't ground it biblically, because just because of the color your skin, I don't believe white are oppressive people and blacks are oppressed, or that our country is set up with Marxist institutions that discriminate against individuals. Again, there is racism out there, whether it is institutional or individual, it is happening out there, and it has to be addressed and stopped, but the theory of CRT, I don't believe that it's biblically—you can't ground it biblically, bottom line. But a few things about this, and I'll go into their book one of the questions with the book about the book with Chua and Rubinfeld. The authors wrote a book called *The Triple Package*, and they talked about individual groups, heritage ethnic groups, and why some are more successful than others.<sup>223</sup> Why do we have immigrants coming into our country that seem to not only have a niche, but also do very well, whether it's in the banking industry, whether it's in the housing industry, whether it's in the restaurant industry?<sup>224</sup> And one of the things that comes into play is, "Why aren't blacks successful in America?"<sup>225</sup> What the book doesn't cover, really, is the history, the history of slavery.<sup>226</sup>

That goes into a whole other gamut of a lot of immigrants that came to this country. You could say black Nigerians. A lot of them came from

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<sup>221</sup> See *Theory*, MERRIAM-WEBSTER DICTIONARY (rev. ed. 2022) (defining "theory" as "a plausible or scientifically acceptable general principle or body of principles offered to explain phenomena").

<sup>222</sup> *Critical Race Theory*, ENCYCLOPEDIA BRITANNICA (2023).

<sup>223</sup> AMY CHUA & JED RUBENFELD, *THE TRIPLE PACKAGE: HOW THREE UNLIKELY TRAITS EXPLAIN THE RISE AND FALL OF CULTURAL GROUPS IN AMERICA* 41–45, 48–50 (2014) (examining the educational and career success of groups of various national origins).

<sup>224</sup> See *id.* at 43–45, 48–50 (describing how Nigerian immigrants outperform black Americans in terms of median income and that immigrants from India and Asia have performed exceptionally well in the business and financial sectors).

<sup>225</sup> See *id.* at 8–11, 44–45 (arguing that some of the disparity in economic outcomes between Black Americans and immigrants of color is due to the lack of the triple package: shared cultural traits of a superiority complex, insecurity, and impulse control).

<sup>226</sup> See *id.* at 73–76 (discussing, briefly, the historical factors of slavery and discrimination).

middle-class families;<sup>227</sup> they had a head start. They had that social capital when they came over, and even the financial capital, which many of our black brothers and sisters in America did not have because of slavery.<sup>228</sup> Just to piggyback on that, blacks struggle in higher education,<sup>229</sup> and I'm going to flip that script a little bit. What's interesting with this, one of our own students wrote their dissertation—Antwan Perry is a black male student—and wanted to find out why African-Americans struggle so much in higher education at the Ivies, or even a school like Regent.<sup>230</sup> Well, what he did is he examined successful black males that completed their studies and graduated from the University, and his research showed a few things. First, that University of Baltimore, Maryland, where he studied a group called the Meyerhoff Scholars—they purposely developed a community to acclimate African-Americans, especially males, to the college campus because it's culture shock.<sup>231</sup> Most universities are what we call PWIs, primarily white institutions.<sup>232</sup> And many of our African-American brothers and sisters come from a black home, typically a black high school or black community.<sup>233</sup> They come to

<sup>227</sup> See, e.g., Yomi Kazeem, *Nigeria's Ongoing Middle-Class Brain Drain Is Costing It Two Generations in One Swoop*, QUARTZ (May 25, 2019), <https://qz.com/africa/1615518/nigerias-middle-class-keep-emigrating-to-canada-australia> (stating that many middle-class Nigerians are emigrating to North America and Europe to seek better opportunities for their children).

<sup>228</sup> See Eleanor Marie Lawrence Brown, *An Alternative View of Immigrant Exceptionalism, Particularly As It Relates to Blacks: A Response to Chua and Rubenfeld*, 103 CALIF. L. REV. 989, 1004–05, 1015 (2015) (articulating the legal and institutional differences that have given African migrants advantages over African Americans).

<sup>229</sup> See *College Enrollment Rates*, NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/programs/coe/indicator/cpb/college-enrollment-rate?tid=74> (May 2022) (reporting fewer black students enrolled in college than white or Asian peers); *Postbaccalaureate Enrollment*, NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/programs/coe/indicator/chb/postbaccalaureate-enrollment> (May 2022) (reporting fewer black students enrolled in graduate programs than white peers).

<sup>230</sup> See generally Antwan L. Perry, *Black Male Student Success in Higher Education: A Case Study of the Meyerhoff Scholars Program 10–11* (Mar. 2018) (Ed.D. dissertation, Regent University) (ProQuest) (focusing on the determinative factors leading to high levels of success for black males in the Meyerhoff Scholars Program at UMBC).

<sup>231</sup> *Model, Meyerhoff Scholars Program*, UNIV. MD. BALT. CNTY. [hereinafter *Meyerhoff Model*] <https://meyerhoff.umbc.edu/about/model> (last visited Jan. 20, 2023). The program began admitting women in 1990 and people from any background that are committed to minority representation in science and engineering in 1996. *History, Meyerhoff Scholars Program*, UNIV. MD. BALT. CNTY. [hereinafter *Meyerhoff History*] <https://meyerhoff.umbc.edu/about/model> (last visited Jan. 21, 2023).

<sup>232</sup> See *Characteristics of Postsecondary Students*, NAT'L CTR. EDUC. STAT., <https://nces.ed.gov/programs/coe/indicator/csb> (May 2022) (reporting that public and private nonprofit schools have a majority white undergraduate and post-graduate enrollment).

<sup>233</sup> See Stephen Menendian et al., *The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/roots-structural-racism> (June 30, 2021) (explaining that many schools “replicate the demographic profiles of the communities and neighborhoods they serve”).

higher education and it is culture shock.<sup>234</sup> So, they have a purposeful program to inculcate African-Americans to higher education.<sup>235</sup> They also purposely develop tight-knit groups, so that they can work off each other and support each other throughout.<sup>236</sup> Another thing, all these individuals had successful mentors in their life, especially professionals out there in the field that came back and mentored them one on one.<sup>237</sup> It's a lot of work to do those things, but that's one of those things that really has taken off at the University of Maryland in the Baltimore campus,<sup>238</sup> and one thing that I think can be replicated across the board at all universities. When we go back and look at CRT, I don't subscribe to that. It doesn't mean I don't acknowledge that racism has happened, and currently is happening, but the critical race theory cannot be grounded biblically.

**Hon. Alice Batchelder: Coke?**

**Deputy AG Stewart:** I think there is disagreement on what CRT means,<sup>239</sup> and I think, in Virginia, we have to approach the issue with a lot of humility because Virginia, frankly, has an absolutely horrendous record of treatment of minorities in our school systems.<sup>240</sup> For any of you

<sup>234</sup> Khandi Bourne-Bowie, *Retention Depends on New Models of Student Development*, 17 BLACK ISSUES HIGHER EDUC. 96, 96 (2000) (arguing that cultural differences play a significant role in the lower retention rate of black students at universities).

<sup>235</sup> *Meyerhoff History*, *supra* note 231.

<sup>236</sup> *Meyerhoff Model*, *supra* note 231.

<sup>237</sup> Perry, *supra* note 230, at 75–77.

<sup>238</sup> See *About, Meyerhoff Scholars Program*, UNIV. MD. BALT. CNTY., <https://meyerhoff.umbc.edu/about/> (last visited Jan. 21, 2023) (noting that the program has 1,600 members and alumni and has been praised as a national model for minority achievement).

<sup>239</sup> Compare RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (3d ed. 2017) (“The critical race theory (CRT) movement is a collection of activists and scholars engaged in studying and transforming the relationship among race, racism, and power. . . . Unlike traditional civil rights discourse, which stresses incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”), and Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994) (defining Critical Race Theory as a tension between “a commitment to being ‘critical,’ which in this sense means also to be ‘radical’—to locate problems not at the surface of doctrine but in the deep structure of American law and culture,” and “confiden[ce] that crafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation”), with Douglas Groothuis, *American Exceptionalism and Critical Race Theory*, 12 J. CHRISTIAN LEGAL THOUGHT 8, 8 (2022) (defining Critical Race Theory as “a neo-Marxist philosophy that divides societies according to racial struggles between the oppressors (white) and the oppressed (people of color, especially Blacks)”).

<sup>240</sup> See, e.g., JEFFREY L. LITTLEJOHN & CHARLES H. FORD, *ELUSIVE EQUALITY: DESEGREGATION AND RESEGREGATION IN NORFOLK’S PUBLIC SCHOOLS 6–7* (2012) (outlining the discriminatory treatment of minorities in Norfolk Public Schools from the 1930s through its continued effects today).

all that know the history of Massive Resistance in Virginia, the schools were closed.<sup>241</sup> In Norfolk, where my family grew up, the schools were closed for over a year.<sup>242</sup> You couldn't go to the Ocean Front in Virginia Beach if you were a person of color.<sup>243</sup> There were restricted beaches.<sup>244</sup> You're restricted in the movie theaters.<sup>245</sup> You're restricted in restaurants.<sup>246</sup> In my father's fraternity at Washington and Lee, Asian-Americans weren't allowed inside the building and the fraternity house, according to the rules of the fraternity.<sup>247</sup> It's a truly horrendous and appalling history in our state of treatment of minorities, and I think we have to approach this issue with humility.

I also think there's a lot of benefit to look at history from the perspective of groups who were not necessarily a majority in the given time. Like what about looking at World War II through the lens of Jewish Americans? Looking at the founding of our country through the lens of women who at the time could not own property? As we were saying, sing the song sweetly, right? We can be very angry about these issues, and there are a lot of really offensive components of it, but I think, in order to persuade folks of where we're coming from, we also need to acknowledge the problem. And I think when we fail to acknowledge the problem, we lose the argument before we've even started. I think the real problem is that we're skipping over the learning aspect of what the treatment of all types of individuals in our history have faced and we're really jumping right into political theory, and the Ibram X. Kendi view of the world that the only way to combat past discrimination is to have present discrimination.<sup>248</sup> I mean that, to me, is as equally as appalling to say in our day and time, because, to make up for the suffering of others in our past, we have to affirmatively discriminate against certain groups in our present. There isn't really time to delve into this issue. But you know one group that's really being aggressively attacked under a lot of these CRT

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<sup>241</sup> *Id.* at 78–79.

<sup>242</sup> *Id.* (noting that the schools were closed from September 29, 1958 to February 2, 1959).

<sup>243</sup> Margaret Matray, *To Some, Stately Hotel; To Others, Symbol of Segregation*, VIRGINIAN PILOT (July 15, 2013, 12:00 AM), [https://www.pilotonline.com/news/article\\_9d2a4d36-0f99-5bf7-a778-3fdc3b5a07b2.html](https://www.pilotonline.com/news/article_9d2a4d36-0f99-5bf7-a778-3fdc3b5a07b2.html).

<sup>244</sup> *Id.*

<sup>245</sup> *Jim Crow Laws and Racial Segregation, Social Welfare History Project*, VA. COMMONWEALTH UNIV., <https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-andracial-segregation/> (last visited Mar. 15, 2023).

<sup>246</sup> *Id.*

<sup>247</sup> *Cf.* Julie J. Park, *Asian American Women's Perspectives on Historically White Sorority Life: A Critical Race Theory and Cultural Capital Analysis*, 7 ORACLE: RSCH. J. ASS'N FRATERNITY/SORORITY ADVISORS 1, 1–2 (2012) (stating that historically white sororities and fraternities explicitly barred Asian Americans for decades, although only one sorority formally banned minority students by 1955).

<sup>248</sup> IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 24 (paperback ed. 2023).

theories are Asian-Americans.<sup>249</sup> We have this case going to the Supreme Court now about discrimination at Harvard against Asian-Americans in admissions.<sup>250</sup> I think that there are some folks that are just turning this idea of discrimination on its head and saying that you can discriminate if there's a laudable purpose behind it, or you can discriminate if it's for the benefit of certain groups, or you're trying to achieve racial balancing.<sup>251</sup> The Supreme Court has repeatedly said that racial balancing for its own sake is unlawful and unconstitutional.<sup>252</sup> So, it's a very complicated topic. It's a very troublesome on many levels. But I think the best that we can do as Christians is really approach it with kindness and humility, and really understanding the pain that a lot of these groups have dealt with, and how they're trying to approach the issue in the academic forum.

**Hon. Alice Batchelder:** Tyson?

**Mr. Langhofer:** Well, I'll just address that issue of how much rights do parents have to dictate curriculum? In general, the school boards have a lot of—you have the Department of Education at the top of the state, and then they have some general rules.<sup>253</sup> Obviously, legislature can set some general rules as well.<sup>254</sup> But parents don't have a lot of rights to dictate actual curriculum.<sup>255</sup> That's the school board's role.<sup>256</sup> So, one of the most important things to do as parents is to get involved with your school board, and to actively either run or vote for individuals that you

<sup>249</sup> See, e.g., *CACAGNY Denounces Critical Race Theory as Hateful Fraud*, CHINESE AM. CITIZENS ALL. GREATER N.Y. (Feb. 23, 2021), <https://nebula.wsimg.com/9499c73d959b9f49be9689476a990776?AccessKeyId=45A6F09DA41DB93D9538&disposition=0&alloworigin=1> (denouncing Critical Race Theory as “racist, repressive, discriminatory, and divisive”).

<sup>250</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 163 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

<sup>251</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003) (articulating University of Michigan Law School's policy of “enrolling a ‘critical mass’ of [underrepresented] minority students” for the laudable purpose of producing diverse and academically outstanding classes).

<sup>252</sup> *Id.* at 329–30 (first citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); and then citing *Richmond v. J.A. Cronson Co.*, 488 U.S. 469, 507 (1989)).

<sup>253</sup> *About VDOE*, VA. DEP'T EDUC., <https://www.doe.virginia.gov/about-vdoe> (last visited Feb. 17, 2023).

<sup>254</sup> VA. CONST. art. VIII, §§ 1, 4 (providing that the General Assembly of Virginia shall provide a high-quality system of free public elementary and secondary education and may revise the standards of quality for school divisions set by the Board of Education).

<sup>255</sup> See, e.g., VA. CODE ANN. § 22.1-207.2 (LEXIS through ch. 22 of the 2022 Spec. Sess. D) (“Parents and guardians have the right to review the family program offered by their school division, including written and audio-visual educational materials used in the program. Parents and guardians also have the right to excuse their child from all or part of family life education instruction.”).

<sup>256</sup> *E.g., id.* § 22.2-253.13:1 (tasking school boards with implementing curriculum aligned with the Board of Education's standards of learning).

believe are going to promote curriculum that you think are best for society at large—that are going to promote the best education. So that’s the best way to affirmatively impact the curriculum in your public schools.<sup>257</sup> Historically, ADF has done very little challenging of actual curriculum because there is a lot of discretion given to local school boards and departments of education.<sup>258</sup> The challenges that we’ve currently brought are against gender identity ideology and CRT—typically where they are either impacting parental rights or they’re creating a racially or religiously hostile environment.<sup>259</sup> So, under Title VI, the Federal Government prohibits racial discrimination, and it prohibits it not only individually where you’d specifically discriminate against the individual, but to create an environment that is racially hostile.<sup>260</sup> And that’s the Albemarle County challenge that we currently have pending, where they adopted a curriculum that specifically said things like, “all whites are racist,” or that America is a fundamentally racist nation, or the issue of collective guilt or opposition to specific religious beliefs.<sup>261</sup> It essentially is telling these students that they are guilty because of their association, because of their immutable characteristics, such as race or sex, or their religion.<sup>262</sup> In those instances, a parent could challenge, not because of the curricular choice specifically, but because the curriculum creates a hostile environment which violates some protected status, such as religion, race, or sex—something like that.<sup>263</sup> So, obviously, the best way is to stop the curriculum from being put in there in the first place by being on the school

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<sup>257</sup> *E.g.*, Terri Huggins Hart, *5 Very Good Reasons to Attend a School Board Meeting*, PARENTS, <https://www.parents.com/parenting/better-parenting/very-good-reasons-to-attend-a-school-board-meeting/> (Feb. 9, 2023).

<sup>258</sup> *Cf.*, *e.g.*, Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863–64 (1982) (recognizing that local school boards have broad discretion to implement curriculum).

<sup>259</sup> *See, e.g.*, *Ibañez v. Albemarle County School Board*, ALL. DEFENDING FREEDOM, <https://adflegal.org/case/ci-v-albemarle-county-school-board> (Feb. 9, 2023) (arguing that the county school board enacted racially discriminatory policies and compels students to support ideas against their deeply held beliefs); *Figliola v. Harrisonburg City Public School Board*, ALL. DEFENDING FREEDOM, <https://adflegal.org/case/df-v-harrisonburg-city-public-school-board> (Feb. 16, 2023) (asserting that the school board usurps parents’ roles in upbringing their children and forces school staff to violate their religious beliefs through its gender identity policies).

<sup>260</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d); *Racial Incidents and Harassment Against Students at Educational Institutions*; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (Mar. 10, 1994).

<sup>261</sup> *Parents to VA Court of Appeals: Racially Divisive Ideology, Religious Stereotypes Don’t Belong in Classroom*, ALL. DEFENDING FREEDOM (Oct. 28, 2022), <https://adflegal.org/press-release/parents-va-court-appeals-racially-divisive-ideology-religious-stereotypes-dont-belong>.

<sup>262</sup> *Id.*

<sup>263</sup> *E.g., id.* (stating that parents and their children sued the school district because the district’s policy divides or demeans students based on their race, religion, or ethnicity).

boards.<sup>264</sup> But if it violates one of those fundamental premises, then, potentially, the parents can do that. But it is an uphill battle, and it's not an easy road.

**Hon. Alice Batchelder:** I think I would say that none of what we've been discussing this morning is an easy road. I think all of it is an uphill battle. But looking back, of course, over the whole history of this country, maybe I should interject at this point that I wish there were more looking back over the history of the country with an objective view. But looking back, we've never had a really easy road; we've always had to fight a lot of battles, and we've done an awfully good job of it, especially in the context of human history. But I think the battle has to still be waged.

I think we're coming to the point where we need to be closing this up, and I think to do that, I would just make a couple of points. One of them is that I've been enlightened a lot by listening to the three of you. That was what my hope was as I started out, and it certainly has been fulfilled. But I would also say, speaking as a mother and a grandmother and a lawyer and a judge and a former teacher, I honestly don't think there's anything more important than the education of our children—both in a family sense and with regard to the nation. And I'm pretty confident that most parents would second that. And I think that they would also agree with me that this is at the top of the list of what is really important to the nation.<sup>265</sup>

One of the things that we're battling right now is this inability of some points of view to be publicized—the insistence on the suppressing and cancelling of points of view that don't conform to the popular or politically popular or any other form of popularity to those views.<sup>266</sup> And I have found myself lately particularly asking law students this question: If there really is only one side to all of these various extremely important issues, how are you as a lawyer going to make a living? I always love the

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<sup>264</sup> See, e.g., Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863–64 (1982) (recognizing that local school boards have authority to dictate curriculum).

<sup>265</sup> See, e.g., Ariel Edwards-Levy, *CNN Poll: Economy and Education Could Shape How Americans Vote in 2022*, CNN (Feb. 11, 2022, 10:04 AM), <https://www.cnn.com/2022/02/11/politics/cnn-poll-economy-education-2022/index.html> (stating 46% of voters said education would be extremely important in the 2022 midterms); Anya Kamenetz, *Why Education Was a Top Voter Priority This Election*, NPR (Nov. 4, 2021, 6:00 AM), <https://www.npr.org/2021/11/04/1052101647/education-parents-election-virginia-republicans> (stating that education was a highly influential factor in the 2021 gubernatorial elections in Virginia and New Jersey).

<sup>266</sup> E.g., Aimee Picchi, *Twitter Files: What They Are and Why They Matter*, CBS NEWS (Dec. 14, 2022, 6:46 PM), <https://www.cbsnews.com/news/twitter-files-matt-taibbi-bari-weiss-michael-shellenberger-elon-musk/> (reporting how Elon Musk argued that the “Twitter Files” demonstrate evidence that Twitter’s former management censored certain stories, topics, and accounts).

old story of the frontier town where there was only one lawyer in town, and he was at a church supper one night, and he was asked if he would say grace before they ate, and he prayed, "Oh, Lord, stir up strife amongst thy people, lest thy servant starve." Well, we don't really want to be in the position of being starving in the legal profession because we can't have real arguments, maybe even fights, in a civilized way, over these issues which are of so much importance to us.

I came across an observation by Abraham Lincoln the other day. He said, "The philosophy of the school room in one generation [will become] the philosophy of government in the next,"<sup>267</sup> and I would commend that to your attention. I think it is well worth considering. But I wonder at this point if it would be appropriate, since what we've been talking about here is education, freedom of speech, free exercise of religion—all things which are critical to the survival of not just our country, really, but Western civilization.<sup>268</sup> So I wonder if it would be appropriate if I asked you, as we close this, to join me in prayer.

Almighty God, who has given us this good land for our heritage: We humbly beseech thee that we may always prove ourselves a people mindful of thy favor, and glad to do thy will. Bless our land with honorable industry, sound learning, and pure manners. Save us from violence, discord, and confusion; from pride and arrogance and from every evil way. Defend our liberties, and fashion into one united people the multitudes brought hither [from] many kindreds and tongues. Endue with the spirit of wisdom those to whom in thy Name we entrust the authority of government, that there may be justice and peace at home, and that, through obedience to thy law, we may show forth thy praise among the nations of the earth.

In the time of prosperity, fill our hearts with thankfulness, and in the day of trouble, suffer not our trust in thee to fail; all which we ask through Jesus Christ our Lord. Amen.<sup>269</sup>

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<sup>267</sup> MARK A. BELILES & STEPHEN K. MCDOWELL, *AMERICA'S PROVIDENTIAL HISTORY* 95 (1989).

<sup>268</sup> See William S. Lind, *Defending Western Culture*, 84 *FOREIGN POL'Y* 40, 40, 42 (1991) (arguing that traditional Western values such as freedom and education are essential to America's success).

<sup>269</sup> *THE BOOK OF COMMON PRAYER* 820 (1979).



# RISKING A NEW BLITZKRIEG: BANNING ARTIFICIAL INTELLIGENCE IN NATIONAL SECURITY

## TABLE OF CONTENTS

### INTRODUCTION

#### I. DEFINING ARTIFICIAL INTELLIGENCE

##### A. Current Controlling Law

1. Hague Conventions
2. Geneva Conventions
3. Convention on the Use of Certain Conventional Weapons

##### B. *Country Positions*

1. Position in Opposition to Additional Laws
2. Positions in Support of Regulation
3. Other Position: China

#### II. HISTORICAL ANALOGUE & RECOMMENDATION

##### A. *Historical Analogue: World War II, the Tank, and Blitzkrieg*

##### B. *Comparison of German Disarmament with a Preemptive Ban of LAWS*

##### C. *Comparison of China's Use of AI with Germany's Disregard of Disarmament*

##### D. *The Dilemma of Enforcement*

### CONCLUSION

#### INTRODUCTION

Hans listened intently as the dull thud of the motorized artillery hit the enemy lines ahead of him. Hans was a tank commander in the German army. Suddenly, he heard the scratchy whine of the radio pipe in: the dive bombers were going to be arriving shortly, and that meant it was time for his tanks to rumble in right behind. Hans began shouting commands, feeling the rising excitement of an almost certain victory in battle. Just thirty minutes later, the Germans broke through the Allied's trenches. This was Blitzkrieg in action. In World War I, these same trenches had withstood years of combat; now, at the start of World War II, they were overwhelmed in a matter of weeks.<sup>1</sup>

The technology that Germany had relied on in World War I—the tanks, the motorized artillery, the air force, et cetera—were all part of disarmament treaties, which supposedly banned Germany from using

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<sup>1</sup> See *Blitzkrieg*, HISTORY, <https://www.history.com/topics/world-war-ii/blitzkrieg> (Dec. 12, 2022) (discussing the history and use of Blitzkrieg and noting how “the Germans blazed through northern France and toward the English Channel”); *Trench Warfare*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/trench-warfare> (Oct. 4, 2022) (explaining the extensive use of trench warfare in World War I).

them in a future war.<sup>2</sup> Why had these disarmament provisions failed so miserably? They were negotiated with the highest ideals and the best intentions: ending future wars and violence.<sup>3</sup>

Technology, including tanks, radar, radios, airplanes, and motorized artillery, rapidly advanced between World War I and World War II.<sup>4</sup> Many countries were unsure of how these technologies would change warfare.<sup>5</sup> During its now infamous Blitzkrieg race through Poland, Germany demonstrated the impact of these technologies in warfare.<sup>6</sup>

Warring nations applying new technology to conventional or altogether new strategies is not a historical anomaly. For thousands of years, countries have used technology to change the tide of war, from the longbow in medieval times to nuclear warheads in the Cold War.<sup>7</sup>

Imagine a new “Blitzkrieg” scenario in the modern era, one involving artificial intelligence. Imagine being a soldier in Afghanistan. On the horizon, you see a couple of enemy jets fly over, and after they pass, you think all is safe. However, a few minutes later, you are surrounded, indeed swarmed, by a hundred drones armed with lethal munitions. What you

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<sup>2</sup> Treaty of Peace Between the Allied and Associated Powers and Germany arts. 159–60, 165, 171, 198, 201, June 28, 1919, S. TREATY DOC. NO. 348 (1923) [hereinafter Treaty of Versailles]; Armistice Convention with Germany art. IV, Nov. 11, 1918, S. TREATY DOC. NO. 348 (1923); PHILIP TOWLE, ENFORCED DISARMAMENT 66 (1997); Andrew Webster, *Piecing Together the Interwar Disarmament Puzzle*, 59 INT’L J. 187, 189–90 (2004); see JAMES S. CORUM, U.S.A.F. ACAD., A CLASH OF MILITARY CULTURES: GERMAN & FRENCH APPROACHES TO TECHNOLOGY BETWEEN THE WORLD WARS 1, 3, 6, 19 (1994) (discussing Germany’s reliance on different technology in World War II).

<sup>3</sup> In the Treaty of Versailles, Part I included the Covenant of the League of Nations. Treaty of Versailles, *supra* note 2, pt. I. Article VIII thereof states, “The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement of common action of international obligations.” Treaty of Versailles, *supra* note 2, art. 8; see also Webster, *supra* note 2, at 189, 195 (observing that disarmament was believed to be vital to preserving peace). In order to accomplish their goals, the Treaty’s victorious signatories required Germany to disarm itself, stating, “In order to render possible the initiation of a general limitation on the armaments of all nations, Germany undertakes strictly to observe the military, naval, and air clauses which follow.” Treaty of Versailles, *supra* note 2, pt. V. The Treaty proceeded to disarm Germany. See *supra* note 2 and accompanying text.

<sup>4</sup> CORUM, *supra* note 2, at 1; cf. Chris Meserole, *Artificial Intelligence and the Security Dilemma*, BROOKINGS: ORDER FROM CHAOS (Nov. 6, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/11/06/artificial-intelligence-and-the-security-dilemma/> (identifying radar, mechanized artillery, and aircraft as technologies existing in the 1930s).

<sup>5</sup> Meserole, *supra* note 4.

<sup>6</sup> *Id.*

<sup>7</sup> See Martin Van Creveld, *War and Technology*, FOREIGN POL’Y RSCH. INST. (Oct. 24, 2007), <https://www.fpri.org/article/2007/10/war-technology-2/> (explaining how technology shapes war and emphasizing the revolutionary effect of nuclear weapons); *How the Longbow Revolutionised Warfare in the Middle Ages*, HIST. HIT (Nov. 1, 2018), <https://www.historyhit.com/how-the-longbow-revolutionised-warfare-in-the-middle-ages/> (“The English Longbow was one of the defining weapons of the [M]iddle [A]ges. It helped England challenge the might of the French and enabled ordinary peasants to defeat wealthy knights.”).

missed was that the jets launched the drones, and after being launched, the swarm of drones went on to methodically surround and destroy their targets while working in perfect unison as a team.<sup>8</sup>

While we have all heard of various drone attacks, the above example is different because the drone swarm is not remote-controlled by a human; it is “self-directed.”<sup>9</sup> This type of technology could make past technology—such as aircraft carriers and tanks—potentially obsolete.

This is not a science-fiction film series; it is reality. Thirteen drones recently attacked a Russian military base.<sup>10</sup> Although Russia claimed that its military destroyed, jammed, or neutralized the drones without any harm, a terrorist group contradicted its claim while taking responsibility.<sup>11</sup> Swarming drone technology has been called the most significant military technology since the nuclear bomb, but the application of drone swarms is just one lethal, weaponized application of artificial intelligence (“AI”).<sup>12</sup> The U.S. and China have demonstrated swarming drone technology as well.<sup>13</sup> In 2021, new drone swarm projects included “the French Icarus project, the Russian Lightning, the Spanish RAPAZ, the U.K.’s Blue Bear swarm[,] and the UAE/South African N-Raven.”<sup>14</sup>

These “Drone Swarms” are one of the applications of AI in the category now labeled “lethal autonomous weapon systems” (“LAWS”), which encompass a much larger and quickly-developing area of AI application in warfare.<sup>15</sup> Internationally, there is already a push to

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<sup>8</sup> See generally Press Release, U.S. Dep’t of Def., Department of Defense Announces Successful Micro-Drone Demonstration (Jan. 9, 2017), <https://www.defense.gov/News/Releases/Release/Article/1044811/departement-of-defense-announces-successful-micro-drone-demonstration/> (demonstrating that drones with swarming capabilities currently exist).

<sup>9</sup> *Id.* (noting how Perdix micro-drones are “autonomous systems”); see *Capturing the Swarm*, CBS NEWS (Aug. 20, 2017, 2:30 PM), <https://www.cbsnews.com/news/60-minutes-capturing-the-perdix-drone-swarm/> (stating the Perdix drone is self-directed).

<sup>10</sup> *Syria: Drone Swarm Attacks Russian Military Bases*, TRIPWIRE (Jan. 12, 2018, 8:00 AM), <https://tripwire.dhs.gov/news/209478>.

<sup>11</sup> *Id.*

<sup>12</sup> David Martin, *New Generation of Drones Set to Revolutionize Warfare*, CBS NEWS (Jan. 8, 2017, 2:34 PM), <https://www.cbsnews.com/news/60-minutes-autonomous-drones-set-to-revolutionize-military-technology/>; Branka Marijan, *AI-Influenced Weapons Need Better Regulation*, SCI. AM. (Mar. 30, 2022), <https://www.scientificamerican.com/article/ai-influenced-weapons-need-better-regulation/> (enumerating several weaponized uses of AI, including cyberwarfare (such as supercharge malware attacks) and autonomous tanks).

<sup>13</sup> Michael Peck, *China’s Autonomous Attack Drones Are Ready to Take Off*, NAT’L INT.: THE REBOOT (Sept. 21, 2021), <https://nationalinterest.org/blog/reboot/chinas-autonomous-attack-drones-are-ready-take-192831>.

<sup>14</sup> David Hambling, *What Are Drone Swarms and Why Does Every Military Suddenly Want One?*, FORBES (Mar. 1, 2021, 8:26 AM), <https://www.forbes.com/sites/davidhambling/2021/03/01/what-are-drone-swarms-and-why-does-everyone-suddenly-want-one/?sh=6a9a3182f5c6>.

<sup>15</sup> See THOMAS B. PAYNE, CONG. RSCH. SERV., R44466, LETHAL AUTONOMOUS WEAPON SYSTEMS: ISSUES FOR CONGRESS, at Summary, 1, 7, 10, 17 (4th version 2016)

regulate LAWS. Over 160 different non-governmental organizations (NGOs) started a “Campaign to Stop Killer Robots,” which seeks to preemptively ban LAWS, or what they call “killer robots.”<sup>16</sup> Already, thirty nations have called to ban LAWS internationally.<sup>17</sup> Other countries, including Germany and the United States, oppose a treaty banning LAWS.<sup>18</sup> Bans like these are not new to the world’s diplomatic stage.<sup>19</sup>

The Allied nations created a legally binding treaty to preemptively disarm Germany of its submarines, air force, and tanks to prevent a World War II.<sup>20</sup> This diplomatic regulation of key technology ultimately did not work.<sup>21</sup> The thesis of this Note is that the current international law sufficiently protects humanity and that attempts to ban LAWS preemptively would fail in safeguarding humankind, likely leading to more significant human rights abuses.

In Part I, this Note will (1) define artificial intelligence and lethal autonomous weapon systems, (2) discuss the current controlling laws, and (3) discuss various countries’ positions on regulating LAWS. In Part II, this Note will (1) discuss a historical analogue of Nazi Germany, disarmament, and Blitzkrieg; (2) explain how that compares with LAWS and disarmament; and (3) analyze the problem of enforcement. Lastly, in Part III, this Note will argue that the international community should not preemptively ban LAWS and that doing so would likely be destructive of human rights.

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(discussing the swift development of LAWS and highlighting how the use of AI in LAWS leads to swarming behavior); see also Ted Piccone, *How Can International Law Regulate Autonomous Weapons?*, BROOKINGS: ORDER FROM CHAOS (Apr. 10, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/04/10/how-can-international-law-regulate-autonomous-weapons/> (likening the rapid development of autonomous weapons to the next global arms race); CBS NEWS, *supra* note 9 (observing the first test of an autonomous drone swarm).

<sup>16</sup> MARY WAREHAM, HUM. RTS. WATCH, STOPPING KILLER ROBOTS: COUNTRY POSITIONS ON BANNING FULLY AUTONOMOUS WEAPONS AND RETAINING HUMAN CONTROL 1 & n.1 (Steve Goose & Bonnie Docherty eds., 2020).

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 23, 53.

<sup>19</sup> Sean Watts, *Regulation-Tolerant Weapons, Regulation-Resistant Weapons and the Law of War*, 91 INT’L L. STUD. 540, 561–607 (2015) (enumerating different attempts throughout history to ban and/or regulate certain types of weapons); Sean Watts, *Autonomous Weapons: Regulation Tolerant or Regulation Resistant?*, 30 TEMP. INT’L & COMPAR. L.J. 177, 178–79, 184 (2016) (similar).

<sup>20</sup> See *supra* note 3 and accompanying text; see also TOWLE, *supra* note 2 (recounting that Germany was forced to disarm herself of her air force, tanks, and submarines in the wake of World War I).

<sup>21</sup> *Id.* at 86–87 (“In terms of reassurance, enforced disarmament and intrusive verification had been a failure. Soon after Hitler’s accession to power in 1933 it became clear that [the Treaty of Versailles] had done nothing to reduce Germany’s military potential.”).

## I. DEFINING ARTIFICIAL INTELLIGENCE

What is artificial intelligence? At first, this may seem to be a simple question, but it is much more elusive and contested than first thought. There is no settled definition for an autonomous weapon when it comes to international law.<sup>22</sup> Much of the international debate revolves around defining artificial intelligence.<sup>23</sup> Some authors have posited that this is one of the fundamental problems with having any widespread international support for a global, legislative solution.<sup>24</sup>

Consider a landmine, for example. After initial setup, a landmine is completely “automated.”<sup>25</sup> A landmine needs an external stimulus of some kind to trigger the mine, and then it explodes.<sup>26</sup> Once a landmine is set, no further human input is required.<sup>27</sup> However, while a landmine is automated, it is not *really* automated, or at least not “fully autonomous.”<sup>28</sup>

In contrast, consider something more “autonomous” like Google Maps, Alexa, or the fictional Terminator.<sup>29</sup> How does one determine where the “autonomy” line is? There is much ambiguity in determining if autonomy means full automation or if it simply means byproducts of a chain reaction set off by a trigger pull.<sup>30</sup> For this reason, some have suggested that, at least for now, we cannot build any weapon that is “fully

<sup>22</sup> Paul Scharre & Michael C. Horowitz, *An Introduction to Autonomy in Weapon Systems* 3 (Ctr. for a New Am. Sec., Working Paper No. 021015, 2015).

<sup>23</sup> Austin Wyatt, *So Just What Is a Killer Robot? Detailing the Ongoing Debate Around Defining Lethal Autonomous Weapon Systems*, WILD BLUE YONDER 68, 72–73, 78 (June 8, 2020), <https://www.airuniversity.af.edu/Portals/10/Wild-Blue-Yonder/Site-Assets/PDFs/WBY%208%20June%2020.pdf> (“Developing a definition for a complete lethal autonomous weapon system (LAWS) is arguably one of the major stumbling blocks to developing an effective international response to the emergence of increasingly autonomous military technology . . .”).

<sup>24</sup> *See id.* at 72–73, 78 (emphasizing how the lack of an accepted definition means “any international regulation would be vulnerable from its inception”).

<sup>25</sup> *See* Rebecca Crootof, *Autonomous Weapon Systems and the Limits of Analogy*, 9 HARV. NAT’L SEC. J. 51, 59 (2018) (identifying a landmine as a type of automated weapon); *cf.* RAE MCGRATH, LANDMINES AND UNEXPLODED ORDNANCE 16 (2000) (observing landmines are “victim-triggered” and “persistent in that their effects continue indefinitely after a war ends”).

<sup>26</sup> *What Is a Landmine?*, INT’L CAMPAIGN TO BAN LANDMINES, <http://www.icbl.org/en-gb/problem/what-is-a-landmine.aspx> (last visited Mar. 14, 2023) (“[Landmines] can be activated by direct pressure from above, by pressure put on a wire or filament attached to a pull switch, or even simply by the proximity of a person within a predetermined distance.”).

<sup>27</sup> *See* MCGRATH, *supra* note 25, at 18 (listing methods of landmine activation that do not require further action by the combatants who placed the mine).

<sup>28</sup> Crootof, *supra* note 25 (noting that although “an autonomous weapon system is capable of independently selecting and engaging targets,” a landmine “does not ‘select’ a target; rather, it responds predictably to a preset trigger”).

<sup>29</sup> Sumbo Bello, *8 Examples of Artificial Intelligence in Our Everyday Lives*, EDGY (May 3, 2021, 7:05 AM), <https://edgy.app/examples-of-artificial-intelligence>.

<sup>30</sup> *See* Wyatt, *supra* note 23, at 69, 74–77 (discussing multiple factors to consider when defining autonomy and observing that “autonomy is not a binary characteristic that can be easily identified, separated and measured”).

autonomous.”<sup>31</sup> There is always a certain amount of pre-programming present in every technology.

The main problem revolves around how much choice, discretion, or lack of pre-programming makes something “autonomous.”<sup>32</sup> Attempts to define AI can quickly devolve into something resembling a “free will” debate, rooted in ancient times, with ideas from the minds of “Plato, Aristotle, Augustine, Aquinas, Descartes, and Kant.”<sup>33</sup> But while it is a murky philosophical subject, most see that there should be a line somewhere, even if they disagree as to where, and that there is still an enormous distinction between a landmine and the Terminator.<sup>34</sup> For simplicity’s sake, we will call this the “robot-human discretion problem.” The robot-human discretion problem has resulted in various typologies or schemes for defining LAWS.

The most popular and long-standing definition consists of three categories of human involvement in the decision-making process.<sup>35</sup> The first category is “human-*in*-the-loop,” where lethal force only occurs under human direction.<sup>36</sup> The second category is “human-*on*-the-loop,” and in this category, humans can override a robot, but robots both target and attack.<sup>37</sup> The third category is “human-*out*-of-the-loop,” which gives robots the ability to target and attack without human input or interaction.<sup>38</sup>

The United States Department of Defense (“DoD”) has an equally popular definition for a fully autonomous weapon system:

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<sup>31</sup> See *id.* at 69 (suggesting that a fully autonomous weapon cannot exist until autonomy is defined).

<sup>32</sup> See *id.* at 69–70, 74–76 (discussing how the role of human decision-making impacts the definition of LAWS); cf. Karni Chagal-Feferkorn, *The Reasonable Algorithm*, 2018 U. ILL. J.L., TECH., & POL’Y 111, 133–35 (discussing the interplay between choice, discretion, and programming in relation to autonomous algorithms).

<sup>33</sup> Timothy O’Connor & Christopher Evan Franklin, *Free Will*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/freewill/> (Nov. 3, 2022).

<sup>34</sup> See FRANK SLIJPER, PAX, WHERE TO DRAW THE LINE: INCREASING AUTONOMY IN WEAPON SYSTEMS – TECHNOLOGY AND TRENDS 7 (2d prtg. 2018) (advocating that a clear line must be drawn concerning the human role in autonomous weapons systems and noting how LAWS exist on “a continuum[] with levels of technology varying from simple automation towards full autonomy”).

<sup>35</sup> BONNIE DOCHERTY, HUM. RTS. WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS 2 (2012); Nicholas W. Mull, *The Roboticization of Warfare with Lethal Autonomous Weapon Systems (LAWS): Mandate of Humanity or Threat to It?*, 40 HOUS. J. INT’L L. 461, 479–80 (2018).

<sup>36</sup> DOCHERTY, *supra* note 35.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

A weapon system that, once activated, can select and engage targets without further intervention by a human operator. This includes human-supervised autonomous weapon systems that are designed to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation.<sup>39</sup>

This DoD definition corresponds with the “human-*on*-the-loop” category.<sup>40</sup> Unsurprisingly, the DoD has an additional definition that fits the “human-*in*-the-loop” category, such as “semi-autonomous” weapon systems.<sup>41</sup> In other words, the DoD definition does not add or change anything substantively to the “human in, on, or out of the loop” categories.<sup>42</sup>

Many NGOs in the Campaign to Stop Killer Robots suggest a different definition: “fully autonomous weapon systems which lack meaningful human control over the critical functions of targeting and engagement in every attack.”<sup>43</sup> A prominent area of disagreement is what “meaningful human control” means.<sup>44</sup> Essentially, however, this definition fails to solve the robot-human discretion problem.

All these definitions have a fatal flaw in that they are “plotting autonomy as a linear and single axis progressively and discretely demarcated by whether humans are in, on, or out of a functional loop.”<sup>45</sup> As others have pointed out, a machine’s sheer complexity is different from the human-machine connection, which is also different from the type of

<sup>39</sup> U.S. DEP’T OF DEF., DIRECTIVE NO. 3000.09, at 13–14 (2012); *see also* Wyatt, *supra* note 23, at 69 (“The most common definition of LAWSs originated in a 2012 US Department of Defense (DOD) directive on autonomous weapon systems.”).

<sup>40</sup> *Compare* U.S. DEP’T OF DEF., *supra* note 39 (indicating that “autonomous weapons systems” are those that do not require further human intervention to engage targets but can be overridden by human operators), *with* DOCHERTY, *supra* note 35 (defining human-on-the-loop weapon as “[r]obots that can select targets and deliver force under the oversight of a human operator who can override the robots’ actions”).

<sup>41</sup> *Compare* U.S. DEP’T OF DEF., *supra* note 39 (defining a semi-autonomous weapon system as “[a] weapon system that, once activated, is intended only to engage individual targets or specific target groups that have been selected by a human operator”), *with* DOCHERTY, *supra* note 35 (defining a human-in-the-loop weapons as “[r]obots that can select targets and deliver force only with a human command”).

<sup>42</sup> *See* Mull, *supra* note 35 (observing how the DoD’s and Human Right Watch’s definitions “[b]oth break down levels of autonomy into three levels that correlate” to one another).

<sup>43</sup> Daan Kayser, *How to Do a Scientist Letter*, in CAMPAIGN TO STOP KILLER ROBOTS: CAMPAIGNER’S KIT 42, 43, 45 (Erin Hunt ed., 2d prt. 2020), [https://www.stopkillerrobots.org/wp-content/uploads/2020/02/2020\\_Campaigners-Kit\\_FINAL.pdf](https://www.stopkillerrobots.org/wp-content/uploads/2020/02/2020_Campaigners-Kit_FINAL.pdf).

<sup>44</sup> Filippo Santoni de Sio & Jeroen van den Hoven, *Meaningful Human Control over Autonomous Systems: A Philosophical Account*, FRONTIERS ROBOTICS & AI, Feb. 28, 2018, at 1–3, 8, <https://doi.org/10.3389/frobt.2018.00015> (“[P]olicy-makers and technical designers lack a detailed theory of what ‘meaningful human control’ exactly means.”).

<sup>45</sup> Chris Jenks, *False Rubicons, Moral Panic, & Conceptual Cul-De-Sacs: Critiquing & Reframing the Call to Ban Lethal Autonomous Weapons*, 44 PEPP. L. REV. 1, 16 (2016).

decision made.<sup>46</sup> Autonomy embodies all of these concepts, and although they are interrelated, they are not the same. This explains some of the philosophical debate that is present in defining AI. In essence, defining AI is more philosophical than a practical legislative effort to determine, for example, what the maximum speed limit should be. This Note does not seek to solve the robot-human discretion problem; rather, it seeks to solve the real-world implication of an international treaty banning LAWS.

While identifying these intricacies and real-world issues, for the purpose of this Note, the term LAWS means that it must have “autonomy” in that the AI must be able to select and engage without human interaction. This demarcates between a landmine (not LAWS) or a drone swarm and the Terminator (LAWS). For this Note, when referring to LAWS, it is not necessary to delineate the exact amount of human oversight or control. This Note will demonstrate that this ongoing debate over definitions helps prove why preemptively banning LAWS is bad, leading to more significant human-rights abuses.

#### A. Current Controlling Law

Two principal types of international law are international humanitarian law and human rights law.<sup>47</sup> Human rights law governs in times of peace and conflict, whereas international humanitarian law only governs during an emergency or periods of armed conflict.<sup>48</sup> International humanitarian law looks at the legality of a war’s justifications, the conduct of war, and specific tactics and weapons regulation.<sup>49</sup> International humanitarian law is rooted in customs, traditions, and history from ancient civilizations; these customs have, over time, been codified in contemporary international humanitarian law through multi-

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<sup>46</sup> See Paul Scharre, *Between a Roomba and a Terminator: What Is Autonomy?*, WAR ON THE ROCKS (Feb. 18, 2015), <https://warontherocks.com/2015/02/between-a-roomba-and-a-terminator-what-is-autonomy/> (explaining how different types of decisions have varying degrees of complexity and how these degrees of complexity must be considered in order to describe autonomy more accurately); Wyatt, *supra* note 23, at 69 (“[I]t is important to note at the outset that it is not realistic to consider autonomy in the robotics field in binary terms; instead, it is much more analytically effective to consider autonomy as a function-based spectrum where human interaction remains present at some point, even if it is limited to the production or strategic deployment stages.”).

<sup>47</sup> See INT’L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? 7 (2022), <https://www.icrc.org/en/document/what-international-humanitarian-law>; Gabriele Porretto & Sylvain Vité, *The Application of International Humanitarian Law and Human Rights Law to International Organisations* 6 (Univ. Ctr. for Int’l Humanitarian L., Rsch. Paper Ser. No. 1, 2006), [https://ihl.org/wp-content/uploads/2018/03/Application\\_of\\_IHL-and-H-rights-law.pdf](https://ihl.org/wp-content/uploads/2018/03/Application_of_IHL-and-H-rights-law.pdf).

<sup>48</sup> INT’L COMM. OF THE RED CROSS, *supra* note 47, at 1, 7 (“[H]uman rights law – unlike [international humanitarian law] – applies during both armed conflict and peacetime, although some of its provisions can be derogated from during an armed conflict.”).

<sup>49</sup> *Id.* at 1, 3, 5; INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS 4 (2023).



national treaties.<sup>50</sup> These treaties address LAWS, even if they only do so implicitly,<sup>51</sup> so it is important to know how and to what extent they potentially control LAWS.

While the Hague Conventions came first, the most famous treaties are the four Geneva Conventions of 1949.<sup>52</sup> The four Geneva Conventions of 1949 have a near-universal ratification, including the United States.<sup>53</sup> The additional protocols of the Geneva Convention are not as widely adopted.<sup>54</sup> Still, the Additional Protocols I and II of the Geneva Conventions have been ratified by over 160 countries, though the U.S. is not among them, and are some of the most widely recognized and adopted treaties in the world.<sup>55</sup> The older Hague Conventions of 1899 and 1907<sup>56</sup>

<sup>50</sup> INT'L COMM. OF THE RED CROSS, *supra* note 47, at 2; INT'L COMM. OF THE RED CROSS, *supra* note 49, at 14–15.

<sup>51</sup> See Erica H. Ma, *Autonomous Weapons Systems Under International Law*, 95 N.Y.U. L. REV. 1435, 1448–49 (2020) (indicating that international humanitarian law principles apply to autonomous weapons systems if they are deployed during an armed conflict).

<sup>52</sup> *Id.* at 1447–48 (noting that the Hague Conventions of 1899 and 1907 preceded the Geneva Conventions); cf. BOYD VAN DIJK, *PREPARING FOR WAR: THE MAKING OF THE GENEVA CONVENTIONS 2* (2022) (describing the Geneva Conventions as “the most important rules for armed conflict ever formulated”).

<sup>53</sup> INT'L COMM. OF THE RED CROSS, *supra* note 49, at 31; Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3, 4–5 (1984); INT'L COMM. OF THE RED CROSS, STATES PARTY TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 01-MARCH-2023, at 1, 6 (2023), [https://ihl-databases.icrc.org/public/refdocs/IHL\\_and\\_other\\_related\\_Treaties.pdf](https://ihl-databases.icrc.org/public/refdocs/IHL_and_other_related_Treaties.pdf).

<sup>54</sup> INT'L COMM. OF THE RED CROSS, *supra* note 49, at 31 (stating that fewer parties have ratified the Additional Protocols than the original Geneva Conventions); INT'L COMM. OF THE RED CROSS, *supra* note 53 (indicating that 196 countries have ratified the original Geneva Conventions, 174 countries have ratified Geneva Protocol I, 169 countries have ratified Geneva Protocol II, and 79 countries have ratified Geneva Protocol III).

<sup>55</sup> INT'L COMM. OF THE RED CROSS, *supra* note 49, at 31; INT'L COMM. OF THE RED CROSS, *supra* note 53; cf. ZHANG Weihua, *Modernization of International Humanitarian Law—The Origins and Evolution of the 1977 Additional Protocols to the 1949 Geneva Conventions*, 17 J. HUM. RTS. 650, 653–54 (2018) (noting that the additional protocols played a major part in developing international humanitarian law); JUDITH GARDAM, U.N. AUDIOVISUAL LIBR. OF INT'L L., *PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I) PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL III)*, at 1 (2021), [https://legal.un.org/avl/pdf/ha/pagec/pagec\\_e.pdf](https://legal.un.org/avl/pdf/ha/pagec/pagec_e.pdf) (stating that the four 1949 Geneva Conventions and the 1977 Protocols “are the best known of the treaty documents and are major components of what is today referred to as International Humanitarian Law”).

<sup>56</sup> Full versions of the conventions can be found, for example, in *THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907* (James Brown Scott ed., 2d ed. 1915), which also includes information about the signing, ratification, and adhesion to the conventions.

(hereinafter Hague Conventions), on the other hand, have significantly fewer signatories and are less comprehensive, and the United States is one of the signatories.<sup>57</sup> Since the United States is a signatory of the Hague Conventions and not the additional protocols of the Geneva Conventions, this Note will first briefly look at the Hague Conventions.

### 1. Hague Conventions

The Hague Conventions primarily dealt with methods of warfare, occupation, and conduct in combat, unlike the Geneva Conventions, which mainly dealt with protecting victims of war.<sup>58</sup> The Hague Conventions prohibit killing or wounding enemy combatants who have laid down their weapons and refusing quarter.<sup>59</sup> The Hague Conventions also prohibit “employ[ing] arms, projectiles, or material of a nature to cause superfluous injury,” and they prohibit destroying the enemy’s property unless “imperatively demanded by the necessities of war.”<sup>60</sup> To comply with the Hague Conventions, LAWS must not cause “superfluous injury” and must have the ability to discriminate when the destruction of property is necessary for the war.<sup>61</sup>

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<sup>57</sup> *E.g.*, Convention Between the United States of America and Certain Powers, with Respect to the Laws and Customs of War on Land art. V, July 29, 1899, 32 Stat. 1803 [hereinafter Hague II] (showing that the 1899 Hague Convention has twenty-six signatories, of which the United States is one); Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land art. 9, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV] (showing that the 1907 Hague Convention has forty-two signatories, of which the United States is one); *Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899*, INT’L COMM. RED CROSS, <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899/state-parties?activeTab=undefined> (last visited Apr. 5, 2023); *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*, INT’L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/state-parties?activeTab=default#footnote-2> (last visited Apr. 5, 2023); *see also Sources of International Humanitarian Law*, DIAKONIA INT’L HUMANITARIAN L. CTR., <https://www.diakonia.se/ihl/resources/international-humanitarian-law/sources-international-humanitarian-law/> (last visited Apr. 5, 2023) (observing that while the Hague Conventions principally dealt with “the conduct of armies during hostilities,” the Geneva Conventions and Additional Protocols not only “extend[ed] the protection provided to civilians,” but they “also set out rules on the conduct of hostilities . . . which define[d] the lawful means and methods of warfare”—areas of “traditional Hague Law”).

<sup>58</sup> *Hague Conventions*, INT’L COMM. RED CROSS, <https://casebook.icrc.org/glossary/hague-conventions> (last visited Feb. 5, 2023); Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61, 64–65 (1997).

<sup>59</sup> Hague II, *supra* note 57, art. XXIII(c)–(d); Hague IV, *supra* note 57, art. 23(c)–(d).

<sup>60</sup> Hague II, *supra* note 57, art. XXIII(e), (g).

<sup>61</sup> *See id.*

## 2. Geneva Conventions

In Geneva Convention Additional Protocol I, the treaty declares: “methods or means of warfare [are] not unlimited.”<sup>62</sup> “It is prohibited to employ weapons, projectiles and material and methods . . . of a nature to cause superfluous injury or unnecessary suffering.”<sup>63</sup> In other words, it is already illegal under Protocol I to use automated or autonomous weapons if they would cause “superfluous injury” or “unnecessary suffering.”<sup>64</sup>

Furthermore, Article 36 of Protocol I says that a party to this convention is “under an obligation to determine whether its employment [of new weapons] would, in some or all circumstances, be prohibited by this Protocol or by any other [applicable] rule of international law.”<sup>65</sup>

Article 48 of Protocol I states that to “ensure respect for and protection of the civilian population . . . the Parties to the conflict shall at all times distinguish . . . between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>66</sup> This is particularly applicable to LAWS as it requires artificial intelligence to be advanced enough to distinguish between civilian and military objectives. In addition, the Geneva Conventions state in Article 51 of Protocol I that, concerning civilians, “[i]ndiscriminate attacks are prohibited.”<sup>67</sup> It then defines what an indiscriminate attack is, including if it is “expected to cause incidental loss of civilian life . . . which would be excessive in relation to the . . . military advantage anticipated.”<sup>68</sup> Article 12 of Protocol I similarly protects medical units, requiring that medical units “be respected and protected at all times and . . . not be the object of attack.”<sup>69</sup>

The Martens Clause is another part of the Geneva Convention Additional Protocols that comes up frequently when talking about LAWS.<sup>70</sup> The Martens Clause states, “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law

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<sup>62</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35(1), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I].

<sup>63</sup> *Id.* art. 35(2).

<sup>64</sup> *See id.*

<sup>65</sup> *Id.* art. 36.

<sup>66</sup> *Id.* art. 48.

<sup>67</sup> *Id.* art. 51(4).

<sup>68</sup> *Id.* art. 51(5).

<sup>69</sup> *Id.* art. 12(1).

<sup>70</sup> *See, e.g.,* Bonnie Docherty, *REMARKS: Banning ‘Killer Robots’: The Legal Obligations of the Martens Clause*, ARMS CONTROL ASS’N (Oct. 2018), <https://www.armscontrol.org/act/2018-10/features/remarks-banning-‘killer-robots’-legal-obligations-martens-clause>; Michael W. Meier, *Lethal Autonomous Weapons Systems (LAWS): Conducting a Comprehensive Weapons Review*, 30 TEMP. INT’L & COMPAR. L.J. 119, 120–21 (2016).

derived from established custom, from the *principles of humanity* and from the dictates of public conscience.”<sup>71</sup> Many who would like to preemptively ban LAWS interpret the Martens Clause to mean that it precludes LAWS because it requires human interaction, such as human emotion.<sup>72</sup> However, the text’s plain meaning and the signatories’ intent contradict this interpretation of “principles of humanity.”<sup>73</sup> Even their actions for further legislation seem to refute that it is a binding interpretation.<sup>74</sup> But, in another sense, those who argue that the Martens Clause precludes LAWS are saying that customary law recognizes a preemptive ban of LAWS, and they are creating a treaty to effectuate the “customary” established law that already exists.<sup>75</sup>

Although the United States has not ratified Protocol I, because it is a party to the first four Geneva Conventions, it must treat persons humanely and may not kill the sick, wounded, or surrendered combatants.<sup>76</sup> Therefore, even if the level of discrimination is not as

<sup>71</sup> Geneva Protocol I, *supra* note 62, art. 1(2) (emphasis added). *See generally* Patrick Leisure, *The Martens Clause, Global Pandemics, and the Law of Armed Conflict*, 62 HARV. INT’L L.J. 469, 476–77 (2021) (explaining that the clause derives its name from Fyodor F. Martens, who proposed it, and that it appears “in numerous other international conventions”).

<sup>72</sup> *See infra* Section I.B.2; Bonnie Docherty & Matthew Griechen, *Legal Arguments, in* CAMPAIGN TO STOP KILLER ROBOTS: CAMPAIGNER’S KIT, *supra* note 43, at 6, 7.

<sup>73</sup> *See* Geneva Protocol I, *supra* note 62, art. 1(2); Vaios Koutroulis, *Martens Clause*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0101.xml> (July 24, 2013). Admittedly, attempting to definitively interpret the signatories’ intent could open a can of worms that is outside the scope of this Note. Looking at the legislative intent, the original purpose of the Martens Clause was to protect the rights of occupied states and customary law. *See* Koutroulis, *supra* (“To appease the fears expressed [by small states] and avoid the possibility of a deadlock in the negotiations, Martens came up with the idea of inserting in the preamble of the convention the clause that has rightfully borne his name ever since.”). Arguably, changing the meaning of “principles of humanity” to simply fit an agenda not only changes the plain meaning of the text but also deviates from the original purpose of the clause.

<sup>74</sup> Those who argue for preemptively banning LAWS say that additional multinational treaties to effectuate a preemptive ban are necessary while simultaneously saying that the Martens Clause already bans them. *Compare* Mary Wareham, *Let’s Stop Killer Robots, in* CAMPAIGN TO STOP KILLER ROBOTS: CAMPAIGNER’S KIT, *supra* note 43, at 2, 3–4 (calling for a treaty to ban LAWS in order “to retain meaningful human control over weapons systems and the use of force”), *with* Docherty & Griechen, *supra* note 72 (arguing that LAWS violate “principles of humanity” and thereby violate the Martens Clause).

<sup>75</sup> An argument from customary law, however, begs the question as to why opposition exists to the preemptive ban of LAWS. If the treaty was *already* presupposed by customary law, then there would be close to a consensus among countries. *See What is International Humanitarian Law?*, INT’L COMM. RED CROSS (July 31, 2004), [https://www.icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf) (defining customary law as “general rules by which all States are bound”); *see also supra* notes 69–70 and accompanying text.

<sup>76</sup> INT’L COMM. OF THE RED CROSS, *supra* note 53; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts.

explicit as in Protocol I, any LAWS need to discriminate between surrendered combatants and actual combatants. So, they must be “discriminating” in this regard.

### 3. Convention on the Use of Certain Conventional Weapons

The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW) is “a multilateral arms control agreement to which the United States became a party in 1982.”<sup>77</sup> Since the CCW directly applies to weapon disarmament, it is the most significant currently binding law.<sup>78</sup> The full title of the treaty calls for prohibiting “weapons which may be deemed to be excessively injurious or to have indiscriminate effects.”<sup>79</sup> In a later adoption, the CCW prohibits “[t]he indiscriminate use of weapons” such as mines, booby-traps, and other devices.<sup>80</sup> “[O]ther devices” are defined as “manually-emplaced munitions and devices . . . designed to kill, injure or damage and which are actuated . . . by remote control or automatically after a lapse of time.”<sup>81</sup>

In 2018, the parties to the CCW agreed that LAWS are regulated by the CCW by agreeing to eleven guiding principles concerning LAWS.<sup>82</sup> The first guiding principle states, “International humanitarian law continues to apply fully to all weapons systems, including the potential development and use of lethal autonomous weapons systems.”<sup>83</sup> The eleven guiding principles include other aspects such as stipulating human responsibility for the use of force and that LAWS must account for potential uses by terrorists.<sup>84</sup>

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3, 12, 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. The United States originally signed the additional Protocol I and II, but they were never ratified by the Senate, and later presidents refuted the additional Protocols. George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1, 1–4 (1991).

<sup>77</sup> KELLEY M. SAYLER, CONG. RSCH. SERV., IF11294, INTERNATIONAL DISCUSSIONS CONCERNING LETHAL AUTONOMOUS WEAPON SYSTEMS (2021).

<sup>78</sup> *See id.*

<sup>79</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (with Protocols), *opened for signature* Apr. 10, 1981, 1342 U.N.T.S. 137 [hereinafter CCW].

<sup>80</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II) art. 3(1), (8) *adopted* May 3, 1996, S. TREATY DOC. NO. 105–1 (1997), 2048 U.N.T.S. 93.

<sup>81</sup> *Id.* art. 2(5).

<sup>82</sup> Rep. of the 2019 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, ¶¶ 16, 26(a), U.N. Doc. CCW/GGE.1/2019/3 (Sept. 25, 2019) [hereinafter Group of Governmental Experts LAWS Report]; *id.* annex IV, cls. (c)–(e), (g)–(k).

<sup>83</sup> *Id.* annex IV, cl. (a).

<sup>84</sup> *Id.* annex IV, cls. (b), (f).

For any person desiring a preemptive ban of LAWS, there is no need to stretch the CCW's interpretation to say that LAWS are controlled by international humanitarian law. This should be a huge relief to LAWS ban seekers as any new "adoption" by the CCW requires consensus, meaning that only a single state needs to vote against a measure for it to be blocked.<sup>85</sup>

Critics (namely, the Stop Killer Robots Campaigners) have said that these principles do not go far enough and are not legally binding because they were adopted with the intent of guiding deliberation at the convention.<sup>86</sup> With this brief survey of the current controlling law, this Note will look next at the different country positions and recommendations.

### B. Country Positions

Countries' positions fall into three categories: (1) those who perceive current controlling law as adequate and oppose additional laws; (2) those who believe explicit regulation of LAWS is needed; and (3) those who seek to sidestep the issue (this position is held by China alone).<sup>87</sup> Each position will be discussed, and arguments outlined, starting with those who oppose additional laws.

#### 1. Position in Opposition to Additional Laws

Countries that have adopted this position include the United States, the United Kingdom, South Korea, Australia, France, Germany, Israel, and Russia.<sup>88</sup> The United States believes the emerging AI technologies can uphold international humanitarian law and save lives in armed conflict.<sup>89</sup> The United States gives five reasons why LAWS would reduce civilian casualties: (1) incorporation of auto self-destruct function, (2) "increase[ed] awareness of civilians . . . on the battlefield," (3) better

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<sup>85</sup> WAREHAM, *supra* note 16, at 5.

<sup>86</sup> *Id.* at 5–6; Aiden Warren & Alek Hillas, *Decreasing Unintentional War: Governance Considerations for Regulating Lethal Autonomous Weapons Systems*, 9 PENN STATE J.L. & INT'L AFFS. 68, 81 (2021).

<sup>87</sup> See SAYLER, *supra* note 77. For clarity's sake, China's position is called a "third" position. However, it is not actually a third position because although China "supports a ban on the use—but not development—of LAWS," it defines LAWS so differently that a weapon falling under its definition "would be unable to comply with [international humanitarian law] and therefore would inherently be illegal." *Id.* (stating that China defines LAWS as "indiscriminate lethal systems that do not have any human oversight and cannot be terminated").

<sup>88</sup> *Id.*

<sup>89</sup> Charles Trumbull, U.S. Mission to Int'l Orgs. in Geneva, Potential Military Applications of Advanced Technology (Mar. 25, 2019), <https://geneva.usmission.gov/2019/03/26/u-s-statement-on-laws-potential-military-applications-of-advanced-technology/>.

outcome assessments of military operations, (4) increased accuracy, and (5) decreased necessity for “immediate fires in self-defense.”<sup>90</sup>

Russia has said it opposes a preemptive ban of LAWS because there is no precedent for banning an entire class of weapons.<sup>91</sup> According to Russia, the use of LAWS “ensure[s] the increased accuracy of weapon guidance on military targets[] while contributing to a lower rate of unintentional strikes against civilians and civilian targets.”<sup>92</sup> In short, the argument for not banning LAWS is that the benefits are too great and will help to further protect human rights, even if there are risks.

## 2. Positions in Support of Regulation

Another position adopted by countries supports a preemptive ban of LAWS.<sup>93</sup> This position is taken by thirty countries and has a large following and media attention.<sup>94</sup> Notably, the International Committee of the Red Cross has joined this movement, recommending regulation of design and prohibition of autonomous weapon systems that (1) are designed so that their outcomes are not “sufficiently understood, predicted and explained,” and (2) target humans.<sup>95</sup>

As mentioned before, this group includes many different NGOs, all under the umbrella organization of the “Campaign to Stop Killer Robots.”<sup>96</sup> Although the many organizations in this group may have slightly differing definitions, some similarities are prevalent in them all—chiefly, their focus on “meaningful human control.”<sup>97</sup> Another common feature is their aligned argument behind the Geneva Convention Martens Clause. These NGOs argue that the Martens Clause precludes the use of

<sup>90</sup> Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Humanitarian Benefits of Emerging Technologies in the Area of Lethal Autonomous Weapon Systems, at ¶ 7, U.N. Doc. CCW/GGE.1/2018/WP.4 (2018).

<sup>91</sup> SAYLER, *supra* note 77.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; WAREHAM, *supra* note 16, at 4 (discussing support for banning “weapons systems that lack meaningful human control”).

<sup>94</sup> *Id.*; *see, e.g.*, Frank Pasquale, ‘Machines Set Loose to Slaughter’: The Dangerous Rise of Military AI, *GUARDIAN* (Oct. 15, 2020, 1:00 PM), <https://www.theguardian.com/news/2020/oct/15/dangerous-rise-of-military-ai-drone-swarm-autonomous-weapons?ref=hyper.com>.

<sup>95</sup> *Autonomous Weapons: The ICRC Recommends Adopting New Rules*, INT’L COMM. RED CROSS (Aug. 3, 2021), <https://www.icrc.org/en/document/autonomous-weapons-icrc-recommends-new-rules>.

<sup>96</sup> WAREHAM, *supra* note 16, at 1 n.1.

<sup>97</sup> WILLIAM BUNN, OLD DOMINION UNIV. MODEL U.N., THE CHALLENGE OF LETHAL AUTONOMOUS WEAPONS SYSTEMS (LAWS) 4 (2021), <https://ww1.odu.edu/content/dam/odu/offices/mun/docs/1st-lethal-autonomous-4.pdf>; *see, e.g.*, SLIJPER, *supra* note 34 (noting that the Dutch peace organization PAX advocates for a definition “guaranteeing meaningful human control” in LAWS).

LAWS because LAWS are incapable of human emotion, have no human conscience, and can feel no compassion or empathy, and are therefore incapable of acting ethically.<sup>98</sup>

### 3. Other Position: China

The last position, which is adopted solely by China, seeks to “ban” LAWS but not their production or development<sup>99</sup>—a position that some have described as “strategic ambiguity.”<sup>100</sup> In 2018, China announced its support of a preemptive ban of LAWS.<sup>101</sup> The media enthusiastically applauded China’s stance because the media largely backed the preemptive prohibition of LAWS.<sup>102</sup> However, the enthusiasm died down because “it soon became clear that the [People’s Republic of China] was seizing on the lack of an internationally agreed upon definition to control the debate in its favor.”<sup>103</sup> China defined LAWS as “indiscriminate, lethal systems that do not have any human oversight and cannot be terminated.”<sup>104</sup>

As seen from the CCW, indiscriminate lethal systems are already banned by International Human Rights law.<sup>105</sup> Therefore, it is clear that China never intended to build LAWS that fit that description in the first place as it would have been illegal by existing international law.<sup>106</sup>

<sup>98</sup> Docherty & Griechen, *supra* note 72.

<sup>99</sup> SAYLER, *supra* note 77.

<sup>100</sup> *Id.*

<sup>101</sup> Wyatt, *supra* note 23, at 70.

<sup>102</sup> See, e.g., Stop Killer Robots (@BanKillerRobots), TWITTER (Apr. 13, 2018, 4:42 AM), <https://twitter.com/BanKillerRobots/status/984713419134853120> (“We will be talking to the delegation of #China, but we welcome the call it just made ‘to negotiate and conclude a succinct protocol to ban the use of fully autonomous weapons systems.’”); UN: Key Action on ‘Killer Robots’, HUM. RTS. WATCH (Dec. 16, 2016, 12:00 AM), <https://www.hrw.org/news/2016/12/16/un-key-action-killer-robots>; JHS, *Lethal Autonomous Weapon Systems and AI: Developments and Resistance*, PLANET DYSTOPIA, <https://planetdystopia.net/blog/autonomous-weapons-ai/> (last visited Apr. 11, 2023); cf. BUNN, *supra* note 97, at 3 (stating China’s announcement was “initially greeted with enthusiasm”); Wyatt, *supra* note 23, at 70 (“On 14 April 2018, China became the first permanent member of the Security Council [of the United Nations] to publicly endorse a ban on the use of LAWSs. This surprise announcement was initially seized on as a victory by the Campaign to Stop Killer Robots and covered extensively in the media . . .” (footnote omitted)).

<sup>103</sup> BUNN, *supra* note 97, at 3.

<sup>104</sup> SAYLER, *supra* note 77.

<sup>105</sup> CCW, *supra* note 79, art. 3; see *supra* notes 77–81 and accompanying text.

<sup>106</sup> Elsa Kania, *China’s Strategic Ambiguity and Shifting Approach to Lethal Autonomous Weapons Systems*, LAWFARE (Apr. 17, 2018, 3:17 PM), <https://www.lawfareblog.com/chinas-strategic-ambiguity-and-shifting-approach-lethal-autonomous-weapons-systems> (“China might be strategically ambiguous about the international legal considerations to allow itself greater flexibility to develop lethal autonomous weapons capabilities while maintaining rhetorical commitment to the position of those seeking a ban . . .”).



## II. HISTORICAL ANALOGUE & RECOMMENDATION

Part II of this Note will (1) analyze the history before World War II leading up to the military advancement of Nazi Germany with Blitzkrieg, (2) compare World War II lessons to LAWS, (3) compare World War II to China's current use of AI, and (4) analyze the different policy implications, concluding that preemptively banning LAWS is fruitless.

### A. *Historical Analogue: World War II, the Tank, and Blitzkrieg*

Consider the implications of the tank for World War II and Blitzkrieg again. In September 1938, Hitler made clear to the international community that Germany would invade Czechoslovakia with military force.<sup>107</sup> The world was on the brink of war.<sup>108</sup> Neville Chamberlain of Great Britain and two other leaders met with Hitler to discuss a “diplomatic resolution” for the possible hostilities.<sup>109</sup> Meanwhile, in mainland Great Britain, the British were preparing for war by installing sirens, bunkers, and sandbags.<sup>110</sup> Neville Chamberlain came back from this meeting waving an agreement that was said to have secured “peace for our time.”<sup>111</sup> Part of the agreement Chamberlain secured was a nonaggression pact between Great Britain and Germany, a promise “never to go to war with one another again”<sup>112</sup>—a promise Germany did not keep.<sup>113</sup>

In 1918 and 1919, Germany entered two disarmament agreements following World War I: the Armistice of November 1918 and the Treaty of Versailles.<sup>114</sup> These binding agreements had the full authority of international law and represented the greatest and most binding type of international law.<sup>115</sup> In the agreement, Germany's air force was abolished

<sup>107</sup> See Daryl G. Press, *The Credibility of Power: Assessing Threats During the “Appeasement” Crises of the 1930s*, INT'L SEC., Winter 2004/05, at 136, 145, 148, 150–51; Christopher Klein, *Chamberlain Declares “Peace for Our Time,”* HISTORY, <https://www.history.com/news/chamberlain-declares-peace-for-our-time-75-years-ago> (Jan. 30, 2020) (explaining that, upon meeting with multiple world leaders, the Sudetenland was ceded to Hitler).

<sup>108</sup> Klein, *supra* note 107.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; NEVILLE CHAMBERLAIN, IN SEARCH OF PEACE 200 (G.P. Putnam's Sons 1939).

<sup>112</sup> Klein, *supra* note 107; CHAMBERLAIN, *supra* note 111, at 210.

<sup>113</sup> See Klein, *supra* note 107.

<sup>114</sup> TOWLE, *supra* note 2; *Armistice Day: World War I Ends*, HISTORY, <https://www.history.com/this-day-in-history/world-war-i-ends> (Nov. 9, 2022); *Jun 28, 1919 CE: Treaty of Versailles*, NAT'L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/treaty-versailles-ends-wwi/> (May 20, 2022).

<sup>115</sup> This is, of course, a generalization. While treaties are the most evident—and possibly the most recognized—formal type of international law, there is much scholarly debate. There are various theories on what is “binding” and, in many ways, enforceable. See Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 95, 98–101

entirely, and its army was reduced to 100,000 men.<sup>116</sup> Furthermore, they banned Germany from specific military factories and certain types of weapons, including submarines, poison gas, and tanks.<sup>117</sup> It was a combination of airpower, tanks, and mobile artillery, along with the coordination allowed by radio communications, that resulted in the effective use of Blitzkrieg.<sup>118</sup> Some authors contend specifically that the critical element in Blitzkrieg was the effective use of the tank because it gave the army new mobility.<sup>119</sup> The bottom line is this: there was a preemptive technological ban on Nazi Germany's use of the tank, air force, and submarine, yet it did not stop Germany's use of the technology in the "Blitzkrieg" offensive.<sup>120</sup> To some extent, disarmament, whether in World War II or the modern era, has to do with one's perspective on international law.

There are two main schools of thought on international law and disarmament: the realist perspective and the idealist perspective.<sup>121</sup> Under an idealist view, things such as LAWS or nuclear weapons pose an existential threat to humanity, and therefore the only rational response is to disarm and believe that other countries will follow this idealist view and disarm as well.<sup>122</sup> In contrast, from a realist's perspective, for international law to be binding on countries and effective, it must be enforceable, and realists believe countries "will not willingly forego the capabilities they believe essential to their security on the hope or promise that cooperation will prevail."<sup>123</sup>

When it comes to international law, "many prescriptions are not enforceable against noncompliant decisionmakers. Even prescriptions

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(Malcolm D. Evans ed., 3d ed. 2010) ("[A] treaty is one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident formal source of law. The 1969 Vienna Convention on the Law of Treaties, which is to a very large extent the codification of pre-existing general law on the subject, states the principle in Article 26, under the heading '*Pacta sunt servanda*': 'Every treaty is binding upon the parties to it and must be performed by them in good faith'.")

<sup>116</sup> TOWLE, *supra* note 2.

<sup>117</sup> *Id.* at 66–67.

<sup>118</sup> *See supra* notes 1–6 and accompanying text.

<sup>119</sup> *See, e.g.*, John Simkin, *Blitzkrieg*, SPARTACUS EDUC., <https://spartacus-educational.com/2WWblitzkreig.htm> (Jan. 2020).

<sup>120</sup> Jerry D. Morelock, *No, the 1919 Treaty of Versailles Was Not Responsible for World War II*, HISTORYNET (July 18, 2017), <https://www.historynet.com/failed-peace-treaty-versailles-1919/>.

<sup>121</sup> Keith B. Payne, *Realism, Idealism, Deterrence, and Disarmament*, STRATEGIC STUD. Q., Fall 2019, at 7, 7–8.

<sup>122</sup> *Id.* at 10, 12 ("[Idealism] essentially contends that the prevailing international system of independent and often conflicting states can be transformed via concerted, cooperative international efforts to such a degree that individual states ultimately will no longer feel compelled to, or need to, maintain independent nuclear arsenals.")

<sup>123</sup> *Id.* at 15–16, 18.

that have enforcement mechanisms are only enforceable to a degree.”<sup>124</sup> As Eric Posner and Jack Goldsmith said, “[M]orality or immorality of international law is exhausted by its content; international legality does not impose any moral obligations. . . . [Countries] cannot bootstrap cooperation by creating rules and calling them ‘law.’”<sup>125</sup>

After World War I, the Allies were not completely under the auspices of an idealist perspective. The Allies, in making disarmament agreements, required Germany to disarm and created an oversight body to monitor the disarmament of Germany, the Inter-Allied Military Commission of Control (IMCC).<sup>126</sup> The IMCC could inspect, supervise, and verify whether disarmament measures were in place.<sup>127</sup> As some authors contend, the main reason disarmament failed was lack of enforcement because it was not “backed by the political will of the major powers.”<sup>128</sup> “This [political] will did not exist for the enforcement of German disarmament, or indeed for the Versailles Treaty as a whole.”<sup>129</sup> So, while there was some enforcement of disarmament efforts before World War II, in the long term, it was not effective.

### *B. Comparison of German Disarmament with a Preemptive Ban of LAWS*

How does the German disarmament compare technologically with the proposed bans of LAWS? The parallels between the military application of AI vis-à-vis LAWS and the joint use of tanks, radio, motorized artillery, and air power are striking. As tanks, motorized artillery, and air power were in the past, LAWS are considered a new technology and method of warfare that are untested in combat; resulting in faster, more mobile militaries; and tied to international disarmament agreements.<sup>130</sup>

However, there are some key differences. LAWS potentially have a greater chance of upending traditional combat as “[m]any commentators have argued that the development of lethal autonomous weapon systems for military use would represent a third revolution in warfare, after the invention of gunpowder and nuclear weapons.”<sup>131</sup> While tanks and submarines were new technology before World War II and resulted in advancements, they were, in many ways, adaptations of conventional

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<sup>124</sup> TAI-HENG CHENG, WHEN INTERNATIONAL LAW WORKS: REALISTIC IDEALISM AFTER 9/11 AND THE GLOBAL RECESSION 10 (2012).

<sup>125</sup> JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 197, 203 (2005).

<sup>126</sup> Webster, *supra* note 2, at 190.

<sup>127</sup> *Id.*

<sup>128</sup> *E.g., id.* at 191.

<sup>129</sup> *Id.*

<sup>130</sup> Meserole, *supra* note 4; *see supra* notes 2, 78–86 and accompanying text.

<sup>131</sup> Emilia Javorsky et al., *Lethal Autonomous Weapons*, THEBMJ (Mar. 25, 2019), <https://www.bmj.com/content/bmj/364/bmj.l1171.full.pdf>.

warfare—just as the transition from horses to chariots, for example.<sup>132</sup> Advancement of AI, however, could result in something outside “conventional” warfare.

Additionally, there is a more important distinction between the disarmament of Germany and a preemptive ban of LAWS. While the former bound Germany alone, a preemptive ban of LAWS would bind not only potentially militant nations, such as Nazi Germany, but also countries that tend to uphold human rights, such as the United States.<sup>133</sup>

This Note argues that LAWS are an inevitable technology in warfare like gunpowder and the tank. By trying to pass legislation that preemptively bans LAWS, we are disarming those most likely to protect human rights. Just like in 1938, we can pass regulations securing “peace in our time,” but without enforcement, this amounts to a Neville Chamberlain-like failure of impotent, paper-flapping agreements.<sup>134</sup> Furthermore, current international humanitarian law may in many ways suffer from the same enforcement dilemma.<sup>135</sup> So, even though international law arguably already covers LAWS, as noted above,<sup>136</sup> a treaty explicitly addressing LAWS is unlikely to be effectively enforced. But first, let us consider China’s use of AI in comparison to Germany’s disregard for disarmament treaties.

### *C. Comparison of China’s Use of AI with Germany’s Disregard of Disarmament*

Consider China’s current use of artificial intelligence. China has been using AI in a manner that has been called a “police state” and an “apartheid with Chinese characteristics.”<sup>137</sup> Some estimate that nearly 800,000 people of an ethnic minority are in gulag-like re-education camps,

<sup>132</sup> See Richard Marian Ogorkiewicz, *Tank*, ENCYC. BRITANNICA (Sept. 15, 2022), <https://www.britannica.com/technology/tank-military-vehicle> (linking the usage of tanks to the history of using vehicles in combat, which dates back to ancient times); John Protasio, *Evolution of the Submarine*, WARFARE HIST. NETWORK, <https://warfarehistorynetwork.com/article/evolution-of-the-submarine/> (last visited Feb. 20, 2023) (noting the concept of “ship[s] that could submerge beneath the water and then resurface” dates back to the 1400s and the first military submarine was used in the American Revolution).

<sup>133</sup> See Treaty of Versailles, *supra* note 2, pt. V (“In order to render possible the initiation of a general limitation of the armaments of all nations, *Germany undertakes strictly to observe the military, naval, and air [disarmament] clauses which follow.*” (emphasis added)); *supra* notes 52–53 and accompanying text; INT’L COMM. OF THE RED CROSS, *supra* note 49, at 4.

<sup>134</sup> See *supra* notes 107–15 and accompanying text.

<sup>135</sup> See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 255–56 (2011) (noting a principal objection to international law is that it “lacks mechanisms of physically coercive enforcement,” meaning “it cannot affect behavior in the right way and hence cannot be a real legal system”).

<sup>136</sup> See *infra* pp. 8–13.

<sup>137</sup> *Inside Xinjiang: Apartheid with Chinese Characteristics*, ECONOMIST, June 2, 2018, at 21, 21, 24.

labeled dissidents or terrorists.<sup>138</sup> People must have certain apps installed on their phones with iris scanning and face recognition checkpoints.<sup>139</sup> In areas of China, there are poles with eight to ten cameras every 100-200 meters that have facial recognition and license plate reading technology, enabling the government to enforce the law permitting only registered owners to drive.<sup>140</sup> These systems oppress Chinese citizens by “us[ing] machine-learning systems, information from cameras, smartphones, financial and family-planning records[,] and even unusual electricity use to generate lists of suspects for detention.”<sup>141</sup> In other words, while the international world debates LAWS, a version of AI is already being used to oppress China’s own people.

Compare this to how Germany was unwilling to comply with the disarmament terms it had agreed to at the end of World War I.<sup>142</sup> In the same way, China is *already* violating human rights laws by discriminating against religious minorities, violating freedom of speech, and oppressing dissidents.<sup>143</sup> Analogously, Germany violated the disarmament treaties’ bans of tanks and would go on to use them in the Blitzkrieg to overwhelm the Allies at the start of World War II.<sup>144</sup> If a country is already violating human rights laws, what will stop it from violating international humanitarian law with LAWS? A preemptive ban of LAWS will not prevent countries *already* violating human rights laws from using them. However, it will halt those law-abiding nations (such as the United States or Great Britain) which actively work to protect human rights.

China’s use of AI is not haphazard; it is intentional. According to Zeng Yi, an executive with one of China’s most prominent military defense companies, “[i]n future battlegrounds, there will be no people fighting,” and the use of AI in the military is “inevitable.”<sup>145</sup> China’s leaders are not taking a backseat with LAWS but are “aggressively pursuing it.”<sup>146</sup> And China is already selling this technology to buyers such as Saudi Arabia, Pakistan, and the United Arab Emirates.<sup>147</sup> This is like the military leaders of Nazi Germany in the 1930s who saw that outmoded forms of warfare, which relied principally on infantry, were being replaced by mobile units of tanks, planes, and artillery to gain superiority on the

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<sup>138</sup> *Id.* at 21–22.

<sup>139</sup> *Id.* at 22, 24.

<sup>140</sup> *Id.* at 24.

<sup>141</sup> *Id.*

<sup>142</sup> Morelock, *supra* note 120.

<sup>143</sup> See AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2020/21: THE STATE OF THE WORLD’S HUMAN RIGHTS 119 (2021).

<sup>144</sup> See *supra* notes 1–6 and accompanying text.

<sup>145</sup> GREGORY C. ALLEN, CTR. FOR A NEW AM. SEC., UNDERSTANDING CHINA’S AI STRATEGY: CLUES TO CHINESE STRATEGIC THINKING ON ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY 5–6 (2019).

<sup>146</sup> *Id.* at 5.

<sup>147</sup> *Id.* at 6.

battlefield.<sup>148</sup> In the 1920s and leading up to World War II, “the majority of maneuver forces were still horse-drawn and unable to keep up with the fast-paced armored units under development.”<sup>149</sup> One well-known German military theorist of the time, Heinz Guderian, saw tanks as the “main war platform when it came to future ground battles . . . assisted by other mobile forces, especially aircraft.”<sup>150</sup>

#### D. *The Dilemma of Enforcement*

Some of the most well-meaning legislation can have devastating unintended consequences. The Treaty of Versailles and Neville Chamberlain’s diplomatic resolution did not stop World War II for lack of good intentions; rather, they failed for lack of enforcement.<sup>151</sup> This is the crucial problem with preemptively banning LAWS.

The great fear of LAWS turning into a Terminator-like Skynet—which is what a preemptive ban of LAWS is supposed to prevent—is most likely to occur in a civilian, commercial context. While the international debate of LAWS continues, commercial AI and military AI are technologically nearly identical.<sup>152</sup> In other words, even if there was international agreement on preemptively banning LAWS, the technology is already advancing commercially, and it is the same. This type of technology is often called “dual-use” because it has uses in both civilian and military contexts.<sup>153</sup>

A great example of dual-use technology is Microsoft’s HoloLens, designed for civilian use for “technicians, doctors[,] and gamers.”<sup>154</sup> The United States military is now contracted with Microsoft to provide augmented reality goggles for combat and training.<sup>155</sup> The purported end goal will increase lethality by increasing accuracy, detection, and targeting.<sup>156</sup> It is relatively well known that the leaders in AI development are in the civilian sector; it is only later that the military adopts the

<sup>148</sup> See Thomas A. Hughes & John Graham Royde-Smith, *World War II: Forces and Resources of the European Combatants, 1939*, ENCYC. BRITANNICA, <https://www.britannica.com/event/World-War-II/Forces-and-resources-of-the-European-combatants-1939> (Mar. 7, 2023).

<sup>149</sup> Tal Tovy, *1930s German Doctrine: A Manifestation of Operational Art*, MIL. REV., May–June 2015, at 56, 57, 61.

<sup>150</sup> *Id.* at 61; *Heinz Guderian*, ENCYC. BRITANNICA (Feb. 15, 2023), <https://www.britannica.com/biography/Heinz-Guderian>.

<sup>151</sup> See *How Britain Hoped to Avoid War with Germany in the 1930s*, IMPERIAL WAR MUSEUMS, <https://www.iwm.org.uk/history/how-britain-hoped-to-avoid-war-with-germany-in-the-1930s> (last visited Feb. 4, 2023); *supra* notes 109–15, 126–129 and accompanying text.

<sup>152</sup> ALLEN, *supra* note 145, at 9.

<sup>153</sup> Daan Kayser & Alice Beck, *Don’t Be Evil: Should the Tech Sector Prevent Killer Robots?*, CLINGENDAEL SPECTATOR (Sept. 25, 2019, 2:40 PM), <https://spectator.clingendael.org/en/publication/dont-be-evil-should-tech-sector-prevent-killer-robots>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

technology for its purposes.<sup>157</sup> This leads to different outcomes based on countries. For example, commercial companies in the United States are “often reluctant to partner” with the military while companies in China have no meaningful choice because they are forced to partner with the Communist Party.<sup>158</sup> So even if legislation is passed preemptively banning LAWS—and in the unlikely scenario that China chooses not to go ahead and implement LAWS—the technology is readily available in the commercial world.<sup>159</sup> In sum, concerning technology, a preemptive ban is a moot point; the technology is being developed in the civilian world and is easily adaptable for military use.

However, this leads to another problematic aspect of the enforcement of bans on LAWS: there is no settled definition of LAWS.<sup>160</sup> Suddenly, the philosophical debate over definitions takes on a practical form. If one country disagrees over what LAWS are, how can it properly enforce a ban on them? Assuming a workable definition existed, then how could it be monitored? There is, as of yet, no AI-sniffing dog to see whether a robot is LAWS compliant or not.<sup>161</sup> Technology such as a landmine or biological weapon is easy to spot, thereby enabling monitoring and potential enforcement of such technology. But how is a ban on LAWS enforced when there is no feasible way to detect and therefore monitor?

More than that, the inability to monitor LAWS gives non-compliant countries a way to disguise their compliance, and it possibly even

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<sup>157</sup> See DANIEL S. HOADLEY & KELLEY M. SAYLER, CONG. RSCH. SERV., R45178, ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY 16 (2020).

<sup>158</sup> *Id.* at 18; Maaike Verbruggen, *The Role of Civilian Innovation in the Development of Lethal Autonomous Weapon Systems*, 10 GLOB. POL’Y 338, 340 (2019) (“[I]n China[,] the divisions between the military and civilian domain are much less clear, and government R&D in AI is explicitly dual-use. Every big company has members of the communist party [on] their board of directors, so there is much less freedom to conduct business independently from state interests.”).

<sup>159</sup> See Meia Nouwens & Helena Legarda, *China’s Pursuit of Advanced Dual-Use Technologies*, INT’L INST. FOR STRATEGIC STUD. (Dec. 18, 2018), <https://www.iiss.org/blogs/research-paper/2018/12/emerging-technology-dominance> (“The development of China’s national research and development capacities has also been utilised in civil–military integration (CMI) efforts, with commercial innovation spilling over into military applications.”).

<sup>160</sup> See Apoorva Chandrachur & Shreya Chamaria, *A Study on Lethal Autonomous Weapons System Under International Humanitarian Law with Special Focus on Killer Robots*, 3 INT’L J.L. MGMT. & HUMANITIES 1605, 1607 (2020) (noting there is no universally accepted definition of LAWS); *supra* notes 22–46 and accompanying text.

<sup>161</sup> See Sarvjeet Singh & Sharngan Aravindakshan, *Killer Robots or Soldiers of the Future: Legal Issues and India’s Role in the Lethal Autonomous Weapons Debate*, 16 INDIAN J.L. & TECH. 103, 104 (2020) (“[A]ny attempts to regulate this technology is premature since it is almost impossible to predict how and what an actually lethal autonomous weapon would look like in the future.”).

incentivizes noncompliance.<sup>162</sup> A security-conscious, ban-compliant government must risk its national security on the word or promises of other countries where there is no enforcement or monitoring.<sup>163</sup> Further, a nation is reasonably incentivized to secretly develop LAWS to protect itself when there is no real enforcement of LAWS.

Also, practically speaking, enforcement and monitoring must occur in the civilian sector.<sup>164</sup> Suddenly, regulators must monitor Amazon, Google, Alibaba, and Apple to see whether LAWS (or its potential) is being developed. This is a regulatory nightmare that has not been thoroughly thought out.<sup>165</sup> Would each tech company be required to submit reports to a regulatory board and be subject to expensive audits? Even with a workable definition of LAWS, this would create a difficult, if not impossible, issue subject to many problems identical to enforcement in the public sector.<sup>166</sup>

Furthermore, a different enforcement problem exists: different countries' political/military motivations. Would any country or military willingly give up control solely into the hands of a machine? The answer is obvious: of course not! Vladimir Putin will not give over complete control of the Russian military to a robot without a kill switch or some way to retain power. In other words, they will only use AI so long as it fulfills their objectives of greater control and more efficient military operations. So, while a country has an incentive to develop LAWS, it has an equally strong incentive to retain control over any LAWS. Enforcement of "meaningful human control" remains, in that sense, a foregone conclusion. China's vague and somewhat useless definition highlights this exact problem—the People's Republic of China does not plan on creating any LAWS it cannot retain control over.<sup>167</sup>

## CONCLUSION

Different legal scholars and groups under the umbrella of the Campaign to Stop Killer Robots rally around a preemptive ban of LAWS and the development thereof, "seek[ing] to retain meaningful human

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<sup>162</sup> See Melissa K. Chan, *China and the U.S. Are Fighting a Major Battle Over Killer Robots and the Future of AI*, TIME (Sept. 13, 2019, 9:45 AM), <https://time.com/5673240/china-killer-robots-weapons/> (explaining that China is "simultaneously working on the technology while trying to use international law as a limit against their competitors").

<sup>163</sup> See *supra* notes 121–27 and accompanying text.

<sup>164</sup> See Charles P. Trumbull IV, *Autonomous Weapons: How Existing Law Can Regulate Future Weapons*, 34 EMORY INT'L L. REV. 533, 535 (2020) ("Even if States did agree to prohibit [LAWS], much of the underlying technology is dual use and being developed by the private sector. A ban would be difficult to verify or enforce.").

<sup>165</sup> See *id.*

<sup>166</sup> *Id.*

<sup>167</sup> See discussion *supra* Section I.B.3.



control over weapons systems and the use of force.”<sup>168</sup> They paint a dire picture of the world with LAWS: an out-of-control arms race, a lower entry threshold for armed conflicts, an ongoing worldwide battlefield, autonomous systems warring, a faster battle pace, accidental wars, militarization in civilian settings, automated oppression, use of LAWS by terrorists, and increased cyber-attacks.<sup>169</sup> This Note has already covered some of the different positions, definitions, and thought-provoking ethical intricacies this involves.

The United States has fully joined this debate, arguing for the ongoing development of LAWS, but at the same time putting a DoD policy in place that “humans must retain judgment over the use of force even in autonomous and semi-autonomous systems.”<sup>170</sup> The depth of this debate can, in many ways, be expressed in the eleven guiding principles that were adopted recently by the United Nations.<sup>171</sup> The principles highlight much of the discussion by agreeing that international humanitarian law applies to LAWS, human responsibility and accountability in LAWS will be retained, and risk assessments and safeguards should be in place.<sup>172</sup>

Under treaties already in force, the use of lethal force would have to be measured so as not to cause superfluous or collateral injury. This is already binding international law.<sup>173</sup> However, in their wisdom, the academics want to ban LAWS when the only countries that will follow this restrictive ban are countries that protect human rights. Ironically, disarming the West jeopardizes the rights of those advocating for disarmament.<sup>174</sup>

In summary, the famous economist Thomas Sowell once said, “Ours may become the first civilization destroyed, not by the power of our enemies, but by the ignorance of our teachers . . . . In an age of artificial intelligence, they are creating artificial stupidity.”<sup>175</sup> The answer to potential human rights abuses is not to disarm countries that protect human rights. This would only hamper the military innovation and protection of human rights in the Western world while allowing countries

<sup>168</sup> Wareham, *supra* note 74, at 3.

<sup>169</sup> See Noel Sharkey, *Global Security*, in CAMPAIGN TO STOP KILLER ROBOTS: CAMPAIGNER’S KIT, *supra* note 43, at 10, 11–12.

<sup>170</sup> Rebecca Kheel, *Fighting the Rise of the Machines*, HILL (Mar. 6, 2018, 6:00 AM), <https://thehill.com/business-a-lobbying/lobbyist-profiles/376851-fighting-the-rise-of-the-machines>; see *supra* notes 89–90 and accompanying text.

<sup>171</sup> Group of Governmental Experts LAWS Report, *supra* note 82, annex IV.

<sup>172</sup> *Id.*

<sup>173</sup> See *supra* notes 60–64 and accompanying text.

<sup>174</sup> See *supra* notes 137–144 and accompanying text; cf. *Countering a Resurgent Terrorist Threat in Afghanistan*, COUNCIL ON FOREIGN RELS. (Apr. 14, 2022), <https://www.cfr.org/report/countering-resurgent-terrorist-threat-afghanistan> (recounting that as the United States withdrew from Afghanistan, terrorist organizations’ presence and influence rose).

<sup>175</sup> THOMAS SOWELL, *CONTROVERSIAL ESSAYS* 308 (2002).

that already violate international law to gain a technological military edge that could lead to another Blitzkrieg.

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# ENLIGHTENING THE ENLIGHTENED: A CRITIQUE OF ENLIGHTENMENT THINKING AND THE SECULAR RELIGION AND ON THE NEED FOR A RETURN TO COVENANT

## TABLE OF CONTENTS

### INTRODUCTION

#### I. DEFINING RELIGION

#### II. ON POLITICAL THEOLOGY AND THE NATURAL LAW

#### III. ON THE SOCIAL CONTRACT THEORY

##### A. *Historical Development of Social Contract Theory*

##### B. *The French Social Contract*

#### IV. ON COVENANT POLITY

##### A. *Defining Covenant Polity*

##### B. *The American Covenant*

#### V. ON THE SECULARIZATION OF POLITICS AND THE SECULAR RELIGION

#### VI. ON THE NEED FOR A RETURN TO COVENANT

### CONCLUSION

## INTRODUCTION

We live in a secular world. Many view secular government as the key to escaping the dictates of religious rule.<sup>1</sup> This was the path blazed during the Enlightenment by the French revolutionaries. They instituted a secular government rooted in Rousseauian social contract theory in hopes of abolishing the influence of institutional religion. But political secularization is a misnomer. For this reason, a secularized government will become religious in its own right but without objective moral elements driving its actions. Proponents of political secularization seek to advance a perception of absolute “liberty.”<sup>2</sup> Yet an unhinged polity is not a

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<sup>1</sup> See, e.g., Eugene Volokh, “*Cleaning Up the Lemon Mess*,” REASON: THE VOLOKH CONSPIRACY (Feb. 28, 2019, 12:49 PM), <https://reason.com/volokh/2019/02/28/cleaning-up-the-lemon-mess/> (“Some [Supreme Court] opinions assume a baseline of complete secularism in government affairs . . . .”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (“The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”); Abraham H. Foxman, *Keep Religion out of Politics*, HUFFPOST, [https://www.huffpost.com/entry/perry-romney-mormon\\_b\\_1095504](https://www.huffpost.com/entry/perry-romney-mormon_b_1095504) (Jan. 15, 2012) (“All candidates of good faith must swiftly, publicly and definitively reject and repudiate religious-based election appeals.”).

<sup>2</sup> Liberty, properly understood, is the freedom to do what one ought. See POPE LEO XIII, *LIBERTAS* para. 1 (1888) (“[T]here are many who imagine that the Church is hostile to

liberated society but a licentious one.<sup>3</sup> And it is not a just society, but an unjust one. We need not license; we need *ordered* liberty—a liberty reasoned to by virtue.<sup>4</sup> Without ordered liberty, there can be no justice and no peace.

Political secularization, a direct result of the Enlightenment, influenced the American founding and Americans' understanding of constitutional governance.<sup>5</sup> But, contrary to popular opinion, political secularization does not define it. Rather, America is—and was meant to be—a covenant polity. To survive this era plagued with political sectarianism, distrust, and hate, Americans must recall the nature of man and the mutual obligations we owe to one another. In other words, if Americans want justice and peace, we must return to covenant polity.

### I. DEFINING RELIGION

As this Note centers on an often misunderstood term—“religion”—it is important to define it from the onset. Religion is more than a mere belief in the transcendent. It is also more than adherence to institutionally prescribed rituals and traditions. Religion, instead, is a virtue. A “[v]irtue is a good quality of the mind by which one lives righteously, of which no

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human liberty. Having a false and absurd notion as to what liberty is, either they pervert the very idea of freedom, or they extend it at their pleasure to many things in respect of which man cannot be rightly regarded as free.”)

<sup>3</sup> *Id.* para. 10 (“[T]he true liberty of human society does not consist in every man doing what he pleases, for this would simply end in turmoil and confusion, and bring on the overthrow of the State; but rather in this, that through the injunctions of the civil law all may more easily conform to the prescriptions of the eternal law.”).

<sup>4</sup> “[N]atural freedom is the fountainhead from which liberty of whatsoever kind flows, *sua vi suaque sponte*.” *Id.* para. 3. And natural liberty exists *only* within “those . . . who are endowed with intelligence or reason”—that is, human persons. *Id.* “Liberty, then, as We have said, belongs only to those who have the gift of reason or intelligence.” *Id.* para. 5.

<sup>5</sup> See William Bristow, *Enlightenment*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/archives/fall2017/entries/enlightenment> (Aug. 29, 2017) (noting Thomas Hobbes's decisive influence on “the Enlightenment process of secularization . . . in political and social philosophy”); Tom Rosentiel, *Religion and Secularism: The American Experience*, PEW RSCH. CTR. (Dec. 3, 2007), <https://www.pewresearch.org/2007/12/03/religion-and-secularism-the-american-experience/> (explaining political secularization's significance to America's founders and discussing its role in the Constitution's structure); *Secularization: A Cultural Pattern of the Enlightenment?*, INTERDISC. CTR. FOR EUR. ENLIGHTENMENT STUD., <https://www.izea.uni-halle.de/en/research/a-ideas-practices-institutions/1-cultural-patterns-of-the-enlightenment/secularization-a-cultural-pattern-of-the-enlightenment.html> (last visited Mar. 29, 2023) (“Secularization was and is often understood as an essential cultural pattern for a modern world disenchanted by the Enlightenment. Along these lines, the concept of secularization was and is frequently used for the description and analysis of modern society after the Enlightenment.”); cf. *Foundations of American Government*, USHISTORY.ORG, <https://www.ushistory.org/gov/2.asp> (last visited Feb. 18, 2023) (connecting Enlightenment thinking and America's founders).

one can make bad use, which God works in us without us.”<sup>6</sup> Put simply, “A virtue is an habitual and firm disposition to do the good.”<sup>7</sup> Religion is categorized as a virtue because it orders our relationship with God and produces good acts. More specifically, religion is categorized as a virtue of justice.<sup>8</sup> Religion, then, “is not a generic phenomenon of the human psyche or of human societies”<sup>9</sup> nor “a hobby or . . . a personality quirk.”<sup>10</sup> It is, instead, the rendering of what is owed to God—the source of all goodness.<sup>11</sup> In short, religion is a habit of rendering that which we owe to our Creator.<sup>12</sup>

Interestingly, the United States Supreme Court arguably recognizes—albeit unknowingly—this distinction between religion as understood popularly versus properly. This proposition is supported by the Supreme Court’s frequent and consistent declination to define religion.<sup>13</sup> If religion is discernable by external acts or proclamations of faith alone, the Court’s hesitance to define religion is misplaced. Even its deflection of judicial resolution of interfaith discrepancies would be misplaced if religion were easily defined by external acts or faith

<sup>6</sup> 23 ST. THOMAS AQUINAS, *SUMMA THEOLOGÆ* pt. I-II, q. 55, art. 4, at 11 (W.D. Hughes trans., Blackfriars 1969) (1485).

<sup>7</sup> CATECHISM OF THE CATHOLIC CHURCH pt. 3, § 1, ch. 1, art. 7, para. 1803 (1993).

<sup>8</sup> SCOTT HAHN & BRANDON MCGINLEY, *IT IS RIGHT AND JUST: WHY THE FUTURE OF CIVILIZATION DEPENDS ON TRUE RELIGION* 7 (2020). There are four cardinal virtues from which all other virtues are derived. The four cardinal virtues are prudence, justice, courage, and temperance. See PLATO, *REPUBLIC* bk. IV, 427e (Paul Shorey trans., Harvard Univ. Press 1969) (c. 375 B.C.) (“Clearly, then, it will be wise, brave, sober, and just.”); MARCUS TULLIUS CICERO, *DE INVENTIONE* bk. II, at 327 (H.M. Hubbell trans., Harvard Univ. Press 1949) (n.d.) (“Virtue may be defined as a habit of mind in harmony with reason and the order of nature . . . . It has four parts: wisdom, justice, courage, temperance.”). Notably, though, Aristotle includes more than four primary, or cardinal, virtues: “The parts of Virtue are Justice, Courage, Temperance, Magnificence, Magnanimity, Liberality, Gentleness, Prudence, Wisdom.” ARISTOTLE, *RHETORIC* bk. I, at 37 (John Edwin Sandys ed., Richard Claverhouse Jebb trans., Cambridge Univ. Press 1909) (n.d.). The Catholic and Orthodox Churches find evidence of four cardinal virtues in Scripture. See *Wisdom* 8:7 (Douay-Rheims) (“[S]he [Wisdom] teacheth temperance, and prudence, and justice, and fortitude, which are such things as men can have nothing more profitable in life.”); *4 Maccabees* 1:18–19 (New Revised Standard with Apocrypha) (“Now the kinds of wisdom are rational judgment, justice, courage, and self-control. Rational judgment is supreme over all of these, since by means of it reason rules over the emotions.”).

<sup>9</sup> HAHN & MCGINLEY, *supra* note 8, at 6.

<sup>10</sup> *Id.* at 8.

<sup>11</sup> See *id.* at 7 (“This virtue of justice rendered to Him who is Justice itself is what the [Catholic] Church through the ages has meant by ‘religion.’”); *Romans* 11:36 (Douay-Rheims) (“For of him, and by him, and in him, are all things: to him be the glory for ever. Amen.”).

<sup>12</sup> See 39 AQUINAS, *supra* note 6, pt. II-II, q. 81, art. 2, at 17 (Kevin D. O’Rourke trans. 1964).

<sup>13</sup> See, e.g., *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (“[I]t is no business of courts to say that what is a religious practice or activity for one group is not *religion* under the protection of the First Amendment.” (emphasis added)); *Thomas v. Rev. Bd.*, 450 U.S. 707, 715 (1981) (noting that courts are “singularly ill equipped” to decide differences of religious practice among members of the same community).

proclamations. Orthodox adherence to a particular faith is not necessarily prerequisite to a sincerely held religious belief as so defined. However, because religion runs deeper than external actions and internal belief, the Supreme Court's refusal to define religion in concrete, materialist terms is properly ordered.

However, popular culture has not exercised similar restraint. To the contrary, it redefined religion to fit within its materialist understanding.<sup>14</sup> Religion is permitted to the extent that it does not impose itself on others. In the secular ideal, religion is a private phenomenon (if it must exist at all).<sup>15</sup> But religion, properly understood, is inherently a public affair.<sup>16</sup>

## II. ON POLITICAL THEOLOGY AND THE NATURAL LAW

The virtue of religion has long served as the building block of successful civilizations.<sup>17</sup> "In a word, human kingdoms are established by divine providence."<sup>18</sup> Even communities seized by worldly materialism, supposed enlightenment, and humanization of the divine "were still aware of this influence of the divine power on their laws and politics."<sup>19</sup> For instance, to the ancient Greeks, "[t]he law, the *nomos* of the city-state, retained even for some skeptic Sophists this theological aspect."<sup>20</sup> The theological root<sup>21</sup> of political thought was observed not just by those who dabbled in theology or policy but also in literature. In *Troilus & Cressida*, Ulysses relays that "[t]here is a mystery—with whom relation durst never meddle—in the soul of state."<sup>22</sup>

<sup>14</sup> Cf. JACK RITCHIE, UNDERSTANDING NATURALISM 1–3 (2008) ("Naturalism is the current philosophical fashion . . . . Naturalists oppose the supernatural. They deny the existence of ghosts, goblins, gods and other spooky entities. . . . According to these philosophers everything in the universe is physical.")

<sup>15</sup> Martin E. Marty, *Religion: A Private Affair, in Public Affairs*, 3 RELIGION & AM. CULTURE J. INTERPRETATION 115, 119 (1993) ("The general public generally approves of the conventional divisions between private and public in religion. Evidence produced by sociologists of religion, so consistent that it does not need documentation here, shows that most people think of religion as being ordinarily private.")

<sup>16</sup> *Id.* at 118–19; Jeff Mirus, *Why Religion and the Church Are the Ultimate Public Things*, CATH. CULTURE (Sept. 11, 2012), <https://www.catholicculture.org/commentary/why-religion-and-church-are-ultimate-public-things/>.

<sup>17</sup> HEINRICH A. ROMMEN, THE STATE IN CATHOLIC THOUGHT 91 (1945) ("In primitive societies theology and politics, priesthood and statecraft, are fused into one.")

<sup>18</sup> 1 ST. AUGUSTINE, THE CITY OF GOD 178 (Marcus Dods ed., George Wilson & J.J. Smith trans., Edinburgh, T. & T. Clark 1871) (415 A.D.).

<sup>19</sup> ROMMEN, *supra* note 17.

<sup>20</sup> *Id.*

<sup>21</sup> This theological root refers to natural and supernatural theology. Not "religious experiences, religious sentiments, or irrational feelings, but doctrine . . . is meant here." *Id.* at 93. The modern caricaturizing of religion, often fueled by religious fundamentalism and superstition, is not representative of natural and supernatural theology nor the virtue of religion.

<sup>22</sup> WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 3, sc. 3, ll. 210–11.

These members of early civilizations detected the dual nature of our world.<sup>23</sup> It is simultaneously temporal and spiritual. All temporal matters are necessarily inspired by the spiritual;<sup>24</sup> otherwise, the temporal realm is nothing more than a subjective and bleak reality. Siphoning these words and applying them in a different context, “the life of man” is “solitary, poore, nasty, brutish, and short”<sup>25</sup> without the spiritual. St. Augustine refers to the nature of the temporal world as an “earthly city.”<sup>26</sup> He says that it “is often divided against itself by litigations, wars, [and] quarrels,” which are “either life-destroying or short-lived.”<sup>27</sup> For when one part of the earthly city “arms against another part” and triumphs, it will either be “inflated with pride,” which “is life-destroying,” or even if it learns from the triumph that our mortal condition is limited the victory “is still only short-lived.”<sup>28</sup> Perhaps paradoxically, these wars are often sparked from a desire for peace.<sup>29</sup> But after attaining such desired peace, if the earthly city “neglect[s] the better things of the heavenly city, which are secured by eternal victory and peace never-ending . . . then it is necessary that misery follow and ever increase.”<sup>30</sup>

To account for both temporal and spiritual realities, early Greek philosophers taught of a law which precedes human law. Herakleitos of Ephesus recounted that “all human laws are fed by the one divine law.”<sup>31</sup> Later, Arab philosophers likewise acknowledged the sustaining role of the divine intelligence.<sup>32</sup> Even the Ancient Egyptians recognized that God “is the principle of wholes (and therefore of all things),” necessarily including

<sup>23</sup> St. Augustine, inspired by this dual nature, identified the “heavenly” and “earthly” cities described in *The City of God*. 2 ST. AUGUSTINE, *supra* note 18, at 51–52 (“There was indeed on earth, so long as it was needed, a symbol and foreshadowing image of this [heavenly] city . . .”).

<sup>24</sup> See *id.* at 52 (“In the earthly city, then, we find two things—its own obvious presence, and its symbolic presentation of the heavenly city.”).

<sup>25</sup> THOMAS HOBBS, *LEVIATHAN* 97 (Oxford Univ. Press 1909) (1651).

<sup>26</sup> See 2 AUGUSTINE, *supra* note 18, at 52–53 (“But the earthly city, which shall not be everlasting[,] . . . is not a good which can discharge its devotees of all distresses . . .”).

<sup>27</sup> *Id.* at 53.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 54 (“For it desires earthly peace for the sake of enjoying earthly goods, and it makes war in order to attain to this peace . . .”).

<sup>30</sup> *Id.*

<sup>31</sup> HERAKLEITOS, FRAGMENT 91B, *reprinted in* JOHN BURNET, *EARLY GREEK PHILOSOPHY* 97, 103 (A & C Black 3d ed. 1920) (n.d.).

<sup>32</sup> In early Arabic poetry and philosophy, *Diwan* “designates all that is divine, celestial; all that emanates from the Universal Intelligence: it is the poetry of the Greeks, the language of the gods, or the voice of the Universal Being of the Egyptians and the Phœnicians.” Fabre d’Olivet, *Discourse Upon the Essence and Form of Poetry*, in *THE GOLDEN VERSES OF PYTHAGORAS* 5, 81 (Nayán Louise Redfield trans., G.P. Putnam’s Sons 1917) (1813) (footnote omitted); JOHN MCGINNIS & DAVID C. REISMAN, *CLASSICAL ARABIC PHILOSOPHY: AN ANTHOLOGY OF SOURCES* 139–40 (2007) (explaining that, in Arabic philosophy, “divine wisdom” illuminates and sustains humanity).

the law.<sup>33</sup> Indeed, evidence of the tradition is found in Hebrew,<sup>34</sup> Egyptian,<sup>35</sup> Hindu,<sup>36</sup> Buddhist,<sup>37</sup> Chinese,<sup>38</sup> Greek,<sup>39</sup> Roman,<sup>40</sup> Christian,<sup>41</sup> and Islamic<sup>42</sup> scholarship. The concept of natural law is well-established—and it has been for millennia.<sup>43</sup>

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<sup>33</sup> PORPHYRY, ON THE CAVE OF THE NYMPHS IN THE THIRTEENTH BOOK OF THE ODYSSEY 31–32 (Thomas Taylor trans., John M. Watkins 1917) (n.d.); *see also* d'Olivet, *supra* note 32, at 130 (“The Egyptians, so celebrated for their wisdom, the extent of their learning, and the multitude of their divine symbols, honoured with silence the God, principle and source of all things . . .”).

<sup>34</sup> Solomon Freehof, *The Natural Law in the Jewish Tradition*, 5 U. NOTRE DAME NAT. L. INST. PROC. 15, 20 (1953) (“Divine-Natural Law was the governing law in the self-governing Jewish communities all over the world from classic antiquity to the dawn of the Modern Era.”).

<sup>35</sup> *See supra* note 33 and accompanying text.

<sup>36</sup> M.S. Sundaram, *The Natural Law in the Hindu Tradition*, 5 U. NOTRE DAME NAT. L. INST. PROC. 69, 70, 72–73 (1953) (“To the Hindu, the Universe is based on Law. The planetary system and the solar system, light and darkness, the stars in their firmament obey the Eternal Law. . . . Hinduism . . . expound[s] Natural Law through precepts, examples, parables, fables, epics, theories, logic, lyrics and other innumerable forms of expression.”).

<sup>37</sup> Daisetz T. Suzuki, *The Natural Law in the Buddhist Tradition*, 5 U. NOTRE DAME NAT. L. INST. PROC. 91, 114 (1953).

<sup>38</sup> Hu Shih, *The Natural Law in the Chinese Tradition*, 5 U. NOTRE DAME NAT. L. INST. PROC. 119, 150 (1953) (“It was Cheng Hao (1032-1085), one of the great philosophers of the age, who, in his memorials to the throne, often referred to the Natural Law (*t'ien-lei*) which he conceived as immutable and not varying with the change of time.”); *id.* at 127 (“[T]wenty-five hundred years ago Lao-tze was preaching in ancient China a political philosophy . . . which bears striking resemblance to the . . . Natural Law philosophy of Herbert Spencer and William Graham Sumner late in the nineteenth century.”); *id.* at 141 (“[T]he Confucian Canon did succeed in serving as a body of ‘Divine Law’ or Sacred Law, as Natural Law in the sense of its many universal principles of morality and justice, and as Natural Law in the sense of the supreme fundamental law to which social and political critics and reformers constantly appealed for support and justification, and which even the most unscrupulous despot never quite dared to challenge.”); *see id.* at 147 (“In the popular language of the people, *tao-lei* means what Mencius regards as that which all minds agree in affirming to the true and just. It is Natural Law in the sense of ‘common right and reason.’”).

<sup>39</sup> *See supra* note 31 and accompanying text.

<sup>40</sup> Ernst Levy, *Natural Law in the Roman Period*, 2 U. NOTRE DAME NAT. L. INST. PROC. 43, 45 (1949).

<sup>41</sup> Heinrich A. Rommen, *The Natural Law in the Renaissance Period*, 2 U. NOTRE DAME NAT. L. INST. PROC. 89, 91 (1949).

<sup>42</sup> Khalifa Abdul Hakim, *The Natural Law in the Moslem Tradition*, 5 U. NOTRE DAME NAT. L. INST. PROC. 29, 38 (1953) (“According to the Quranic teaching, religion is essentially a comprehension of the Natural Law and living in obedience to that Law, for only thereby shall man be true to himself, and only by being true to himself shall he be true to his God and just to the rest of His creatures and His creation.”).

<sup>43</sup> To clarify, I am not equating the eternal law with the natural law. The natural law is participatory in the eternal law; however, they are distinct. 28 AQUINAS, *supra* note 6, q. 91, arts. 1–2, at 23 (Thomas Gilby trans., 1966). The natural law can be ascertained *because* it inheres in things that are observable by nature. *Id.*



The law, then, as we have understood for millennia,<sup>44</sup> runs deeper than the text of a statute or the holding of a case or even its original meaning. There is an eternal law which influences positive law. The degree of the eternal law to which we can understand through reason alone is the natural law.<sup>45</sup> Positive law must be in accord with the natural law to carry authority. Indeed, to be positive law, the law must be “an ordinance of reason for the common good, made [and promulgated] by the authority who has care of the community.”<sup>46</sup> The fundamental difference between natural law and all other forms of human law is that “[n]atural [l]aw is eternal and unalterable.”<sup>47</sup>

Sir William Blackstone recognized and wrote on the natural law’s underpinning of positive ordinances. In his *Commentaries on the Laws of England*, he relates that the law is “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”<sup>48</sup> But he clarifies that the natural law “is of course superior in obligation to any other,” notes that it “is binding over all the globe in all countries, and at all times,” and emphasizes that “no human laws are of any validity, if contrary to” the natural law.<sup>49</sup> Blackstone’s recounting echoes the lessons of Aristotle from millennia before: “[t]he mark of the political order is law, and law springs from something distinctive in human nature.”<sup>50</sup> Abraham Lincoln, too, detected this

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<sup>44</sup> Hu Shih, *supra* note 38, at 153 (“[T]he concept or concepts of Natural Law or Natural Right have always played the historical role of a fighting weapon in mankind’s struggle against the injustice and the tyranny of unlimited human authority.”).

<sup>45</sup> See 28 AQUINAS, *supra* note 6, q. 91, arts. 1–2, at 23 (Thomas Gilby trans., 1966) (“Now this sharing in the Eternal Law by intelligent creatures is what we call ‘natural law’”). Because our world is both temporal and spiritual, the eternal law necessarily encompasses both realms. *Id.* For this reason, the natural law is consonant with the eternal law. *Id.* However, only aspects of the eternal law can be understood within the temporal realm. *Id.* In this sense, the natural law is a participation in the eternal law but is not itself the eternal law. *Id.* The natural law is truly a new law that is legislated by God at the time of creation and inheres in the nature of things. *Id.* Thus, the natural law is a participation in the eternal law but is not itself the eternal law. *Id.*

<sup>46</sup> *Id.* art. 4, at 17.

<sup>47</sup> Sundaram, *supra* note 36, at 71.

<sup>48</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*44. *But see* Melville M. Bigelow, *Definition of Law*, 5 COLUM. L. REV. 1 (1905) (“That [Blackstone’s definition] is unsatisfactory has often been declared . . . . That it is dangerous as well as unsound is worth pointing out at some length.”).

<sup>49</sup> BLACKSTONE, *supra* note 48, at \*41.

<sup>50</sup> Hadley Arkes, *Inescapably Natural*, FIRST THINGS (Mar. 2016), <https://www.firstthings.com/article/2016/03/inescapably-natural> (“Blackstone simply registered in a rough way the lesson taught by Aristotle in the first books of political science[.]”).

underlying proposition. He recognized that “an abstract truth, applicable to all men and all times,” lingered below America’s founding documents.<sup>51</sup>

But as philosophy veers further from truth, blindly, though perhaps paradoxically in pursuit of truth, it plagues political thought. For the first time, political philosophy has reached a point where it “treat[s] its subject matter as if God did not exist.”<sup>52</sup>

### III. ON THE SOCIAL CONTRACT THEORY

Classic theistic philosophical assumptions differ starkly from secular philosophical assumptions. It is no surprise, then, that social contract theory “is the view that persons’ moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live.”<sup>53</sup> Therefore, as rationalism rose, “political philosophy emancipated itself from the doctrines of natural and supernatural theology just as the state became religiously indifferent.”<sup>54</sup> The widespread adoption of social contract theory has proven to be the natural culmination of such religious detachment in the political realm.

#### A. *Historical Development of Social Contract Theory*

Early glimmers of social contract theory appear as far back as 431 B.C. Thucydides’ *History of the Peloponnesian War* recounts the Peloponnesian War between the Spartans and Athenians.<sup>55</sup> It also serves, in part, as a barebones political treatise highlighting the difference between domestic and interstate governance. Thucydides seems to suggest that, within a state, citizens consent to be governed by a social contract, which provides order at the expense of some acceptable degree of individual liberty.<sup>56</sup> He contrasts this contract with international affairs where no such social contract exists.<sup>57</sup> Lack of such a contract emboldens the strong to decide how the weak will be governed.<sup>58</sup>

<sup>51</sup> Letter from Abraham Lincoln to H.L. Pierce and Others (Apr. 6, 1859), in 5 COMPLETE WORKS OF ABRAHAM LINCOLN 124, 126–27 (John G. Nicolay & John Hay eds., Lincoln Mem’l Univ. new and enlarged ed. 1894).

<sup>52</sup> ROMMEN, *supra* note 17, at 92.

<sup>53</sup> Celeste Friend, *Social Contract Theory*, INTERNET ENCYC. PHIL., <http://www.iep.utm.edu/soc-cont> (last visited Feb. 6, 2023).

<sup>54</sup> ROMMEN, *supra* note 17, at 92.

<sup>55</sup> THUCYDIDES, THE PELOPONNESIAN WAR 3 (Martin Hammond trans., Oxford Univ. Press 2009) (n.d.).

<sup>56</sup> Alexander Kemos, *The Influence of Thucydides in the Modern World*, POINT REFERENCE (1994), <http://www.hri.org/por/thucydides.html>.

<sup>57</sup> *Id.*

<sup>58</sup> Book V, Chapters 84–116 of Thucydides’s *History of the Peloponnesian War*, commonly known as the “Melian Dialogue,” implicitly suggests this stark contrast between domestic and international affairs. See THUCYDIDES, *supra* note 55, at 303 (“[I]f the independents survive, it is because we are too frightened to attack them. So quite apart from the resulting extension of our empire your subjection will give us greater security. It is

Some scholars maintain that Epicurus, too, advocated for a type of social contract theory.<sup>59</sup> Epicurus, a hedonist, held pleasure to be the highest good.<sup>60</sup> Accordingly, Epicurus advocated for the maximization of pleasure and the “removal of all pain.”<sup>61</sup> To Epicurus, “[n]o pleasure is in itself evil.”<sup>62</sup> Justice, then, “is a contract of expediency, to prevent one man from harming or being harmed by another.”<sup>63</sup> In other words, justice exists merely as a measure to determine whether one person’s pleasure has infringed on the pleasure of another, not as a good in itself. Therefore, where the political realm is concerned, “[t]here never was an absolute justice, but only [an agreement] made in mutual intercourse . . . providing against the infliction or suffering of harm.”<sup>64</sup> Uniquely, Epicurus’s pleasure-centric social contract must “reconcile the individual’s pursuit of pleasure and tranquility with the public need for justice and peace.”<sup>65</sup>

In the seventeenth century, Thomas Hobbes<sup>66</sup> translated Thucydides’s *History of the Peloponnesian War* into English.<sup>67</sup> That academic exercise surely influenced him while penning *Leviathan*, in which the social contract theory is first formally described not as a restraint on political power, but as a justification for absolutism.<sup>68</sup> Hobbes,

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particularly important that we, as a naval power, should not let islanders get away from us, especially you in your relatively weak position.”).

<sup>59</sup> John J. Thrasher, *Reconciling Justice and Pleasure in Epicurean Contractarianism*, 16 *ETHICAL THEORY & MORAL PRAC.* 423–24 (2013).

<sup>60</sup> Tim O’Keefe, *Epicurus (341–271 B.C.E.)*, *INTERNET ENCYC. PHIL.*, <https://iep.utm.edu/epicur/> (last visited Mar. 29, 2023).

<sup>61</sup> R.D. HICKS, *STOIC AND EPICUREAN* 185 (Charles Scribner’s Sons 1910).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 177.

<sup>64</sup> *Id.* at 178; *see also id.* at 177 (“Those animals which were incapable of making compacts with one another, to the end that they might neither inflict nor suffer harm, are without either justice or injustice. Similarly those tribes which either could not or would not form mutual covenants to the same end are in the like case.”).

<sup>65</sup> Thrasher, *supra* note 59, at 423.

<sup>66</sup> Interestingly, Hobbes claimed he was born during a time of panic in England, as the Spanish Armada approached the island. R.E.R. BUNCE, 1 *THOMAS HOBBS* 1 (2009). “[S]o much fear my mother conceived at that time that she gave birth to twins: myself and Fear,” Hobbes wrote of the event (in Latin) in his lyric autobiography. *THOMAS HOBBS, TOMAE HOBBS MALMESBURIENSIS*, at ll. 25–26 (Karl Maurer trans., n.d.) (1673), [https://udallasclassics.org/wp-content/uploads/maurer\\_files/Hobbes.pdf](https://udallasclassics.org/wp-content/uploads/maurer_files/Hobbes.pdf).

<sup>67</sup> *E.g.*, Duncan Stewart, *Thomas Hobbes*, *STAN. ENCYC. PHIL.*, <https://plato.stanford.edu/entries/hobbes/#1> (Feb. 12, 2021).

<sup>68</sup> *See HOBBS*, *supra* note 25, at 131–32 (“The only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort . . . is[] to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will . . . . The attaining to this Sovereigne Power, is by two wayes. One, by Naturall force . . . . *The other*[] is when men agree amongst themselves[] to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected by him against all others.” (emphasis added)); *see also, e.g.*, Deborah Baumgold, *Hobbesian*

influenced by both Thucydides<sup>69</sup> and Epicurus,<sup>70</sup> understood the state of nature to be chaotic, if not anarchic. He wrote that without a sovereign with absolute power, humanity would engage in a “[war] of every one against every one,”<sup>71</sup> and that life would be “nasty, brutish, and short.”<sup>72</sup> His worldview, much like Thucydides and Epicurus, was hedonistic.<sup>73</sup> Hobbes believed in natural rights.<sup>74</sup> Indeed, to be a hedonist is to advocate

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*Absolutism and the Paradox of Modern Contractarianism*, 6 EUR. J. POL. THEORY 207, 207, 219 (2009) (“However, by dismissing his defense of absolutism, readers miss the audacity of Hobbes’s core political argument, which consists in the joint claims that consent is the foundation of legitimate authority and that sovereignty is necessarily absolute.”); Sharon A. Lloyd & Susanne Sreedhar, *Hobbes’s Moral and Political Philosophy*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/hobbes-moral/> (Sept. 12, 2022) (“Hobbes is famous for his early and elaborate development of what has come to be known as ‘social contract theory’ . . . He is infamous for having used the social contract method to arrive at the astonishing conclusion that we ought to submit to the authority of an absolute—undivided and unlimited—sovereign power.”).

<sup>69</sup> Richard Schlatter, Note, *Thomas Hobbes and Thucydides*, 6 J. HIST. IDEAS 350, 350 (1945) (“The *History of the Peloponnesian War* apparently crystallized for Hobbes many of the ideas fundamental in his later political philosophy.”); Gabriella Slomp, *Hobbes, Thucydides and the Three Greatest Things*, 11 HIST. POL. THOUGHT 365, 365–67 (1990) (discussing the relationship between Hobbes’s *Leviathan* and Thucydides’s *History of the Peloponnesian War*).

<sup>70</sup> Patricia Springborg, *Hobbes’s Materialism and Epicurean Mechanism*, 24 BRIT. J. FOR HIST. PHIL. 819, 821–22 (2016) (“Hobbes subscribed to the axioms of Epicurus’s *Kuriai Doxai* [Principal Doctrines].”).

<sup>71</sup> HOBBS, *supra* note 25, at 96; *see also* Elijah Weber, *Rebels with a Cause: Self-Preservation and Absolute Sovereignty in Hobbes’s Leviathan*, 29 HIST. PHIL. Q. 227, 227–28 (2012) (“In order to resolve this conflict, an absolute sovereign is required because any other arrangement leaves open the possibility of conflict between equally powerful entities, thereby causing further social instability.” (citation omitted)).

<sup>72</sup> HOBBS, *supra* note 25.

<sup>73</sup> Johan Olsthoorn, *On the Absence of Moral Goodness in Hobbes’s Ethic*, 25 J. ETHICS 241, 252–53 (2020) (discussing “Hobbes’s hedonistic and relational conception of goodness”).

<sup>74</sup> *See* HOBBS, *supra* note 25, at 99 (“The Right of Nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto.”). This is also true of other writers of Hobbes’s day, including Hugo Grotius and Samuel von Pufendorf. *See* HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY 21 (2006) (Martine Julia van Ittersum ed., Liberty Fund 2006) (1868) (“Therefore, since God fashioned creation and willed its existence, every individual part thereof has received from Him certain natural properties whereby that existence may be preserved and each part may be guided for its own good, in conformity, one might say, with the fundamental law inherent in its origin. From this fact the old poets and philosophers have rightly deduced that love, whose primary force and action are directed to self-interest, is the first principle of the whole natural order.”); Kari Saastamoinen, *Liberty and Natural Rights in Pufendorf’s Natural Law Theory*, in 59 TRANSFORMATIONS IN MEDIEVAL AND EARLY-MODERN RIGHTS DISCOURSE 226–27 (Virpi Mäkinen & Petter Korkman eds., 2006) (“[Pufendorf] conceptualised this freedom by referring to the idea, also inherited from a long line of late medieval and early modern scholars, that human beings have subjective rights that belong

for purported natural rights—the right of self-preservation being the most essential.<sup>75</sup> But prioritizing natural rights over natural law often causes conflict because natural rights emphasize privileges whereas natural law emphasizes duty.<sup>76</sup> Indeed, the hedonist posits that natural law—if granted any purchase at all—applies only when self-preservation is *not* at issue.<sup>77</sup>

John Locke sympathized with and developed social contract theory but not in the form he inherited it. For Locke, natural law trumps natural rights—even in a social contract.<sup>78</sup> Indeed, he rejected the contention that

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to them prior to any human agreements or legislation.”). Both Pufendorf and Grotius subscribed to

the characterization of early modern natural law as distinctively “Protestant.” Because of its rejection of scholastic rationalism and universalism, and its interest in the particular, the singular, and the irregular on various levels of analysis (i.e., its appreciation of difference and insistence on dissent, its ‘protestant’ and broadly anti-imperial’ character), the discipline is also aptly described as ‘individualistic.’ . . . In sum, the approach was secular rather than atheistic, as it typically combined relatively sparse convictions derived from natural theology . . . with an emphasis on personal religiosity . . . . That is, it privatized . . . religion . . . .

*Pufendorf’s Moral and Political Philosophy*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/pufendorf-moral/#ModNatLaw> (Mar. 31, 2021) (citation omitted).

<sup>75</sup> See Springborg, *supra* note 70, at 830–31 (“Men not only seek self-preservation above all, Hobbes maintains, but they have a right to do so.”).

<sup>76</sup> See HOBBS, *supra* note 25, at 99 (“For though they that speak of this subject, use to confound Jus, and Lex, *Right* and *Law*; yet they ought to be distinguished; because RIGHT[] consisteth in liberty to do, or forbear; Whereas LAW, determineth[] and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent.”); see also Rex Martin, *Hobbes and the Doctrine of Natural Rights: The Place of Consent in His Political Philosophy*, 33 W. POL. Q. 380, 381 (1980) (“[N]atural law must inhibit natural right.”).

<sup>77</sup> See HOBBS, *supra* note 25, 99–101 (“[I]t is a precept, or generall rule of Reason, *That every man[] ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps[] and advantages of Warre.* The first branch of which Rule[] containeth the first[] and Fundamentall Law of Nature; which is, *to seek Peace, and follow it.* The Second, the summe of the Right of Nature; which is, *By all means we can, to defend our selves.*”); cf. Haig Patapan & Jeffrey Sikkenga, *Love and the Leviathan: Thomas Hobbes’s Critique of Platonic Eros*, 36 POL. THEORY 803, 806–07 (2008) (distinguishing Hobbes’s hedonism from Locke’s).

<sup>78</sup> Steven Forde, *John Locke and the Natural Law and Natural Rights Tradition*, NAT. L., NAT. RTS., & AM. CONSTITUTIONALISM (2011), <https://www.nlnrac.org/earlymodern/locke>. For Locke,

the natural law as a divine decree carries with it the corresponding eternal rewards and punishments. These are not mere additions to the binding force of the natural law, but rather, an essential part of it. The sanctions are intended not only to motivate men, but also to make them realize their final good according to the wise plan of the Creator. . . . It opens the transcendental end of man, as the consequence of the conformity or disagreement of his actions with the law of nature.

JERRY GAELA ESPERANZA, JOHN LOCKE AND THE NATURAL: YESTERDAY AND TODAY: A CRITICAL ANALYSIS 69 (2005), <https://core.ac.uk/download/pdf/83559243.pdf>.

the natural law can be “abolished.”<sup>79</sup> Locke’s understanding of the natural law as irrevocable prompted him to write that “though this be a *state of liberty*, . . . *it is not a state of licence*.”<sup>80</sup> For that same reason, he argued that all persons are “bound to preserve” themselves, “to preserve the rest of mankind,” and to not “take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.”<sup>81</sup> These propositions run contrary to the hedonistic social contracts advanced by Hobbes, Thucydides, and Epicurus, which place self-preservation and pleasure on a mantle above all other rights or duties. Rather, Locke’s understanding of mutual obligation brings covenant polity to mind.

After John Locke came Jean-Jacques Rousseau, who returned to a hedonist social contract model. Rousseau’s sole goal was to form an association in “which each associate, though he becomes a member of the group, nevertheless obeys only himself, and remains as free as before.”<sup>82</sup> In other words, Rousseau sought the fruits of a society that imposed duties, such as Locke’s, but without the attached strings. Rousseau believed imposed duties would infringe on a person’s prior “freedom,” making him less “free” than before. The necessary duties imposed on all members of society by natural law, then, are irreconcilable with a Rousseauian society.

### B. *The French Social Contract*

During the so-called Enlightenment, French revolutionaries sought to overthrow the Cross and the Crown and replace both with a nonreligious polis governed by a Rousseauian social contract.<sup>83</sup> Some scholars aptly describe Rousseau’s influence on the French revolutionaries as cultish.<sup>84</sup> “The political cult of Rousseau, a product of the first, enthusiastic years of the Revolution, helped provide a rationale, a symbol, and a channel of expression” for the revolutionaries’ “essentially romantic political philosophy and ideology.”<sup>85</sup> Truly, France owes its

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<sup>79</sup> JOHN LOCKE, *ESSAYS ON THE LAW OF NATURE* 199, 201 (W. von Leyden ed., 6th prt. 2002) (1676) (“[T]his natural law will never be abolished; for human beings cannot alter this law, because they are subject to it, and it is not the business of subjects to abrogate laws at their liking, and because God certainly would not wish to do so.”).

<sup>80</sup> JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 197 (London, A. Millar et al. 6th prt. 1764) (1689).

<sup>81</sup> *Id.* at 198.

<sup>82</sup> JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 13 (Willmoore Kendall trans., Henry Regnery Co. 1954) (1895).

<sup>83</sup> HILAIRE BELLOC, *THE FRENCH REVOLUTION* 20, 26, 28 (1911); *see also* Gordon H. McNeil, *The Cult of Rousseau and the French Revolution*, 6 *J. HIST. IDEAS* 197, 203 (1945) (“There was now a political iconography, replacing the symbols of the literary cult, and Rousseau and his *Contrat [S]ocial* appeared in many of the prints of the period.”).

<sup>84</sup> McNeil, *supra* note 83.

<sup>85</sup> *Id.* at 211.

revolution to Rousseau. “[T]he *Contrat [S]ocial* was the lever which was used to overthrow” both Cross and Crown.<sup>86</sup>

To that end, the revolutionaries needed an avenue to nurture the general will. Per Rousseauian social contractarianism, “it is only the general will which is obligatory upon individuals, and it is never certain that an individual will conform to the general will, until after it has been submitted to the free suffrages of the people.”<sup>87</sup> Accordingly, the will of the then-ruling institution—the Catholic Church—became nonobligatory and, even worse, nonconforming with the general will. The revolutionaries viewed Catholic nonconformity as an existential threat to the newly minted French Republic and labeled Catholics as tyrants.<sup>88</sup> Fearful of the Catholic Church’s ‘tyrannical’ tendencies, the Rousseauian revolutionaries turned to terror.<sup>89</sup> But to accomplish their terror-driven goals, the revolutionaries needed to consolidate power.<sup>90</sup> They did so in December 1793 through the Law of 14 Frimaire.<sup>91</sup> The law sought to organize the revolution, promote compliance, and centralize authority “in a parliamentary dictatorship, with the Committee of Public Safety at the helm.”<sup>92</sup> Maximilien Robespierre, the tiny giant of the French Revolution,<sup>93</sup> vehemently declared to the February 1794 National Convention that “[t]error is nothing but prompt, severe, inflexible justice;

<sup>86</sup> *Id.* at 203.

<sup>87</sup> ROUSSEAU, *supra* note 82, at 61–62.

<sup>88</sup> See W. SCOTT HAINE, THE HISTORY OF FRANCE 84–85 (2000) (“[Revolutionary] armies . . . engaged in a zealous program of dechristianization. Churches were closed down or demolished and religious statues, relics, and books were destroyed. . . . [N]obles and priests were targeted initially [in the Reign of Terror].”); Charles A. Gliozzo, *The Philosophes and Religion: Intellectual Origins of the Dechristianization Movement in the French Revolution*, 40 CHURCH HIST. 273 & n.1 (1971) (noting that dechristianization, which was justified on national defense grounds, was pursued through aggressive anti-clericalism, prohibition on Christian practices, and the establishment of new cults that worshipped reason and the human mind).

<sup>89</sup> HAINE, *supra* note 88; Alberto M. Piedra, *The Dechristianization of France During the French Revolution*, INST. WORLD POL. (Jan. 12, 2018), <https://www.iwp.edu/articles/2018/01/12/the-dechristianization-of-france-during-the-french-revolution/>.

<sup>90</sup> Harrison W. Mark, *Power Struggles in the Reign of Terror*, WORLD HIST. ENCYC. (Nov. 16, 2022), <https://www.worldhistory.org/article/2105/power-struggles-in-the-reign-of-terror/> (noting how Jacobins sought to consolidate power to effectively suppress counterrevolutionaries).

<sup>91</sup> *France: The Jacobin Dictatorship*, ENCYC. BRITANNICA, <https://www.britannica.com/place/France/The-Jacobin-dictatorship#ref465236> (last visited Feb. 6, 2023).

<sup>92</sup> *Id.*

<sup>93</sup> Robespierre stood a mere 5’3” but was a powerhouse revolutionary leader. See L. DUPERON, *VIE SECRÈTE, POLITIQUE ET CURIEUSE DE M.J. MAXIMILLEN ROBESPIERRE* 23 (Paris, Chez Prevost 1794), <https://archive.org/details/viesecrètropolit00dupe/page/n1/mode/2up> (indicating Robespierre stood somewhere between 5’2” and 5’3” according to his portrait); Marc Bouloiseau, *Maximilien Robespierre: French Revolutionary*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Maximilien-Robespierre/The-Committee-of-Public-Safety-and-the-Reign-of-Terror> (Dec. 5, 2022). That was, of course, before he was beheaded. Bouloiseau, *supra*.

it is therefore . . . a consequence of the general principle of democracy applied to our country's most pressing needs."<sup>94</sup> He continued, "Social protection is due only to peaceful citizens; there are no citizens in the Republic but the republicans. The royalists, the conspirators are, in its eyes, only strangers or, rather, enemies."<sup>95</sup>

Inspired by Robespierre, Georges Auguste Couthon proposed the Law of 22 Prairial to the Committee of Public Safety just four months after Robespierre's speech to the National Convention.<sup>96</sup> The law sought to eliminate due process protections for the accused and instill a climate of moral suspicion.<sup>97</sup> The law, known as "Robespierre's Law," codified and institutionalized a genocidal assault on French Catholics.<sup>98</sup> It is aptly and eerily known as "*La Terreur*"—The Terror.<sup>99</sup> *La Terreur* truly epitomizes the "antireligious fervor of the French revolutionaries" that "convinced almost everyone that the forces of unbelief and sedition were united in their determination to overturn the society."<sup>100</sup> Even Immanuel Kant later insisted "that all the horrors that took place in France were nothing compared to those that people had suffered under a despotic regime, and that the Jacobins were probably right in all their actions."<sup>101</sup>

<sup>94</sup> Maximilien Robespierre, National Convention Speech of 17 Pluviôse (Feb. 5, 1794), in *THE NINTH OF THERMIDOR: THE FALL OF ROBESPIERRE* 32, 38 (Richard Bienvenu ed., 1968).

<sup>95</sup> *Id.* at 39.

<sup>96</sup> 2 A. AULARD, *THE FRENCH REVOLUTION: A POLITICAL HISTORY* 286 (Bernard Miall trans., 1910); see also CHRISTOPHER DAWSON, *THE GODS OF REVOLUTION* 101 (Don J. Briel ed., 2015) (showing that George Auguste Couthon played an important role in the passage of the Law of 22 Prairial).

<sup>97</sup> See AULARD, *supra* note 96, at 290–92 (observing how the Law of 22 Prairial declared certain groups "enemies of the people" and proscribed death as the sole punishment, which resulted in "liberty of whatever kind [as] a thing of the past[,] [t]he least opposition of expos[ing] a citizen, even a woman, to the scaffold"); *Reign of Terror*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Reign-of-Terror> (Nov. 9, 2022) ("[T]he committee obtained the Law of 22 Prairial, year II (June 10, 1794), which suspended a suspect's right to public trial and to legal assistance and left the jury a choice only of acquittal or death.").

<sup>98</sup> See *Robespierre Overthrown in France*, HIST., <https://www.history.com/this-day-in-history/robespierre-overthrown-in-france> (Jan. 11, 2023) (explaining that the Law of 22 Prairial was passed as a law only six days after Robespierre entered power, paving the way for the Reign of Terror); HAROLD BEHR, *THE FRENCH REVOLUTION: A TALE OF TERROR AND HOPE FOR OUR TIMES* 91 (2015) (noting that the Catholic Church was subjected to the Reign of Terror).

<sup>99</sup> See AULARD, *supra* note 96, at 277–80, 290–92 ("The Revolutionary Government as a whole is often called the *Government of the Terror*. The phrase, *the Terror*, is also applied to the period when this Government existed in its fullest force . . . . In order to fully understand what the Terror was, we must read the articles of [the Law of 23 Ventôse and the Law of 22 Prairial,] which define crimes and proclaim penalties.").

<sup>100</sup> HERBERT SCHLOSSBERG, *THE SILENT REVOLUTION AND THE MAKING OF VICTORIAN ENGLAND* 58–59 (2000).

<sup>101</sup> Lea Ypi, *On Revolution in Kant and Marx*, 42 *POL. THEORY* 262, 267 (2014) (quoting JACQUES DROZ, *L'ALLEMAGNE ET LA REVOLUTION FRANÇAISE* 158 (1949) (internal quotation marks omitted)).



France's *Contrat Social*, then, is rooted in disdain for institutional religion. It sought to eliminate "tyrannical," institutional Catholicism. Ironically, it pursued this goal through tyranny.<sup>102</sup> Even Robespierre recognized as much.<sup>103</sup> But the French revolutionaries merely substituted one institutional religion—Catholicism—with another: a tyrannical, hyper-secularist Rousseauian cult. Unsurprisingly, France's First Republic crumbled within twelve years after undergoing numerous violent changes in form and leadership.<sup>104</sup>

"He who fights monsters should be careful lest he thereby become a monster."<sup>105</sup> Such is the plight of secularism and the experience of the French revolutionaries.<sup>106</sup> In seeking to minimize religion's influence on public life, the French Republic morphed into what it most despised—a religion.<sup>107</sup> In fact, during the French Revolution, Jacques Hébert founded the "Cult of Reason"—a state-sponsored atheistic cult—to replace Catholicism.<sup>108</sup> The group dedicated itself to celebrating rationalism,

<sup>102</sup> See HAINE, *supra* note 88, at 83–85 (discussing the National Convention's laws that targeted "threats to the revolution" and resulted in the deaths of many priests and Catholic lay people); Gliozzo, *supra* note 88 (discussing the devastating effects of the French Revolution's dechristianization and its impact on the Catholic Church).

<sup>103</sup> Robespierre, *supra* note 94, at 39 ("Yes, as the sword which glitters in the hands of liberty's heroes resembles the one with which tyranny's lackeys are armed. Let the despot govern his brutalized subjects by terror; he is right to do this, as a despot. Subdue liberty's enemies by terror, and you will be right, as founders of the Republic.").

<sup>104</sup> See generally Paris: *Capital of the 19th Century: 1. The First Republic (1792-1804)*, BROWN UNIV. LIBR. CTR. FOR DIGIT. SCHOLARSHIP, <https://library.brown.edu/cds/paris/chronology1.html> (last visited Apr. 6, 2023) (tracing the history of France's First Republic, which began in 1792 and ended in 1804).

<sup>105</sup> 8 FRIEDRICH NIETZSCHE, *Beyond Good and Evil, in THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE* 1, 74 (Adrian Del Caro trans., 2014).

<sup>106</sup> See HAHN & MCHINLEY, *supra* note 8, at 73 ("Political systems that claim not to be based in or to favor religious principles have an unsurprising habit of failing in this most basic regard.").

<sup>107</sup> ANDREW WERNICK, AUGUSTE COMTE AND THE RELIGION OF HUMANITY: THE POST-THEISTIC PROGRAM OF FRENCH SOCIAL THEORY 19 (2001) ("[R]econstructive reformers sought to install [a post-theistic religion] as the historically proper replacement for the Catholicism of the *ancien régime*.").

<sup>108</sup> AULARD, *supra* note 96, at 162–63 ("The 'cult of Reason[]' organised in Paris . . . . Many of the churches were closed, then converted into Temples of Reason; there were 'Goddesses of Reason' and anti-Catholic processions. . . . In the departments, and especially in the cities, there were serious and sincere attempts to abolish the ancient religion and to establish a rationalistic worship. . . . The cult was eagerly adopted in those critical hours of the national defence (at the end of 1793) by the generality of active patriots, by the Jacobins, by the members of the revolutionary committees, by the municipal officers; in short, by the whole militant Revolution."); Gliozzo, *supra* note 88, at 273 & n.2; *The Cult of the Supreme Being*, ALPHA HIST., <https://alphahistory.com/frenchrevolution/cult-of-the-supreme-being/#:~:text=Hébert's Cult of Reason,-The Supreme> (last visited Mar. 17, 2023) ("In 1793, radical journalist Jacques Hébert and his followers founded the Cult of Reason, a group dedicated to celebrating liberty, rationalism, empirical truth and other Enlightenment values. The Cult of Reason was, in essence, an atheist church."). Once Catholicism was

unhinged liberty, and general Enlightenment values.<sup>109</sup> Indeed, “the French . . . generated a civic humanism saturated with the corporatism and religious externalism of the unreconstructedly Catholic.”<sup>110</sup> This result should not surprise us. As Aristotle observed, “[E]very community is established with a view to some good . . . . But, if all communities aim at some good, the state or political community, which is the highest of all, . . . aims, and in a greater degree than any other, at the highest good.”<sup>111</sup> Political secularism is no different. Its privatization of religion does not quash our innate desire to serve a good greater than ourselves. Rather, it merely confuses our desire to serve our Creator and replaces it with a desire to serve ourselves.

It is important to recall that religion is a virtue of justice.<sup>112</sup> It is the ultimate culmination of rendering what is owed to whom it is due: God. As Aristotle highlights, all communities—political in particular—are intrinsically oriented towards the good.<sup>113</sup> Therefore, “[t]he question is not whether we will organize our society around a religious principle,” but around what principle we will organize our society.<sup>114</sup> Will our guiding principle be true and life-sustaining, or false and life-destroying?

#### IV. ON COVENANT POLITY

Secular government will always select a guiding principle that is, in some way, false. This is epitomized by the catastrophic failures of the First French Republic. It is impossible for a secular government to select a wholly true guiding principle because secularism itself posits a false reality: that man can be separate from God.<sup>115</sup> In a polis where falsehood is empowered, truth erodes. The erosion of truth naturally leads to social and institutional erosion. And when a society erodes too much, it collapses. This is what covenant polity seeks to prevent from occurring.

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banned, the French repurposed the Notre-Dame de Paris Cathedral into a “Temple of Reason.” Erik Gregerson, *Herbertist French Political History*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Hebertist> (last visited Feb. 4, 2023).

<sup>109</sup> AULARD, *supra* note 96, at 162 (“[T]here were serious and sincere attempts to abolish the ancient religion [i.e., Christianity] and to establish a rationalistic worship.”); ALPHA HIST., *supra* note 108 (noting the Cult of Reason was “a group dedicated to celebrating liberty, rationalism, empirical truth and other Enlightenment values.”); *see also* EMMET KENNEDY, *A CULTURAL HISTORY OF THE FRENCH REVOLUTION* 343–45 (1964) (explaining how French citizens reveled in reason and liberty during the “Festival of Reason,” at which time Notre Dame was declared the “Temple of Reason”).

<sup>110</sup> WERNICK, *supra* note 107, at 7–8.

<sup>111</sup> 1 ARISTOTLE, *POLITICS* 25 (Benjamin Jowett trans., Oxford Univ. Press 1908) (c. 350 B.C.).

<sup>112</sup> *See supra* notes 6–12 and accompanying text.

<sup>113</sup> ARISTOTLE, *supra* note 111.

<sup>114</sup> HAHN & MCGINLEY, *supra* note 8, at 82–83.

<sup>115</sup> “If I ascend into heaven, thou art there: if I descend into hell, thou art present.” *Psalms* 138:8 (Douay-Rheims).

### A. *Defining Covenant Polity*

Covenant societies “are founded on an idea,” are “dedicated to a proposition,” and “represent conscious new beginnings.”<sup>116</sup> Covenant is a political concept familiar to Western political history.<sup>117</sup> As Peter Leithart noted, “American order is laid out in covenantal and quasi-covenantal documents, from [John] Winthrop’s [A] *Model of Christian Charity* to the U.S. Constitution.”<sup>118</sup> To understand covenant, though, one must first understand the meaning of politics in a covenant society.

Politics is the art of associating . . . men for the purpose of establishing, cultivating, and conserving social life among them. . . . The subject matter of politics is therefore association . . . , in which the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life.<sup>119</sup>

Covenant polities find their roots in this understanding of politics and political association.

Covenant polities are traceable to medieval and early modern Europe, and they remain present in the European Union, “a postmodern covenant of nations, albeit one distorted by its adherence to liberalism.”<sup>120</sup> At their core, covenantal polities are anti-individualist and emphasize mutual obligation.<sup>121</sup> Proponents of covenant polity do “not understand ‘covenant’ as equivalent to the later idea of ‘social contract.’”<sup>122</sup> Members of a covenantal polity cannot be disqualified from the pact for transgressing the rules of the society, nor is their entrance into the covenant voluntary or easily dissoluble.<sup>123</sup> Critically, the pact is “not based on individual people agreeing together to submit themselves to a rule or a sovereign,” as is the case for socially contracted societies; rather, the pact “involves different elements of society, including the family, the guild,

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<sup>116</sup> Rabbi Jonathan Sacks, A Free Society Is a Moral Achievement (June 15, 2016), <https://www.rabbisacks.org/videos/free-society-moral-achievement-bradley-prize/>.

<sup>117</sup> Peter J. Leithart, *The Promise and Limits of Covenant Polity*, FIRST THINGS (Nov. 17, 2017), [www.firstthings.com/web-exclusives/2017/11/the-promise-and-limits-of-covenant-polity/](http://www.firstthings.com/web-exclusives/2017/11/the-promise-and-limits-of-covenant-polity/).

<sup>118</sup> *Id.*

<sup>119</sup> JOHANNES ALTHUSIUS, *THE POLITICS OF JOHANNES ALTHUSIUS* 12 (Frederick S. Carney trans., 1964) (footnote omitted).

<sup>120</sup> Leithart, *supra* note 117.

<sup>121</sup> *Id.*

<sup>122</sup> Simon P. Kennedy, “Covenant” and Polity in the Thought of the Early Reformers, AD FONTES (Mar. 9, 2017), <https://adfontesjournal.com/church-history/covenant-polity-thought-early-reformers/>.

<sup>123</sup> *Id.*; see also ALTHUSIUS, *supra* note 119, at 62 (“Even the reluctant are compelled to comply with this communication.”).

[and] local and provincial authorities.”<sup>124</sup> In so doing, covenantal polities “affirm[]” non-political attachments of “family, kin, and local community,” while liberalism divides them.<sup>125</sup>

Covenant’s anti-individualism is not to be confused with anti-consent.<sup>126</sup> To the contrary, the political order is based on consent.<sup>127</sup> However, it is a different type of consent than that of liberal, socially contracted societies.<sup>128</sup> Consent is not formally or expressly made to enter a covenant polity.<sup>129</sup> Rather, because “[p]eople participate by general consensus through this pact in the building of political life together,” it is implied that they “bind themselves to one another through this pact.”<sup>130</sup> Indeed, “[p]eople are in society together, closely connected, and are so because of a kind of mutually-binding oath.”<sup>131</sup> In this way, proponents of covenant polities recognize the intrinsic social nature of man and understand that by being a social creature, man consents, *by his nature*, to be bound by mutual obligation and natural duty to others.<sup>132</sup> Still, consent is not what matters most in covenant societies, as is the case in socially contracted societies.<sup>133</sup> This is because consent is implied (and expressed) through man’s nature as a social creature.<sup>134</sup> It follows, then, that said consent cannot be revoked because it is inherent in man’s nature as a social creature. To reject consent to the covenant would be to reject

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<sup>124</sup> Kennedy, *supra* note 122; *see also* ALTHUSIUS, *supra* note 119, at 62; Leithart, *supra* note 117 (noting that covenants “form[] a federation of subsidiary societies,” whereas liberalism attempts to “bind[] together detached individuals”).

<sup>125</sup> Leithart, *supra* note 117.

<sup>126</sup> The bond between citizens in a covenant is “consensus, together with trust extended and accepted among the members of the commonwealth.” ALTHUSIUS, *supra* note 119, at 62. Put another way, the bond is “a tacit or expressed promise to communicate things, mutual services, aid, counsel, and the same common laws.” *Id.*

<sup>127</sup> ALTHUSIUS, *supra* note 119, at 62.

<sup>128</sup> *See* Leithart, *supra* note 117 (“Instead of binding together detached individuals [liberalism’s consent], this consent [covenant polity’s consent] forms a federation of subsidiary societies.”).

<sup>129</sup> *See id.* at 62.

<sup>130</sup> Kennedy, *supra* note 122.

<sup>131</sup> *Id.*

<sup>132</sup> *See* Simon P. Kennedy, *The Origins of Politics According to Althusius*, AD FONTES (Oct. 17, 2016), <https://adfontesjournal.com/church-history/origins-politics-according-althusius/> (“To be sure, Althusius held that society formed because of a consensual pact between people. But this idea need not lead us in a liberal individualist direction. Althusius’[s] conception of the origins of society, through his ‘four causes’ explanation, shows that he believed people were naturally inclined toward society, that they are designed by God to perform acts of love toward one another, and that even the laws which people make are to be designed to enable these acts of love. Althusius’s conception of the origins of society shows that people are naturally social and political. It also shows that we are naturally neighbors to each other. We are, in that sense, intertwined with one another.”).

<sup>133</sup> Leithart, *supra* note 117; Friend, *supra* note 53.

<sup>134</sup> *Id.*

personhood. So, it is not consent itself which grants legitimacy to a covenantal society, but human nature as social creatures.

Covenantal polities are cognizant of reality, recognizing that “[h]uman beings have different abilities.”<sup>135</sup> Proponents of covenantal political order recognize that “we all need the superior gifts of others, as others need ours,” if society is to function well.<sup>136</sup> For this reason, covenants prescribe “hierarchies of skill and knowledge” to “harmonize[] democratic consent with recognition of aristocratic excellence.”<sup>137</sup> To do so is to recognize and affirm the intrinsic human dignity of all persons.<sup>138</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*; see also POPE JOHN XXIII, *PACEM IN TERRIS* para. 9 (1963), [https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf\\_j-xxiii\\_enc\\_1104196\\_3\\_pacem.pdf](https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_1104196_3_pacem.pdf) (“Any well-regulated and productive association of men in society demands the acceptance of one fundamental principle: that each individual man is truly a person. His is a nature, that is, endowed with intelligence and free will. As such he has rights and duties, which together flow as a direct consequence from his nature.”).

<sup>137</sup> Leithart, *supra* note 117. Alexander Hamilton arguably recognized this key distinction. In a private letter, Hamilton discussed “the general principle” of the financial measures enacted by the New York legislature in 1782: “The general principle of it is an assessment, according to *circumstances and abilities collectively considered.*” Letter from Alexander Hamilton to Robert Morris (Aug. 13, 1782), [https://founders.archives.gov/documents/Hamilton/01-03-02-0057-0001#document\\_page](https://founders.archives.gov/documents/Hamilton/01-03-02-0057-0001#document_page).

<sup>138</sup> See Daniel J. Elazar, *Recovenanting the American Polity*, JERUSALEM CTR. FOR PUB. AFFS., <https://www.jcpa.org/dje/articles2/recovampol.htm> (last visited Mar. 15, 2023) (observing that in covenantal polities, “[c]ovenantal obligations are not the obligations of a subordinate to a superior . . . , but rather [are] the shared obligations of humans to a mutually accepted agreement,” premised on the notion that “all humans as God’s creatures have a certain inherent dignity”). Pope Francis’s description of exclusion encapsulates the danger of a society that does not recognize the inherent dignity of each person:

Today everything comes under the laws of competition and the survival of the fittest, where the powerful feed upon the powerless. As a consequence, masses of people find themselves excluded and marginalized: without work, without possibilities, without any means of escape.

Human beings are themselves considered consumer goods to be used and then discarded. We have created a ‘throw away’ culture which is now spreading. It is no longer simply about exploitation and oppression, but something new. Exclusion ultimately has to do with what it means to be a part of the society in which we live; those excluded are no longer society’s underside or its fringes or its disenfranchised – they are no longer even part of it.

POPE FRANCIS, *EVANGELII GAUDIUM* 45–46 (2013).

Liberalism's obsession with individualism<sup>139</sup> and egalitarianism,<sup>140</sup> on the other hand, causes its adherents to inevitably devolve into defensive politics.<sup>141</sup> Covenant, however, is "characterized by mutual communication of goods," and "directs political and social activity toward the common good."<sup>142</sup> This was America's intended political function.

### B. *The American Covenant*

Like the French, those we now call the American founders were skeptical of institutional religion.<sup>143</sup> But, for them, the British monarchy's tight clutch over the Church of England in all matters was just a symptom of a larger problem—an excessively powerful government.<sup>144</sup> The Americans recognized that it was not the Church of England *itself* that wrought oppression and political suppression—it had merely been exploited to that end.<sup>145</sup> For this reason, American revolutionaries took

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<sup>139</sup> Legal scholarship demonstrates liberalism's preference for rights over duties. *See, e.g.*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 223 (Bloomsbury 2013) (1977) ("The language of rights now dominates political debate in the United States."); THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 14–15 (1984) (recounting the development of the "civil rights vision" in American society); Luke Milligan, *Natural Law, Commonwealths, and Higher Education*, 57 U. LOUISVILLE L. REV. 501, 501 (2019) ("Contemporary political and legal discourse is typically fixed in the language of rights. Arguments about duty are uncommon, and those resting on natural duty are virtually non-existent." (footnotes omitted)).

<sup>140</sup> Stephen Davies, *The Classic Liberal Ideal of Equality*, AM. INST. FOR ECON. RSCH. (July 2, 2019), <https://www.aier.org/article/the-classical-liberal-ideal-of-equality> ("The idea of liberal equality is one of the core beliefs of classical liberalism.").

<sup>141</sup> By this, I mean the defense of rights. *See* Robert H. Bork, *Hard Truths About the Culture War*, FIRST THINGS (June 1995), <https://www.firstthings.com/article/1995/06/hard-truths-about-the-culture-war> ("Modern liberalism[, which grew out of classical liberalism,] employs the rhetoric of 'rights' incessantly to delegitimize restraints on individuals by communities. It is a pernicious rhetoric because it asserts a right without giving reasons.").

<sup>142</sup> Leithart, *supra* note 117.

<sup>143</sup> *See, e.g.*, *Thomas Jefferson and Religious Freedom*, MONTICELLO, <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/thomas-jefferson-and-religious-freedom/> (last visited Feb. 6, 2023) ("Jefferson saw religious freedom as essential for a functioning republic. Without religious freedom and a strict separation of church and state, 'kings, nobles, and priests' threatened to create a dangerous aristocracy.").

<sup>144</sup> *See* ROBERT R. REILLY, *AMERICA ON TRIAL: A DEFENSE OF THE FOUNDING* 261 (2020); FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 211–13 (2003) ("[John] Adams warned Americans that if they were not vigilant, the British church and state would combine to take away their civil and religious rights."). *See generally* THE DECLARATION OF INDEPENDENCE para. 2–29 (U.S. 1776) for a summary of the founders' grievances against the Crown.

<sup>145</sup> *See* LAMBERT, *supra* note 144, at 181 (recounting instances in colonial America in which Americans resisted the expansion of the Church of England's influence to preserve their civil liberties and prevent abridgements of their natural rights).

aim at the Crown but *not* the Cross (unlike the French who sought to dismantle both).<sup>146</sup>

That distinction set the tone for the American founding. The founders' radical trust in self-governance was not inspired by a philosophical assumption that man is perfectible in himself and is therefore free to exercise radical autonomy.<sup>147</sup> Notably, those are key assumptions of classical liberalism.<sup>148</sup> Rather, America's founding is rooted in the Judeo-Christian tradition and presupposes the validity of natural law.<sup>149</sup> John Adams himself made a point to "remind[] the people of elevated rank" of "[t]he principles of nature and eternal reason[]—[t]he principles on which the whole government over us, now stands."<sup>150</sup> Perhaps even more to the point, Adams bluntly stated that Americans did not invent this foundation of society; they "found it in their religion."<sup>151</sup>

Even Thomas Jefferson agreed that something more undergirds the American experiment. He observed, "[T]he object of the Declaration of Independence" was "[n]ot to find out new principles, or new arguments, never before thought of . . . [I]t was intended to be an expression of the american [sic] mind, and to give to that expression the proper tone and

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<sup>146</sup> See THE DECLARATION OF INDEPENDENCE para. 2, 30 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpation, all having in direct object the establishment of an absolute Tyranny over these States. . . . We, therefore, the Representatives of the united States of America . . . *appealing to the Supreme Judge of the world* for the rectitude of our intentions, do . . . solemnly publish and declare, That these United Colonies are, and of Right out to be Free and Independent States . . . ." (emphasis added)); Joseph Loconte, *Two Revolutions for Freedom*, HERITAGE FOUND. (July 13, 2021), <https://www.heritage.org/american-founders/commentary/two-revolutions-freedom> ("The French revolutionaries were as vicious in their attacks on the Church as they were on the monarchy and nobility.").

<sup>147</sup> See THE FEDERALIST NO. 6, at 21 (Alexander Hamilton) (Dover Thrift ed. 2014) ("[M]en are ambitious, vindictive, and rapacious."); THE FEDERALIST NO. 10, at 43 (James Madison) (Dover Thrift ed. 2014) ("The latent causes of faction are thus sown in the nature of man . . . render[ing] them much more disposed to vex and oppress each other than to cooperate for their common good."); GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 162 (1989) (noting Publius assumed that humans are "prone to pursue immediate long-range self-interests at the expense of the common good, [and] that they are neither perfect nor perfectible").

<sup>148</sup> See Patrick J. Deneen, *Unsustainable Liberalism: Liberalism's Contradictions Are Unsustainable and We Must See Man and Nature Anew*, FIRST THINGS (August 2012), <https://www.firstthings.com/article/2012/08/unsustainable-liberalism> ("[Classical] liberalism is constituted by a pair of . . . anthropological assumptions that give liberal institutions a particular orientation and cast: 1) anthropological individualism and the voluntarist conception of choice, and 2) human separation from and opposition to nature.").

<sup>149</sup> REILLY, *supra* note 144, at 4.

<sup>150</sup> John Adams, Letter to the Inhabitants of the Colony of Massachusetts-Bay (Jan. 23, 1775), in 2 PAPERS OF JOHN ADAMS 226, 230 (Robert J. Taylor et al. eds., 1977).

<sup>151</sup> JAMES HUTSON, FORGOTTEN FEATURES OF THE FOUNDING: THE RECOVERY OF RELIGIOUS THEMES IN THE EARLY AMERICAN REPUBLIC 100 (2003) (quoting Letter from John Adams to Thomas Boylston Adams (Mar. 18, 1794) (on file with Library of Congress)).

spirit called for by the occasion.”<sup>152</sup> For this reason, Jefferson “did not consider it as any part of [his] charge to invent new ideas altogether.”<sup>153</sup> Rather, since the founders recognized that rights are “derived from the great Legislator of the universe” and “cannot be repealed or restrained by human laws,”<sup>154</sup> it is clear that the Declaration of Independence, the American Revolution, and the Constitution were not intended to advance a novel political ideal. Instead, they served as a wake-up call to the British Crown—which the Americans perceived to be violating the natural law.<sup>155</sup> These documents and events set the tone for the American covenant.

The founders viewed the formation of the American covenant as year one in a new era—a *novus ordo seclorum*.<sup>156</sup> That America ushered in a new era of history is an understatement. From its base, the American covenant differs dramatically from the French *Contrat Social*, which sought nothing more than to unhinge reason from liberty. “In America alone, reason and liberty concurred in the formation of constitutions.”<sup>157</sup> This is so because of the founders’ firm reliance on the natural law tradition, their recognition of man as a social creature, and their understanding of mutual obligation.<sup>158</sup>

<sup>152</sup> Letter from Thomas Jefferson to Henry Lee (May 8, 1825), <https://founders.archives.gov/documents/Jefferson/98-01-02-5212>.

<sup>153</sup> Letter from Thomas Jefferson to James Madison (Aug. 30, 1823), <https://founders.archives.gov/documents/Jefferson/98-01-02-3728>.

<sup>154</sup> JOHN ADAMS, *A Dissertation on the Canon and Feudal Law*, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 19, 22 (2000).

<sup>155</sup> See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (“When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of earth, the separate and equal state to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.” (emphasis added)); REILLY, *supra* note 144, at 12, 249. Of course, whether the Crown’s actions *actually* violated the natural law is up for debate. 1 WILLIAM BLACKSTONE, COMMENTARIES \*42–43 (“Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. *And herein it is that human laws have their greatest force and efficacy*; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former.” (emphasis added)).

<sup>156</sup> REILLY, *supra* note 144, at 248–49. *Novus ordo seclorum* appears on the reverse of the Great Seal of the United States. U.S. DEPT. OF STATE BUREAU OF PUB. AFFS., THE GREAT SEAL OF THE UNITED STATES 4, 6, 15 (2003). The motto is borrowed from a line of Virgil’s *Eclogue IV*, “*magnus ab integro seclorum nascitur ordo*” (“a great order of ages is born anew”). David M. Pollio, *Virgil and American Symbolism*, 87 CLASSICAL OUTLOOK 137, 137 (2010).

<sup>157</sup> 1 DAVID RAMSEY, HISTORY OF THE AMERICAN REVOLUTION 356 (Applewood Books photo. reprinted. 2009) (1789).

<sup>158</sup> REILLY, *supra* note 144, at 265, 274. The French sought a rationalist approach to destroy an order and create one anew, whereas the Americans sought to maintain tradition.



Still, many believe America is merely a contractarian society.<sup>159</sup> It has even been dubbed “the nation in which citizens can most fully engage in social contracting.”<sup>160</sup> This is not only a deficient description of the American covenant but goes a step further by limiting the scope of the American experiment. Viewing the founding through a liberal, social-contracting lens causes our worldview to form around the logic of contract. Social contracts dictate the bounds of our duties and responsibilities by design.<sup>161</sup> Troublingly, such contractual logic urges Americans to “fulfill the obligations [they] signed on to and” to believe “that only those duties . . . have moral force.”<sup>162</sup> Inversely, if Americans view society contractually, they will deny that they have inherent, unalienable duties to society, their neighbors, and to the environment.<sup>163</sup> This wasn’t the American vision.

President Abraham Lincoln understood America to be more than contractual. In fact, he knew America to be covenantal. Once an agnostic and religiously indifferent character,<sup>164</sup> Lincoln’s demeanor changed suddenly when boarding a passenger train in Springfield, Illinois bound for Washington D.C., where he would soon be inaugurated as the nation’s

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*Id.* at 280. This is the key distinction between the two. And in maintaining tradition, the Americans recognized their implied obligations to one another through covenant.

<sup>159</sup> See, e.g., Jaren Wilkerson, Comment, *Disappearing Together? American Federalism and Social Contract Theory*, 17 U. PA. J. CONST. L. 569, 571–72 (2014) (observing “our great nation’s unique position in the world of Social Contract Theory”).

<sup>160</sup> *Id.* at 571.

<sup>161</sup> *Social Contract*, ENCYC. BRITANNICA (Jan. 2, 2023), <https://www.britannica.com/topic/social-contract>.

<sup>162</sup> HAHN & MCGINLEY, *supra* note 8, at 11.

<sup>163</sup> Our duties to the environment are apparent in our disordered desire to exploit nature for our material advantage. See Deion A. Kathawa, *From Steam Engines to the Singularity: How the Technological Spirit of (Classical) Liberalism Remakes Man in Its Own Image*, JOSIAS (Mar. 19, 2021), <https://thejosias.com/2021/03/19/from-steam-engines-to-the-singularity-how-the-technological-spirit-of-classical-liberalism-remakes-man-in-its-own-image/>; see also POPE FRANCIS, LAUDATO SI’ 87–88 (2015), [https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si.html](https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html) (“Neglecting to monitor the harm done to nature and the environmental impact of our decisions is only the most striking sign of a disregard for the message contained in the structures of nature itself. When we fail to acknowledge as part of reality the worth of a poor person, a human embryo, a person with disabilities – to offer just a few examples – it becomes difficult to hear the cry of nature itself; everything is connected. Once the human being declares independence from reality and behaves with absolute dominion, the very foundations of our life begin to crumble, for ‘instead of carrying out his role as a cooperater with God in the work of creation, man sets himself up in place of God and thus ends up provoking a rebellion on the part of nature.’” (quoting POPE JOHN PAUL II, CENTESIMUS ANNUS para. 37 (1991))).

<sup>164</sup> Lincoln once asked his law partner, William Herndon, to “erase the word God from a speech which [Herndon] had written and read to [Lincoln] for criticism because [Herndon’s] language indicated a personal God, whereas [Lincoln] insisted no such personality ever existed.” 3 WILLIAM H. HERNDON & JESSE WILLIAM WEIK, *HERNDON’S LINCOLN* 446 (Chicago, Belford-Clarke Co. 1890).

sixteenth president.<sup>165</sup> While boarding, he received a religious gift from Abraham Kohn, a Jew, which sparked his eventual change in theology.<sup>166</sup> A short time later, President-elect Lincoln remarked in Trenton, New Jersey, that the men who struggled during the Revolutionary War, particularly at the Christmas Crossing, must have done so for “something more than common[,] . . . something even more than National Independence.”<sup>167</sup> This “something,” he continued, “held out a great promise to all the people of the world to all time to come.”<sup>168</sup> He then acknowledged that “this Union, the Constitution, and the liberties of the people” are to be “perpetuated in accordance with the original idea for which that struggle was made.”<sup>169</sup> This original idea, he concludes, makes Americans “[God’s] almost chosen people.”<sup>170</sup>

While in Pennsylvania—still en route to Washington D.C. for his inauguration—the President-elect again hinted towards the American covenant:

I have often inquired of myself, what great principle or idea it was that kept this Confederacy so long together. It was not the mere matter of the separation of the colonies from the mother land; but something in that Declaration giving liberty, not alone to the people of this country, but hope to the world for all future time.<sup>171</sup>

Lincoln, most confidently, hints that America is a covenantal society and suggests in his address that the Declaration of Independence is its key—it “is the heart of the American covenant.”<sup>172</sup>

Undoubtedly, critics will remind proponents of the American covenant that the Declaration of Independence’s drafters—Thomas Jefferson, in particular—derived their concept of equality from classical liberalism and Enlightenment thinking.<sup>173</sup> In other words, they will contend the Declaration of Independence roots its understanding of equality not in religious doctrine but in Enlightenment social contract theory, reminiscent of the French *Contrat Social*. Critics advance this as

<sup>165</sup> Meir Y. Soloveichik, *Lincoln’s Almost Chosen People*, FIRST THINGS (Feb. 2021), [www.firstthings.com/article/2021/02/lincolns-almost-chosen-people](http://www.firstthings.com/article/2021/02/lincolns-almost-chosen-people).

<sup>166</sup> *Id.* Kohn gave Lincoln a painting of an American flag, framed, with “[a]s I was with Moses, so I will be with thee; . . . the Lord thy God is with thee whithersoever thou goest” inscribed on its stripes. *Id.* (omission in original).

<sup>167</sup> Abraham Lincoln, Address to the New Jersey General Assembly at Trenton, New Jersey (Feb. 21, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 235, 236 (Roy P. Basler et al. eds., 1953).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Abraham Lincoln, Speech in Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861), in COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 167, at 240, 240.

<sup>172</sup> Soloveichik, *supra* note 165.

<sup>173</sup> *See id.* (pointing out the “dissonance” between the Declaration of Independence and its classically liberal themes).

a problem since Enlightenment thinking posits “a self-evident truth . . . about *the equality of the individual*, endowed with rights, such that government derives its legitimation from the consent of the governed,” whereas covenant polity hinges on “the binding together in one body politic of persons who assume unlimited responsibility to and for each other under God.”<sup>174</sup>

And they would be partly right. Enlightenment thinking does imply a deficiency of obligation—this is one of its key distinctions from covenant polity.<sup>175</sup> However, recall that John Locke, the primary source of social contractarianism relied upon by Jefferson and other founders,<sup>176</sup> recognized that all persons are not merely “bound to preserve” themselves, but “to preserve the rest of mankind.”<sup>177</sup> Locke’s social contractarianism recognizes, and affirms, the existence of mutual obligation<sup>178</sup>—the primary tenet distinguishing other forms of social contractarianism from covenant polity.<sup>179</sup> Lincoln, keen of the distinction, recognized that Americans’ “belief in the infinite value of the individual binds us together and *calls us to sacrifice* for one another.”<sup>180</sup> Obligation to others was a key theme of President John F. Kennedy’s inaugural address, too: “[A]sk not what your country can do for you—ask what you can do for your country.”<sup>181</sup>

In part, that is what makes America different, and is what makes it covenantal. Sure, the American founding was influenced by Enlightenment thinking.<sup>182</sup> However, while the French revolutionaries, proponents of Enlightenment thinking, and even “Locke spoke of the equal rights of man; . . . a shared belief in equality *obligates* Americans on behalf of those heretofore unrecognized as equal.”<sup>183</sup> At the founding, Americans recognized natural duty to fellow men, understood the role of the natural law in society, and properly perceived man to be an inherently social

<sup>174</sup> *Id.*

<sup>175</sup> See *supra* pp. 609–10; Samuel Moyn, *Rights vs. Duties*, BOS. REV. (May 16, 2016), <https://www.bostonreview.net/articles/samuel-moyn-rights-duties> (noting that Enlightenment thinkers asserted the supremacy of rights in response to the emphasis on obligations to “*escape* from the confinement of duty”). But see DECLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] (Fr. 1795) (acknowledging some obligation and duties).

<sup>176</sup> *American Constitutionalism*, ENCYC. BRITANNICA, [www.britannica.com/topic/political-philosophy/American-constitutionalism](http://www.britannica.com/topic/political-philosophy/American-constitutionalism) (Mar. 16, 2023) (“The founders of the United States were deeply influenced by republicanism, by Locke, and by the optimism of the European Enlightenment.”).

<sup>177</sup> LOCKE, *supra* note 80, at 198.

<sup>178</sup> André Munro, *State of Nature*, ENCYC. BRITANNICA (July 23, 2021), <https://www.britannica.com/topic/state-of-nature-political-theory>.

<sup>179</sup> See *supra* Part III and Section IV.A.

<sup>180</sup> Soloveichik, *supra* note 165 (emphasis added).

<sup>181</sup> President John F. Kennedy, Inaugural Address (Jan. 20, 1961).

<sup>182</sup> Soloveichik, *supra* note 165.

<sup>183</sup> *Id.*

creature. In short, the founders understood that a covenantal bond unites all Americans and would outlast any purported social contract. However, as time separates us from the founding era and as the continued rise of modernism and secularism unbinds us from objective morality, contemporary America finds its government regulated by the passions and reason regulated by the government.<sup>184</sup>

#### V. ON THE SECULARIZATION OF POLITICS AND THE SECULAR RELIGION

Karl Marx ominously warned that “[r]eligion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people.”<sup>185</sup> His words succinctly capture his perception of religion as a form of escapism. As a materialist, Marx perceived the world at face value.<sup>186</sup> Nothing more, nothing less. Therefore, to Marx, the aspirational value of the virtue of religion is merely “a humane escapism to a world of values and virtues that are, quite literally, too good for this world.”<sup>187</sup> Marx’s perception of the world is not dissimilar to popular perceptions held by many Americans today.<sup>188</sup> Of course, this is in large part due to the secularization of politics.<sup>189</sup> But even Locke detected—and warned of—the plights of a secularist regime. For this reason, he posited that those “who ‘deny the being of a God’” are “not at all to be tolerated” because “[p]romises, covenants, and oaths, which are the bounds of human society, can have no hold upon an atheist.”<sup>190</sup> To drill his point even further, Locke continued, “The taking away of God,

<sup>184</sup> See Jeffrey Rosen, *America Is Living James Madison’s Nightmare*, ATLANTIC (Sept. 12, 2018), [www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/](http://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/) (“The polarization of Congress, reflecting an electorate that has not been this divided since about the time of the Civil War, has led to ideological warfare between parties that directly channels the passions of their most extreme constituents and donors . . . . Today, passion has gotten the better of us.”).

<sup>185</sup> KARL MARX, *CRITIQUE OF HEGEL’S ‘PHILOSOPHY OF RIGHT’* 131 (Annette Jolin & Joseph O’Malley trans., Cambridge Univ. Press 1970) (1843).

<sup>186</sup> GLENN R. MARTIN, *PREVAILING WORLDVIEWS OF WESTERN SOCIETY SINCE 1500*, at 156, 160 (2006) (“Marx, agreeing with most contemporary intellectuals, dispensed with the idea of God, and . . . [c]onsequently, he adopted materialism . . . . [To Marx] [m]an is, as it were, matter in motion. . . . Marx . . . having been liberated from idealism, had become a thorough-going materialist.” (emphasis omitted)).

<sup>187</sup> HAHN & MCGINLEY, *supra* note 8, at 3.

<sup>188</sup> See Gregory A. Smith, *A Growing Share of Americans Say It’s Not Necessary to Believe in God to Be Moral*, PEW RSCH. CTR. (Oct. 16, 2017), [www.pewresearch.org/fact-tank/2017/10/16/a-growing-share-of-americans-say-its-not-necessary-to-believe-in-god-to-be-moral/](http://www.pewresearch.org/fact-tank/2017/10/16/a-growing-share-of-americans-say-its-not-necessary-to-believe-in-god-to-be-moral/) (“Most U.S. adults now say it is *not* necessary to believe in God to be moral and have good values . . . .”).

<sup>189</sup> See Shadi Hamid, *America Without God*, ATLANTIC (Mar. 10, 2021), [www.theatlantic.com/magazine/archive/2021/04/america-politics-religion/618072/](http://www.theatlantic.com/magazine/archive/2021/04/america-politics-religion/618072/).

<sup>190</sup> JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 56 (Huddersfield 1796) (1689); *cf.* *Omychund v. Barker* (1744) 26 Eng. Rep. 15, 19; 1 Atk. 22, 28 (“All that in point of nature and reason is necessary to qualify a person for searing [an oath], is the belief of a God, and an imprecation of the Divine Being upon him if he swears falsely.”).

though but *even in thought*, dissolves all.”<sup>191</sup> It seems clear that Locke would disapprove of the modern, secularist American experiment—one devoid of all religion.

American secularization is largely a twentieth and twenty-first century phenomenon.<sup>192</sup> But fleeting religiosity has not led to a corresponding uptick in rational political discourse. In fact, the opposite is true.<sup>193</sup> Recent studies conducted by the Pew Research Center “illustrate the increasingly stark disagreement between Democrats and Republicans on the economy, racial justice, climate change, law enforcement, international engagement and a long list of other issues.”<sup>194</sup> Without doubt, “Americans have rarely been as polarized as they are today.”<sup>195</sup> Illustrating this reality most painfully was Pew’s discovery that, in 2020, eighty-nine percent of Trump supporters indicated they would “[b]e very concerned about the country’s direction [if Biden was elected]” and [believed] Biden’s election would lead to lasting harm to the U.S.” while ninety percent of Biden supporters indicated they would “[b]e very concerned about the country’s direction [if Trump was elected]” and [believed] Trump’s election would lead to lasting harm to the U.S.”<sup>196</sup> It cannot be rebutted that as Christianity, in particular, and religion, in general, lose influence in America, ideological intensity and fragmentation spike.<sup>197</sup>

But what secularists fail to acknowledge is that a rise in secularism does not correlate with a decline in “belief.” Rather, secularism encourages the abandonment of religious belief in favor of political belief.<sup>198</sup> This is what political theorist Samuel Goldman refers to as “the law of the

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<sup>191</sup> LOCKE, *supra* note 190 (emphasis added).

<sup>192</sup> Hamid, *supra* note 189 (“From 1937 to 1998, church membership remained relatively constant, hovering at about 70 percent. Then something happened. Over the past two decades, that number has dropped to less than 50 percent, the sharpest recorded decline in American history.”).

<sup>193</sup> See *Public Highly Critical of State of Political Discourse in the U.S.*, PEW RSCH. CTR. (June 19, 2019), <https://www.pewresearch.org/politics/2019/06/19/public-highly-critical-of-state-of-political-discourse-in-the-u-s/> (“Large majorities say the tone and nature of political debate in the United States has become more negative in recent years—as well as less respectful, less fact-based and less substantive.”); Steven P. Millies, *Irrationality in Politics*, N.Y. TIMES: OPINION (Feb. 6, 2016), <https://www.nytimes.com/2016/02/07/opinion/sunday/irrationality-in-politics.html> (“We are past political division. We have embarked on a more visceral era in which emotion supersedes political discussion.”).

<sup>194</sup> Michael Dimock & Richard Wike, *America Is Exceptional in the Nature of Its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), [www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide](http://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (emphasis omitted).

<sup>197</sup> Hamid, *supra* note 189.

<sup>198</sup> See *id.*

conservation of religion.”<sup>199</sup> The law posits that “[i]n any given society, there is a relatively constant and finite supply of religious conviction. What varies is how and where it is expressed.”<sup>200</sup> Viewed from this perspective, it is evident that Americans have no deficiency of faith—just what was once religious is now political. Put aptly, the state of contemporary America’s vile political discourse “is what religion without religion looks like.”<sup>201</sup>

Perhaps this degradation was inevitable in America. Our civic religion is inclusive of a founding myth, its own prophets and rituals, and its own sacred works. America’s history and ornate trappings, coupled with man’s natural inclination to root all ideologies in faith (whether religious or secular), culminated in the adoption of Americanism as the national religion. But this religious Americanism is, in fact, a vice opposed to the virtue of religion.<sup>202</sup> There are two chief opposing vices to religion: superstition, which opposes religion by excess, and irreligion, which opposes religion by deficiency.<sup>203</sup> Americanism embodies both.<sup>204</sup> Per the law of the conservation of religion, religious conviction itself has not faltered—its distribution has merely changed.<sup>205</sup> Rather than rendering that which we owe to our Creator, Americans now render all to political actors and other important business and cultural leaders—to an overwhelmingly excessive degree.<sup>206</sup> In so doing, at least two divisive schools of secular Americanism have formed, each with clashing dogmas and doctrines of political faith.

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<sup>199</sup> *Id.* Goldman is a professor of political science at George Washington University and the Executive Director of the John L. Loeb Institute for Religious Freedom. *See Samuel Goldman*, GEO. WASH. UNIV. DEPT. POL. SCI., <https://politicalscience.columbian.gwu.edu/Samuel-goldman> (last visited Mar. 24, 2023).

<sup>200</sup> Hamid, *supra* note 189.

<sup>201</sup> *Id.*

<sup>202</sup> *See* 39 AQUINAS, *supra* note 6, pt. II-II, q. 81, art. 2, at 17 (Kevin D. O’Rourke trans., 1964) (“Clearly, then, religion is a virtue because it pays the debt of honour to God.”); HAHN & MCGINLEY, *supra* note 8, at 7 (“This virtue of justice rendered to Him who is Justice itself is what the Church through the ages has meant by ‘religion.’”).

<sup>203</sup> 40 AQUINAS, *supra* note 6, pt. II-II, q. 92, art. 1, at 5 (Thomas Franklin O’Meara & Michael John Duffy trans., 1968); *id.* q. 97, art. 3, at 95, 97.

<sup>204</sup> *See* Hamid, *supra* note 189 (discussing the steep decline in American religious practice and the concomitant excessive belief in politics and political figures as a source of salvation).

<sup>205</sup> *See id.* (“On the left, the ‘woke’ take religious notions such as original sin, atonement, ritual, and excommunication and repurpose them for secular ends. . . . On the right, adherents of a Trump-centric ethno-nationalism still drape themselves in some of the trappings of organized religion. . . .”).

<sup>206</sup> *See id.* (discussing examples of Americans offering religious-like reverence to political figures). Thus, Americans simultaneously demonstrate an excess of religious devotion to temporal matters (akin to the superstitious species of idolatry) and a deficiency of devotion to the Creator Himself (akin to irreligion). *See* 40 AQUINAS, *supra* note 6, pt. II-II, q. 92, art. 2, at 7, 9 (Thomas Franklin O’Meara & Michael John Duffy trans., 1968) (accounting the various species of superstition).

For support, consider the woke left's adoption of religious dogmas—"such as original sin, atonement, . . . and excommunication"—to secular ends, and the Trumpian right's perverted adornments, drawn from institutional religion, and appeals to conspiracy and religious narrative "of earthly corruption redeemed by a godlike force," which is ever present amongst QAnon's members.<sup>207</sup> As members of both the right and left abandon religious faith (even unwittingly) and opt instead to exercise political faith, each respective denomination of the American secular religion—rooted in worldly affairs with no concept of final justice—seeks to embody its values on earth here and now, believing that a wholly just world can be attained.<sup>208</sup> This causes each rival faction to unleash its mutual dissatisfaction on its fellow citizens, now considered "deplorables or enemies of the state" by the opposing faction.<sup>209</sup> The American social fabric is torn—the inevitable result of political secularization.<sup>210</sup>

Although the law changes at a painfully slow pace, it is unfortunately not immune to the lingering effects of political secularization. Aside from the Church and the family, the law is arguably the most essential social institution.<sup>211</sup> This is so partly because legal authority is requisite for communities to "overcome coordination problems and effectively pursue the common good."<sup>212</sup> Without it, people would struggle to "pursue human

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<sup>207</sup> Hamid, *supra* note 189.

<sup>208</sup> *See id.*

<sup>209</sup> *Id.* (internal quotation marks omitted).

<sup>210</sup> *See* Blake Smith, *Liberalism for Losers: Carl Schmitt's "The Tyranny of Values"*, AM. AFFS. J., Spring 2021, at 222, <https://americanaffairsjournal.org/2021/02/liberalism-for-losers-carl-schmitts-the-tyranny-of-values/> ("It is impossible, therefore, to have a society in which different values can be reconciled through a spirit of tolerant pluralism. The psychological act of positing a value for oneself is inseparable from a desire to realize that value in the world."); *cf.* Antony Barone Kolenc, *Religion Lessons from Europe: Intolerant Secularism, Pluralistic Neutrality, and the U.S. Supreme Court*, 30 PACE INT'L L. REV. 43, 43, 46, 72–73, 117 (2017) (observing that secularism results in "an increasingly militant separation of religious ideals from the public life, leading ultimately to a repressive society that has no room in its government for religious citizens").

<sup>211</sup> *See* 28 AQUINAS, *supra* note 6, pt. I-II, q. 90, art. 2, at 9, 11 (Thomas Gilby trans., 1966) ("As their beginning lies in reason, so also one phase of its activity is the start of what follows; this first and foremost is where law comes in. Now the deeds we perform, these being the concern of the practical reason, all originate from our last end. We have shown that the last end of human living is happiness or well-being. Consequently law is engaged above all with the plan of things for human happiness. . . . [I]t must needs be that law properly speaking deals with this subordination to a common happiness."); *id.* q. 95, art. 1, at 101 ("Consequently we see the need for men's virtue and peace that laws should be established . . .").

<sup>212</sup> LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 249 (2019).

flourishing.”<sup>213</sup> This is so much so that only few would argue society could continue absent law.<sup>214</sup>

Expectedly, albeit tragically, political secularization lends itself to jurisprudential secularization. Justice Oliver Wendell Holmes, Jr. himself posited that society would gain “if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.”<sup>215</sup> He believed that “by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.”<sup>216</sup> His advocacy for the schism of law and morality raised numerous eyebrows in 1897.<sup>217</sup> But now Justice Holmes’ remarks are, in many ways, the status quo of American jurisprudence.<sup>218</sup> Jurisprudence stripped of morality has resulted in countless holdings divorced from the natural law that shock the moral conscience.<sup>219</sup> In the twenty-first century, judicial impartiality is

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<sup>213</sup> *Id.*

<sup>214</sup> See Daniel Greenfield, *A Lawless Society*, DANIEL GREENFIELD (June 23, 2012), <https://www.danielgreenfield.org/2012/06/lawless-society.html> (“A lawless society is a depressing place to live because it’s a place completely without law.”); Lia Eustachewich, *How the Seattle CHOP Zone Went from Socialist Summer Camp to Deadly Disaster*, N.Y. POST (July 1, 2020, 6:39 PM), [www.nypost.com/2020/07/01/how-seattle-chop-went-from-socialist-summer-camp-to-deadly-disaster/](http://www.nypost.com/2020/07/01/how-seattle-chop-went-from-socialist-summer-camp-to-deadly-disaster/) (“[T]he leaderless six-block zone . . . quickly spiraled into violence and chaos, culminating in a pair of shootings that killed two black teens.”); Nick Chater, *Could We Live in a World Without Rules?*, BBC FUTURE (Feb. 21, 2020), [www.bbc.com/future/article/20200220-could-we-live-in-a-world-without-rules](http://www.bbc.com/future/article/20200220-could-we-live-in-a-world-without-rules) (“The urge to overturn stifling, unjust or simply downright pointless rules is entirely justified. But without some rules—and some tendency for us to stick to them—society would slide rapidly into pandemonium.”).

<sup>215</sup> Oliver Wendell Holmes, Jr., Address, *The Path of the Law*, 10 HARV. L. REV. 457, 464, 457 n.1 (1897) (noting Justice Holmes delivered this address as a justice “of the Supreme Judicial Court of Massachusetts[] at the dedication of the new hall of the Boston University School of Law[] on January 8, 1897”).

<sup>216</sup> *Id.*

<sup>217</sup> *History of Boston University School of Law*, BOS. UNIV. SCH. L., <https://www.bu.edu/law/about/history-of-the-school/> (last visited Apr. 13, 2023) (“[Justice Holmes’s] speech shocked many with his view that the law was just a business, predicting what the next court will decide in the next case. He suggested that a contract was just an option either to perform or to pay damages, and noted that a ‘bad man’ does not care about ethics or lofty ideals – rather, the ‘bad man’ simply wants to know what will keep him out of jail or allow him to avoid paying damages.”).

<sup>218</sup> See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 1* (2000) (asserting that Holmes “sounded the principal theme of twentieth-century jurisprudence” and noting “the extent to which post-Holmes visions of law differ from pre-Holmes visions”).

<sup>219</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403–04 (1857) (holding that “a negro, whose ancestors were imported into [the U.S.], and sold as slaves” could not be an American citizen and therefore lacked standing to sue in federal court); *The Civil Rights Cases*, 109 U.S. 3, 11, 24–25 (1883) (holding that the Civil Rights Act of 1875 was unconstitutional because the Thirteenth and Fourteenth Amendments only allow Congress to prevent governmental racial discrimination); *Plessy v. Ferguson*, 163 U.S. 537, 547–48,



synonymous with amorality.<sup>220</sup> Somewhere amidst recent centuries the law suffered a fractured inheritance.<sup>221</sup>

But amoral law is fundamentally unjust and un-American. “[J]urisprudence is a subaltern science, that is, a science ultimately deriving its principles from other sciences and ordained to a good distinct from and above itself.”<sup>222</sup> The founders, well-versed in natural law, understood this.<sup>223</sup> They knew that law originates not from the will of the governed but, as noted above, from “the great Legislator of the universe.”<sup>224</sup> They sought to institute a society that captures this eternal reality. Therefore, reason is paramount to the Republic’s operation.<sup>225</sup> Reason, alone, “ought to control and regulate the Government. The passions ought to be controlled and regulated by the Government.”<sup>226</sup> As Attorney General Bill Barr put it, “No society can exist without some

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551 (1896) (holding that separate but equal segregation laws were not violative of the Fourteenth Amendment); *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927) (Holmes, J.) (upholding a Virginia statute authorizing the sterilization of “feeble minded” persons under due process and equal protections grounds, observing the law was beneficial as it prevented the State from “being swamped with incompetence” and stating that “[t]hree generations of imbeciles are enough”); *Korematsu v. United States*, 323 U.S. 214, 217–18, 225 (1944) (holding that neither the president nor Congress violated their war powers by forcibly removing Japanese Americans to relocation camps as a matter of national security).

<sup>220</sup> See Pat Smith, *Originalism and the Tyranny of Values*, IUS & IUSTITIUM (Mar. 30, 2021), <https://iustitium.com/originalism-and-the-tyranny-of-values/>, for an excellent take on how judicial impartiality is not impartial at all, but rather succumbs to the nihilism and positivism of value logic.

<sup>221</sup> See Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>. In hopes of remedying this jurisprudential moral deficiency, Harvard Law professor Adrian Vermeule advocates for “a substantive moral constitutionalism that, although not enslaved to the original meaning of the Constitution, is also liberated from the left-liberals’ overarching sacramental narrative, the relentless expansion of individualistic autonomy.” *Id.*

<sup>222</sup> Aníbal Sabater, *Dante’s Lawyers from Hell*, IUS & IUSTITIUM, (Apr. 9, 2021), <https://iustitium.com/dantes-lawyers-from-hell/>.

<sup>223</sup> See Kody W. Cooper, *How the Founders’ Natural Law Theory Illuminates the Original Meaning of Free Exercise*, 22 FEDERALIST SOC’Y REV. 42, 45–46 (2021) (“[The Founders] all expressed principles consonant with classical Christian natural law theory, namely, that natural rights are tethered to the moral law and teleologically oriented toward genuine human flourishing. . . . The Founders understood positive law to be grounded in the natural moral law, which included natural duties to God.”).

<sup>224</sup> ADAMS, *supra* note 154; see *supra* notes 149–155 and accompanying text.

<sup>225</sup> See William P. Barr, Att’y Gen., U.S. Dept. of Just., Remarks to the Law School and the De Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019), [www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics](http://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics) (“[The Founders] understood that individuals, while having the potential for great good, also had the capacity for great evil. Men are subject to powerful passions and appetites, and, if unrestrained, are capable of ruthlessly riding roughshod over their neighbors and the community at large. . . . [W]e can, through reason, experience, discern standards of right and wrong that exist independent of human will.”).

<sup>226</sup> THE FEDERALIST NO. 49, at 249 (Alexander Hamilton) (Dover Thrift ed. 2014).

means for restraining individual rapacity.”<sup>227</sup> For these reasons, jurisprudence requires not just utilization of “word[s] of moral significance”<sup>228</sup> but strict observance of morality.

#### VI. ON THE NEED FOR A RETURN TO COVENANT

Remarking on the collapse of Russia, Nobel and Templeton Prize laureate Aleksandr Solzhenitsyn remarked that “[m]en have forgotten God; that’s why all this has happened.”<sup>229</sup> He understood that a society without God is one doomed to crumble, and he lived it. This is so because a society without God is a society that worships self at the expense of all others.<sup>230</sup> America is not immune to this fate. Nor was Rome.<sup>231</sup> America is in a unique position, however, as a “covenantal nation.”<sup>232</sup> For America to be saved from its secular spiral, it must return to covenant.

To do so, America should follow the examples set by Hungary and Poland—two covenantal polities. Hungary’s dedication to covenant polity is publicly displayed in the Preamble to its Constitution:

Our Fundamental Law shall be the basis of our legal order: *it shall be a covenant among Hungarians past, present and future*; a living framework which expresses the nation’s will and the form in which we want to live.<sup>233</sup>

Likewise, Poland’s dedication to covenant polity is publicly displayed in the Preamble to its Constitution, albeit not as explicitly as in Hungary’s Preamble:

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<sup>227</sup> Barr, *supra* note 225.

<sup>228</sup> Holmes, *supra* note 215.

<sup>229</sup> Aleksandr Solzhenitsyn, Templeton Prize Acceptance Address (May 10, 1983), [www.templetonprize.org/laureate-sub/solzhenitsyn-acceptance-speech](http://www.templetonprize.org/laureate-sub/solzhenitsyn-acceptance-speech).

<sup>230</sup> Letter from Alexander Hamilton to Robert Morris, *supra* note 137 (“Here we find the general disease which infects all our constitutions, an excess of popularity. . . . The inquiry constantly is what will *please* not what will *benefit* the people. In such a government there can be nothing but temporary expedient, fickleness and folly.”).

<sup>231</sup> Saint Jerome offered the following reflection during the sack of Rome in 410:

Who would believe that Rome, built up by the conquest of the whole world, had collapsed, that the mother of nations had become also their tomb; that the shores of the whole East, of Egypt, of Africa, which once belonged to the imperial city, were filled with the hosts of her men-servants and maid-servants, that we should every day be receiving in this holy Bethlehem men and women who once were noble and abounding in every kind of wealth but are now reduced to poverty? . . . Who would have believed that mighty Rome, with its careless security of wealth, would be reduced to such extremities as to need shelter, food, and clothing?

ST. JEROME, *Preface to COMMENTARY ON EZEKIEL BOOK III*, reprinted in 6 THE PRINCIPAL WORKS OF ST. JEROME 500, 500 (Philip Schaff & Henry Wave eds., W.H. Fremantle trans., Wm. B. Eerdmans Pub’g Co. 1954) (c. 410 A.D.).

<sup>232</sup> Soloveichik, *supra* note 165.

<sup>233</sup> MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmb. (emphasis added).

Having regard for the existence and future of our Homeland, . . . We, the Polish Nation—all citizens of the Republic, Both those who believe in God as the source of truth, justice, good, and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, *Equal in rights and obligations towards the common good* . . . call upon those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, *the obligation of solidarity with others*, and respect for these principles as the unshakeable foundation of the Republic of Poland.<sup>234</sup>

Most telling is Poland’s emphasis of mutual obligation to one another throughout its Constitution<sup>235</sup>—a key tenet of covenant polity.

Both republics are strict adherents to the foundational concept of mutual obligation. For evidence, look no further than each republic’s expansive social safety nets<sup>236</sup> (typically considered a left-wing policy initiative) and strict socially conservative policies respecting life, marriage, and the nuclear family unit<sup>237</sup> (typically considered right-wing policy initiatives<sup>238</sup>). This fusion of seemingly contradictory policy goals is

<sup>234</sup> KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, pmbi. (Pol.) (emphasis added).

<sup>235</sup> *Id.* arts. 82–86.

<sup>236</sup> *See, e.g.*, KODEKS PRACY [LABOR CODE], USTAWA Z DNIA 26 CZERWCA 1974 R., DZ. U. 1974 NO 24 POZ. 141 art. 92, 94 (Pol.) (imposing an absolute legal obligation of social support on employers for their employees); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY arts. 65–68, 70 (establishing the rights of citizens to labor, health care, education, and social support). Poland is also known for its successful social housing programs and policies, “called and usually referred to as TBS (‘towarzystwo budownictwa społecznego’) – a society for social housing involving special housing companies and local governments.” József Hegedüs, *Social Safety Nets, the Informal Economy and Housing Poverty – Experiences in Transitional Countries*, 5 EUR. J. HOMELESSNESS 15, 20 (2011).

<sup>237</sup> *See, e.g.*, Charlotte Pence Bond, *Hungarian Parliament Passes Law Banning Showing LGBT Content to Minors*, DAILY WIRE (June 16, 2021), [www.dailywire.com/news/hungarian-parliament-passes-law-banning-showing-lgbt-content-to-minors/](http://www.dailywire.com/news/hungarian-parliament-passes-law-banning-showing-lgbt-content-to-minors/) (explaining how the ruling conservative party passed legislation protecting minors from “LGBT and transgender content” and noting how the opposition party did not even attend the vote); Benjamin Novak, *Hungary Adopts Child Sex Abuse Law That Also Targets L.G.B.T. Community*, N.Y. TIMES (June 15, 2021), [www.nytimes.com/2021/06/15/world/europe/hungary-child-sex-lgbtq.html](http://www.nytimes.com/2021/06/15/world/europe/hungary-child-sex-lgbtq.html) (“Legislation increasing sentences for pedophiles was changed to include restrictions on portrayals of homosexuality and transgender people that young people might see.”); Antonia Mortensen, *Poland Puts New Restrictions on Abortion into Effect, Resulting in a Near-Total Ban on Terminations*, CNN (Jan. 28, 2021, 4:42 PM), [www.cnn.com/2021/01/28/europe/poland-abortion-restrictions-law-intl-hnk/index.html](http://www.cnn.com/2021/01/28/europe/poland-abortion-restrictions-law-intl-hnk/index.html) (showing how the Polish government recently banned almost all abortions); MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. 66 (“In the Republic of Hungary mothers shall receive support and protection before and after the birth of the child . . . .”); KONSTYTUCJI RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, arts. 38, 47–48, 50, 53, 72 (Pol.).

<sup>238</sup> *See, e.g.*, JEFFREY BELL, THE CASE FOR POLARIZED POLITICS: WHY AMERICA NEEDS

accomplished through each republics' acknowledgement of the nature of man and respect for mutual obligation.<sup>239</sup>

The Polish economy is equally fascinating and influenced by principles of covenant polity. The Polish economic system seeks to foster social solidarity and fair distribution of wealth and employment.<sup>240</sup> To that end, Poles “proclaim[] not only the duty to pay fair wages but also the need to introduce various forms of co-ownership of the instruments of labor, workers’ participation in the management of the workplace or in the profits of the company.”<sup>241</sup>

Whatever both republics are doing is working. Reports compiled by the Organisation for Economic Co-operation and Development (OECD) demonstrate this. Per the OECD, a mere eight percent of Hungary’s population lives in relative income poverty and just twenty-two percent of poor households report spending more than forty percent of their income on housing.<sup>242</sup> Poland produced similar numbers, with only ten percent of its population living in relative income poverty and thirteen percent of poor households spending more than forty percent of their income on housing.<sup>243</sup> But, per the OECD, the percentage of the United States’ population living in relative income poverty is twice as much as in Hungary at eighteen percent, and the percentage of poor American households spending more than forty percent of their income on housing costs is more than double that in Poland at twenty-nine percent.<sup>244</sup> Even more, the OECD ranks American household debt, a subcategory under its resources for well-being survey, as “middle-performing,” but it ranks both Polish and Hungarian household debt as “top-performing.”<sup>245</sup>

In recognizing their covenantal structures of government, the Polish and Hungarian republics minimize the role of individualism ever

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SOCIAL CONSERVATISM 8, 9, 11–12 (2012) (noting that social liberals, who base rights in human enlightenment, advocate for legalized abortion and the redefinition of marriage).

<sup>239</sup> Other scholars attribute this “historically novel alliance of two different streams of nonconformist thinking” to Poland and Hungary’s unique role as post-Soviet nations with religious homogeneity. Kalman Rupp, *Democracy, Market and Social Safety Nets: Implications for Postcommunist Eastern Europe*, 12 J. PUB. POL’Y 37, 53 (1992). But without continued recognition and reinforcement of mutual obligation to one another, both republics would have certainly strayed away from such economic policies during their transition to free market economies post-Soviet occupation.

<sup>240</sup> KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, arts. 20–24 (Pol.).

<sup>241</sup> Mikołaj Ryłski, *Legal Regulation of the Obligation of Employers to Provide Social Support to Employees in the Polish Legal System*, 30 EMP. RESPS. & RTS. J. 279, 280 (2018).

<sup>242</sup> ORG. FOR ECON. CO-OPERATION & DEV., HOW’S LIFE IN HUNGARY? 2 (2020).

<sup>243</sup> ORG. FOR ECON. CO-OPERATION & DEV., HOW’S LIFE IN POLAND? 2 (2020).

<sup>244</sup> ORG. FOR ECON. CO-OPERATION & DEV., HOW’S LIFE IN THE UNITED STATES? 2 (2020).

<sup>245</sup> *Id.* at 1; ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 243, at 1; ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 242, at 1.

prevalent in contemporary America.<sup>246</sup> This is because covenantal polity roots its law and policy in truth, ordered liberty, and obligation rather than blind partisanship, license, and pure concern for self. In so doing, the republics effectively support their citizens, and their citizens support each other. America is owed this future (and present). But it must embrace its covenantal duties, as both Hungary and Poland have, to attain it.

#### CONCLUSION

Religion, properly understood, is a virtue. For a society to survive it must encourage and embrace virtue. The French revolutionaries went too far by seeking to overthrow the Cross along with the Crown. They incentivized viciousness and licentiousness, embraced terror, and, as a result, their society collapsed in a matter of years.<sup>247</sup> The so-called “enlightened” French were actually benighted. The American founders, on the other hand, sought to retain the Cross while overthrowing the Crown, so fundamental truths remain a part of the country’s charter and national character.<sup>248</sup> Indeed, the founders understood the importance of *ordered* liberty.<sup>249</sup> Yet, contemporary America’s increased devotion to secular “truths” has driven it away from natural truth and toward licentiousness. As America strays further and further from objective truth and embraces license over ordered liberty, it approaches collapse. To avoid collapse, Americans must desire—and implement—a return to covenant.

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<sup>246</sup> See *supra* notes 233–235 and accompanying text.

<sup>247</sup> TIMOTHY TACKETT, *THE COMING OF THE TERROR IN THE FRENCH REVOLUTION* 1, 3, 7, 342, 344–45, 347, 349 (2015) (examining how the leaders of the French Revolution “became terrorists” and embraced self-destructive violence).

<sup>248</sup> Indeed, “ordered liberty” appears in at least 131 Supreme Court decisions. Luke Milligan, *U.S. Supreme Court Cases Using Term “Ordered Liberty”* (2023) (unpublished manuscript) (on file with author). In *Dobbs v. Jackson Women’s Health Organization*, the Court explained that “[t]he term ‘liberty’ alone provides little guidance,” but “history and tradition . . . map the essential components of the Nation’s concept of *ordered* liberty[.]” 142 S. Ct. 2228, 2247–48 (2022) (emphasis added).

<sup>249</sup> “[O]f all the loose terms in the world, liberty is the most indefinite. It is not solitary, unconnected, individual, selfish liberty, as if every man was to regulate the whole of his conduct by his own will. The liberty I mean is *social* freedom. It is that state of things in which liberty is secured by the equality of restraint. . . . This kind of liberty is, indeed, but another name for justice; ascertained by wise laws, and secured by well-constructed institutions.” Letter from Edward Burke to Charles-Jean-François Depont (Nov. 1789), in *FURTHER REFLECTIONS ON THE FRENCH REVOLUTION* 3, 7 (Daniel E. Ritchie ed., 1992).

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