

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

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## 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 prtg. 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 prtg. 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

<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> Anibal 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.

*Robert E. Ranney\**

<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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