FEDERAL COURTS — JUDICIAL POWER — FIFTH CIRCUIT HOLDS THAT COURTS CANNOT COMPEL USE OF PREFERRED PRONOUNS. — *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020).

Debates about gender identity have taken on increasing significance, affecting universities and schools, businesses and hospitals, media and entertainment. Inevitably, these debates have also found their way into courtrooms. Recently, in *United States v. Varner*,[1] the Fifth Circuit addressed whether federal judges have power to compel the use of preferred pronouns in court. In part from its reading of statutory law, *Varner* concluded that a federal court cannot compel a litigant to use another party's preferred pronouns. Although *Varner* did not explicitly invoke constitutional avoidance, its holding averted constitutional problems involving the free exercise of religion and freedom of speech.

In 2012, the federal prisoner in *Varner*[2] received a fifteen-year prison sentence after pleading guilty to a child pornography charge.[3] While completing this sentence, the *Varner* defendant wrote to the district court, asking it to change the name on the judgment of conviction from "Norman Keith Varner" to "Kathrine Nicole Jett" because the defendant, who was born male, now identified as a woman.[4]

The district court took this letter as a motion to amend the judgment of conviction and proceeded to deny the motion.[5] The court cited precedent from the Fifth,[6] Tenth,[7] and Eleventh[8] Circuits to conclude that a "new, preferred name" could not justify "amend[ing] the previously entered Judgment."[9] Inmates, the court explained, have no constitutional right to update prison records with a new name, so the name change document attached to the motion made no difference.[10] The district court also questioned the validity of the name change order, which a Kentucky state court had granted: state law required in-state residency for name changes,[11] a condition the defendant apparently had

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[1] 948 F.3d 250 (5th Cir. 2020).

[2] The prisoner, who was convicted under the name of Norman Keith Varner, now goes by Kathrine Nicole Jett. *Id.* at 252. The *Varner* court used the name from the conviction proceedings, *id.*, whereas the *Harvard Law Review*'s presumption is to use the currently preferred name. To navigate the discrepancy, this comment avoids using either.

[3] *See id.* at 252.

[4] *Id.*

[5] *Id.* at 253.

[6] United States v. Jordan, 162 F.3d 93 (5th Cir. 1998) (per curiam).

[7] United States v. White, 490 F. App'x 979 (10th Cir. 2012).

[8] United States v. Baker, 415 F.3d 1273 (11th Cir. 2005) (per curiam).

[9] Order at 2, *quoted in Varner*, 948 F.3d at 253 (order sealed).

[10] *See Varner*, 948 F.3d at 252–53.

[11] *See* KY. REV. STAT. ANN. § 401.010 (Baldwin, Westlaw through 2020 Reg. Sess. & Nov. 3, 2020 election).

not met.[12] Regardless, the district court denied the motion on the basis that a new name does not warrant amending an old judgment.[13]

On appeal, the Fifth Circuit vacated the district court's ruling.[14] Writing for the panel, Judge Duncan[15] held that the district court had no jurisdiction even to entertain the defendant's motion to amend.[16] The panel enumerated "the recognized categories of postconviction motions," concluding that none authorized jurisdiction over such a motion to amend a judgment.[17] Rule 35 of the Federal Rules of Criminal Procedure (FRCP) — which confers jurisdiction to correct a sentence — did not apply: the motion was made more than two weeks after sentencing[18] and was not made by the government.[19] FRCP 36, authorizing correction of clerical errors, failed because "[a] name change obtained six years after entry of judgment" does not count as a clerical error.[20] After considering and rejecting two other statutes,[21] the *Varner* court lastly ruled out 28 U.S.C. § 2255 because the motion did not contest the validity of the sentence or conviction.[22] Having eliminated any statutory basis that could justify ruling on such a motion, the panel held that the district court lacked jurisdiction to entertain it.

The panel also denied a separate motion that the defendant had submitted directly to the Fifth Circuit together with the appeal.[23] This motion sought the use of feminine pronouns to describe the defendant, who was "'biological[ly]' . . . male" but identified as a woman.[24] The panel interpreted this motion as aiming "at a minimum" to compel the government and district court to use feminine instead of masculine pronouns.[25] The court proceeded to deny the motion, finding it had no authority to "require litigants, judges, court personnel, or anyone else to refer to . . . litigants with pronouns matching their subjective gender

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[12] *Varner*, 948 F.3d at 252–53 (citing Order at 2–3). The defendant was incarcerated in Pennsylvania when the Kentucky court granted the name change order. Letter Brief of U.S. Department of Justice at 2, *Varner*, 948 F.3d 250 (No. 19-40016).

[13] *Varner*, 948 F.3d at 253.

[14] *Id.* at 252.

[15] Judge Duncan was joined by Judge Smith.

[16] *Varner*, 948 F.3d at 254.

[17] *Id.* at 253; *see id.* at 253–54.

[18] *Id.* at 253–54; *see* FED. R. CRIM. P. 35(a).

[19] *Varner*, 948 F.3d at 253–54; *see* FED. R. CRIM. P. 35(b)(1)–(2).

[20] *Varner*, 948 F.3d at 254. The rule was "meant only to correct mindless and mechanistic mistakes." *Id.* (quoting United States v. Ramirez-Gonzalez, 840 F.3d 240, 247 (5th Cir. 2016) (internal quotation marks omitted)).

[21] *See* 18 U.S.C. §§ 3582(c)(2), 3742.

[22] *Varner*, 948 F.3d at 254.

[23] *See id.* at 252, 254, 258.

[24] *Id.* at 255 (alteration in original) (quoting Appellent's [sic] Reply to Government's Response at 2, *Varner*, 948 F.3d 250 (No. 19-40016)); *see id.* at 254–55.

[25] *Id.* at 254.

identity" rather than their biological sex.[26] In other cases where a party who was born male identified as a woman, courts had sometimes opted to use the party's preferred pronouns.[27] But no court, the panel found, had done so "as a matter of binding precedent" or had "purported to obligate litigants or others to follow the practice."[28] Nor, the court held, did any federal statute justify imposing such a requirement.[29]

The panel also explained that judicial impartiality prevented it from compelling the use of the defendant's preferred pronouns.[30] Citing federal judicial ethics requirements,[31] the *Varner* panel emphasized the need for courts to avoid "bias for or against either party to [a] proceeding."[32] Present-day courts, the panel explained, often have to decide cases involving "hotly-debated issues of sex and gender identity."[33] In such cases, the court reasoned, compelling one party to use another party's preferred pronouns could indicate approval for the latter party's legal position.[34] For the court, this risk was particularly acute in litigation — such as disputes over school bathroom policies — where the legal outcome hinged on determining "whether [the litigant] is a boy."[35]

Finally, the court cited administrability concerns in holding that it could not compel the use of preferred pronouns.[36] The court explained that using a litigant's preferred pronouns might not be as simple as substituting *him* for *her* or *her* for *him*.[37] The court included a university's pronoun usage guide[38] and quoted a *Harvard Law Review* article[39] to illustrate that preferred pronouns may include "neologisms" that range

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[26] *Id.* at 254–55.

[27] *Id.* at 255 (comparing Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) ("Farmer prefers the female pronoun and we shall respect her preference . . . ."), with Gibson v. Collier, 920 F.3d 212, 217 (5th Cir. 2019) ("He has lived as a female since the age of 15 and calls himself Vanessa Lynn Gibson.")).

[28] *Id.* at 255.

[29] *Id.* at 255–56. Congress, the panel argued, knew exactly how to single out gender identity, as specific legislation had previously done so. *Id.* (citing, among other statutes, 18 U.S.C. § 249(a)(2)(A)). But no statute required courts or litigants "to use pronouns according to a litigant's gender identity." *Id.* at 255.

[30] *Id.* at 256.

[31] CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2(A), *in* 175 F.R.D. 363, 365 (1998).

[32] *Varner*, 948 F.3d at 256 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002) (emphasis omitted)).

[33] *Id.*

[34] *See id.*

[35] *Id.* (quoting Adams *ex rel.* Kasper v. Sch. Bd., 318 F. Supp. 3d 1293, 1296 (M.D. Fla. 2018)).

[36] *See id.* at 256–58.

[37] *Id.* at 256.

[38] The university's pronoun usage guide included the following examples: *(f)ae*, *(f)aer*, *(f)aers*; *ey*, *em*, *eirs*; *ve*, *ver*, *vis*; and *xe*, *xem*, *xyrs*. *Gender Pronouns*, UNIV. OF WIS.–MILWAUKEE LGBTQ+ RES. CTR., https://uwm.edu/lgbtrc/support/gender-pronouns [https://perma.cc/PRU3-BZLR].

[39] Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 957 (2019) (giving the examples of *ze* and *hir*).

beyond the traditional *he* and *she*.[40] The court expressed concern that unfamiliar pronouns would impede communication in court, and worried about the lines courts would have to draw in policing acceptable pronoun usage.[41] Furthermore, the panel noted, those who failed to comply with an order to use preferred pronouns would risk being held in contempt of court.[42] The panel thus "decline[d] to enlist the federal judiciary" in compelling the use of preferred pronouns.[43]

Judge Dennis dissented.[44] He would have held that the district court had jurisdiction to entertain the motion to amend.[45] The dissent argued that FRCP 36, which "allows the court, at any time, to correct 'a clerical error in a judgment,'" provided jurisdiction.[46] For the dissent, power to correct a clerical error necessarily entailed jurisdiction to determine whether there was any clerical error to correct.[47] The dissent agreed with the panel that a subsequent name change did not count as a clerical error under FRCP 36.[48] But this meant that the district court correctly denied the motion to amend — not that the district court lacked jurisdiction to entertain the motion in the first place.[49] Thus, the dissent would have affirmed the district court's denial of the motion.[50]

The dissent next addressed the defendant's motion for the use of feminine pronouns, taking issue with the court's approach.[51] On the majority's interpretation, this motion had aimed to compel the district court and the government's attorneys to use the defendant's preferred pronouns.[52] By contrast, the dissent read the motion more narrowly.[53] On the dissent's reading, this motion, filed in the court of appeals, requested only that the panel itself use the defendant's preferred pronouns.[54] If he had found it necessary to use pronouns in deciding the appeal, Judge Dennis would have granted the sought-after relief: he would have used feminine pronouns in reference to the defendant "though no law compels granting or denying such a request."[55]

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40 *Varner*, 948 F.3d at 257.
41 *Id.* at 257–58.
42 *See id.* at 257.
43 *Id.* at 258.
44 *Id.* at 259 (Dennis, J., dissenting)
45 *Id.*
46 *Id.* at 258 (quoting FED. R. CRIM. P. 36); *see id.* at 258–59.
47 *Id.* at 259.
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.* at 259–61.
52 *Id.* at 259.
53 *See id.* at 259–60.
54 *Id.*
55 *Id.* at 260.

The *Varner* court based its holding in part on statutory silence: courts have no authority to compel the use of preferred pronouns because no federal statute gives them that authority. *Varner* did not explicitly invoke the canon of constitutional avoidance, but constitutional avoidance can help explain *Varner*'s holding. By ruling out any statutory basis for compelling preferred pronoun use, even without comprehensive statutory analysis, *Varner* averted potential First Amendment problems. Many people object to referring to others by preferred, rather than biological, pronouns — an objection that can stem from religious[56] or nonreligious[57] concerns. Thus, requiring a litigant to use another party's preferred pronouns could raise free exercise and compelled speech problems — problems that *Varner*'s holding avoids.

Varner used statutory construction to justify holding that federal courts lack power to compel preferred pronoun use. "[N]o federal statute or rule," the panel wrote, "requir[ed] courts or other parties to judicial proceedings to use pronouns according to a litigant's gender identity."[58] Although Congress knew how to legislate about gender identity, it had not done so here.[59] Because "Congress ha[d] said nothing" to require using preferred pronouns, the panel concluded that federal courts lack power to compel preferred pronoun usage.[60]

In arriving at this conclusion, the court kept its discussion of statutory law brief and did not attempt a comprehensive analysis of potentially relevant statutes. In its jurisdictional analysis of the name change motion, the court ran through various provisions, eliminating each in turn.[61] But here, by contrast, the court did not consider all potentially relevant provisions, even to rule them out.[62] Although sound policy arguments and faithful application of circuit precedent also supported the court's conclusion that it could not compel preferred pronoun usage,[63] the court's statutory analysis was somewhat sparse.

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[56] *See, e.g.*, Iliana Magra, *He Opposed Using Transgender Clients' Pronouns. It Became a Legal Battle.*, N.Y. TIMES (Oct. 3, 2019), https://www.nytimes.com/2019/10/03/world/europe/christian-transgender-uk.html [https://perma.cc/L8SY-NMBR] ("Dr. Mackereth . . . said that as a Christian he could not 'use pronouns in that way in good conscience.'").

[57] *See, e.g.*, Zack Beauchamp, *Jordan Peterson, the Obscure Canadian Psychologist Turned Right-Wing Celebrity, Explained*, VOX (May 21, 2018, 9:59 AM), https://www.vox.com/world/2018/3/26/17144166/jordan-peterson-12-rules-for-life [https://perma.cc/7A7D-HA3M] ("[Peterson] said he would refuse to refer to transgender students by their preferred pronouns; separating gender and biological sex was, in his view, 'radically politically correct thinking.'").

[58] *Varner*, 948 F.3d at 255.

[59] *Id.* at 255–56.

[60] *Id.* at 256; *see id.* at 254–56.

[61] *See id.* at 253–54.

[62] *See id.* at 255–56.

[63] *See id.* at 254–58.

The court did not explicitly invoke constitutional avoidance, but that canon[64] can help justify the court's reading of statutory law.[65] In ruling out any basis for compelling preferred pronoun usage, the court avoided the constitutional problems that could arise from a litigant's objection to using a party's preferred pronouns. Many religious adherents believe that each human person is either male or female[66] — immutably from life's start.[67] They may correspondingly object to using pronouns that endorse a change in gender identity.[68] Nonreligious principles also motivate objections to referring to others by their preferred, rather than biological, pronouns.[69] In light of these objections, requiring the use of preferred pronouns in the courtroom could occasion constitutional claims invoking religious liberty and compelled speech.

If a court compelled a litigant — in violation of his religious beliefs — to use a party's preferred pronouns, the litigant could raise a free exercise claim. Under *Employment Division v. Smith*,[70] the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'"[71] but *Smith* would not necessarily rule out a claim here. If a court order targeted religious

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64 Modern avoidance, which interprets a statute to avoid a difficult constitutional question, is at issue here. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997). Classical avoidance, by contrast, interprets a statute to avoid a ruling of unconstitutionality. *See id.*

65 *See id.* Constitutional avoidance can also explain why the inherent power of courts to make their own rules would not justify compelling preferred pronoun usage.

66 The Catholic Church condemns gender theory as a "profound falsehood" because it treats sex as "a social role that we choose for ourselves" rather than a "given element of nature, that man has to accept." Benedict XVI, *Address on the Occasion of Christmas Greetings to the Roman Curia*, HOLY SEE (Dec. 21, 2012), http://www.vatican.va/content/benedict-xvi/en/speeches/2012/december/documents/hf_ben-xvi_spe_20121221_auguri-curia.html [https://perma.cc/X9ZL-EQ77]. The Church contrasts gender theory with the biblical teaching that "being created by God as male and female pertains to the essence of the human creature." *Id.*

67 *See, e.g.*, Brief of Amici Curiae Religious Freedom Institute's Islam & Religious Freedom Action Team and Islamic Scholars in Support of Employers at 12, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17-1618) ("Islamic jurisprudence teaches that a person's sex cannot change. God's creation of male and female is determined by biology . . . .").

68 *See, e.g.*, *Dr. Nicholas Meriwether's Story*, ALL. DEFENDING FREEDOM, https://www.adflegal.org/professor-meriwether-story [https://perma.cc/VE27-9T65] ("As a Christian, Dr. Meriwether believes that God has created human beings in his image, as male or female — and that God does not make mistakes. To call a man a woman or vice versa would be to say something that just is not true and to endorse an ideology that conflicts with his religious beliefs.").

69 *See, e.g.*, Brief Amicus Curiae of Public Advocate of the United States et al. at 5 n.3, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 140 S. Ct. 1731 (2020) (No. 18-107) ("[T]hese *amici* do not follow the prejudicial nomenclature adopted by the Sixth Circuit in referring to the Respondent 'biological male' as 'she' and 'her.' Use of incorrect pronouns at best obscures, but actually concedes, that it is possible for a person to change sex from a man to a woman or *vice versa*.").

70 494 U.S. 872 (1990).

71 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

believers[72] or a judge demonstrated hostility toward religious belief,[73] the litigant would likely prevail: strict scrutiny applies when the challenged policy is not neutral or generally applicable.[74] Furthermore, under *Smith*, even a neutral and generally applicable policy might collapse under the pressure of a hybrid claim — that is, a claim that joins free exercise with another constitutional right.[75] Compelling a litigant, over religious scruples, to use another party's preferred pronouns could present a hybrid claim that combines free exercise and free speech.

A litigant could also raise a separate compelled speech claim under the Free Speech Clause. Under the Court's compelled speech doctrine, government may not compel expression that supports patriotism[76] or individualism,[77] even in venues under tight government control. If government cannot compel expression of patriotic ideology in a classroom, it might not be able to compel expression of gender ideology in a courtroom. Although proponents of preferred pronouns characterize them as mere courtesies, lacking expressive value,[78] opponents view them as concessions to "transgender ideology."[79] And when support for preferred pronouns correlates with partisan affiliation,[80] using them could be understood as a political statement. Cast in this light, preferred pronouns appear to be the kind of speech government may not compel.[81]

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[72] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

[73] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (finding a free exercise violation when "consideration of [the litigant's] case was neither tolerant nor respectful of [the litigant's] religious beliefs").

[74] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020).

[75] *See Smith*, 494 U.S. at 881 ("[T]he First Amendment bars application of a neutral, generally applicable law to religiously motivated action [in cases] . . . involv[ing] . . . the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.").

[76] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating compulsory recitation of the Pledge of Allegiance in a public school).

[77] *See* Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977) (invalidating a law that made it a crime to cover up the words "Live Free or Die" on state license plates).

[78] *See* Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 49–50 (2020).

[79] Graham Hillard, *Conservatives Shouldn't Use Transgender Pronouns*, NAT'L REV. (Apr. 4, 2019, 6:30 AM), https://www.nationalreview.com/2019/04/transgender-pronouns-conservatives-should-not-use [https://perma.cc/FRW7-NBCV].

[80] *Cf.* Zlati Meyer, *6 of the 2020 Democrats Now List Their Pronouns in Their Twitter Bios*, FAST CO. (Oct. 17, 2019), https://www.fastcompany.com/90404480/6-of-the-2020-democrats-now-list-their-pronouns-in-their-twitter-bios [https://perma.cc/KJY9-XU72].

[81] To be sure, courts can compel certain kinds of speech. In *Hamilton v. Alabama*, 376 U.S. 650 (1964) (per curiam), the Supreme Court implied that the Black defendant had the right to be addressed by the prosecutor as "Miss Hamilton" rather than "Mary." *See Ex parte* Hamilton, 156 So.2d 926, 926–27 (Ala. 1963), *rev'd sub nom. Hamilton*, 376 U.S. 650. And *Branzburg v. Hayes*, 408 U.S. 665 (1972), held that citizens have no First Amendment immunity from subpoenas. *See id.* at 667. But race, unlike gender identity, is a suspect class. *See* Michael J. Lenzi, Comment, *The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete*

This is not to argue that the panel primarily had First Amendment problems in mind. Rather, the argument is that *Varner*'s reading of the law is best justified on the basis of constitutional avoidance. Likewise, *Varner*'s holding has the effect of constitutional avoidance: the rule it announces averts potential free exercise and free speech problems. *Varner* thus protects litigants who object to using preferred pronouns. Where *Varner* is good law,[82] courts will not compel them.

Of course, compelled speech claims are not the exclusive property of those who object to preferred pronouns. A litigant ordered to use a party's biological pronouns could also object on compelled speech grounds. And while Judge Duncan used biological pronouns in reference to the defendant, he conceded judges' license to use preferred pronouns.[83] It is no great leap to infer that litigants enjoy the same license. Although this reasoning suggests that both sides in the debate over transgender identity enjoy the same immunity from compelled pronoun use, social conservatives may have greater opportunity to invoke this protection.[84] *Varner* is thus consistent with the robust socially conservative jurisprudence that has won Judge Duncan scholarly acclaim.[85]

Debates over transgender identity are unlikely to go away soon. Whenever litigants who identify as transgender seek to have others refer to them by their preferred pronouns in court, the issues in *Varner* are likely to recur. As the first federal appellate court to decide whether judges can mandate preferred pronouns, the Fifth Circuit is likely to serve as a reference point for other courts that consider the issue.[86] At the least, litigants who object to gender theory now have *Varner* to cite as an authority. If courts aim to avoid overreaching — if they refrain from trampling on objections, religious or otherwise — they will follow *Varner*'s lead and decline to compel the use of preferred pronouns.

Policies, 67 AM. U. L. REV. 841, 865, 876 (2018). Issuing subpoenas is a longstanding prerogative of judges, whereas stipulating correct pronoun usage is the traditional province of grammarians.

[82] *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), handed down five months after *Varner*, did not undermine *Varner*. In *Bostock*, the Supreme Court took an expansive view of sex-based discrimination, holding that Title VII's ban on employment discrimination "because of [an] individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1), also covered discrimination on the basis of "homosexuality or transgender status." *Bostock*, 140 S. Ct. at 1741–42. This holding did not extend beyond Title VII and thus did not overrule *Varner*'s protections for litigants.

[83] *See Varner*, 948 F.3d at 255.

[84] One advocate of preferred pronouns approvingly discusses examples of courts compelling preferred pronouns, but never suggests that judges — even those who use biological pronouns — have forbidden others from using preferred pronouns. *See* McNamarah, *supra* note 78, at 58–59.

[85] *See* Adrian Vermeule, *The Guardian of Life*, MIRROR OF JUST. (Apr. 7, 2020), https://mirrorofjustice.blogs.com/mirrorofjustice/2020/04/the-guardian-of-life.html [https://perma.cc/GNE9-EPEX] (praising the Fifth Circuit as a "[g]uardian of [l]ife" for an opinion by Judge Duncan that upheld restrictions on abortion). Under this approach, hailed as common-good constitutionalism, "legal outcomes should accord with . . . a socially conservative understanding of natural law." Recent Case, In re Abbott, *954 F.3d 772 (5th Cir. 2020)*, 134 HARV. L. REV. 1228, 1233 (2021).

[86] *See, e.g.*, State v. Cantrill, No. L-18-1047, 2020 WL 1528013, at *7–8 (Ohio Ct. App. Mar. 31, 2020) (discussing *Varner* but ultimately disagreeing with its conclusion).