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What's in a Name?: The Constitutionality of Using Personal Pronouns in Public Schools (2023)

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WHAT'S IN A NAME?: THE CONSTITUTIONALITY OF USING PERSONAL PRONOUNS IN PUBLIC SCHOOLS

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*Bradley Alan MacDonald, Juris Doctor Candidate at the University of Illinois Chicago School of Law. At the forefront, I want to thank my Mom and Dad for their endless care, love, and support. I am eternally grateful for all the sacrifices you made to help me pursue my dreams and passions. I would also like to thank my dearest friends Michael, Keiara, Audrey, Josary, Kelly, Jeremy, Matt, Joe, Trenton, Andrew, Ivor, Marissa, and Erin who have given me constant encouragement and many laughs throughout law school. Finally, as the third generation in my family to graduate from the John Marshall Law School (JMLS) (now UIC School of Law), I dedicate this article to my grandfather Clayton J. MacDonald (JMLS Class of 1953) and my father Gregory A. MacDonald (JMLS Class of 1984) who have taught me what it means to be a caring, zealous, patient, and impactful advocate.

I. INTRODUCTION

Every autumn, millions of American students return to school across the United States to begin the new academic year.[1] The new year ushers in a sense of excitement and nervousness as students have new classes, meet new teachers, get to see their old friends, and make new ones. The first day of class is inaugurated by the stereotypical roster check. The teacher, Mr. Smith, runs through the list of names, mispronouncing a few as he proceeds, and asks if any students have nicknames. "Nicholas" wants to be called "Nick," "Jacqueline" wants to be called "Jackie," and "Jackson" wants to be called "Jax with an x." However, unbeknownst to the teacher, Jax began transitioning from male to female and now goes by the pronouns she/they. Jax, after a few instances of being called "he or him," decides she should talk to the teacher. After talking with Jax, Mr. Smith states that he will not use the student's personal pronouns because he does not feel comfortable doing so as it goes against his sincerely held religious beliefs.[2] Jax now feels uncomfortable in the classroom and feels that other students are looking at her differently. This story, while fictional, depicts scenarios happening across our nation's schools.[3]

This Comment will address the question of whether students should have the constitutional right to use their personal pronouns in public school classrooms. It will also discuss how schools, school districts, and teachers have responded to the increasing social changes regarding gender identity in classrooms across the country.[4] As the conversation about pronouns evolves, this Comment will use the terms "chosen pronouns" or "personal pronouns" to reflect current discourse. However, there will be certain moments when "preferred pronouns" will be used because this is the language used in the case law. Part I will outline the general issues surrounding the current situation, which includes the lack

1. *Back-to school statistics*, IES NAT'L CTR. FOR EDUC. STATS., www.nces.ed.gov/fastfacts/display.asp?id=372 [perma.cc/9VCR-SQ6D] (last accessed Jan. 3, 2023) (noting that 49.5 million students attended public school in fall 2021).

2. *An Employer's 3-Step Guide to Responding to COVID-19 Vaccine Religious Objections*, FISHER PHILLIPS (Aug. 26, 2021), www.fisherphillips.com/news-insights/3-step-guide-covid19-vaccine-religious-objections.html [perma.cc/G3B2-9EZE] (noting that under federal law, sincerely held religious beliefs, "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.").

3. Phyllis L. Fagell, *Teacher wants to know if he has to call a student 'they'*, PHI DELTA KAPPAN (May 7, 2019), www.kappanonline.org/teacher-student-they-transgender-pronoun-grammar-career-confidential-fagell/ [perma.cc/253L-RAB4] (presenting an interview with a teacher who does not wish to use the preferred pronouns of students). This also notes a study from the *Journal of Adolescent Health*, which found that when transgender and gender nonconforming students are able to use their names, they will experience 35% less thoughts of suicide and 71% fewer symptoms of severe depression. *Id.*

4. Donna St. George, *Gender transitions at school spur debate over when, or if, parents are told*, WASH. POST (July 18, 2022), www.washingtonpost.com/education/2022/07/18/gender-transition-school-parent-notification/ [perma.cc/K6WC-L4GQ].

of a clear policy or directive from any political branch of government to determine whether a student's right to use a personal pronoun or a teacher's free speech and free exercise rights should prevail. This uncertainty, which has resulted in judicial circuits reaching split decisions, presents a twofold problem.[5]

First, students who are currently advocating and litigating the issue cannot find any protection under the Constitution. Since there is presently no Supreme Court ruling that determines whether using personal pronouns is or is not an express or implied fundamental constitutional right, students are left unprotected and forced to abide by the policies enacted by the district, school, or teacher. Secondly, without a clear policy, teachers attempt to create their own solutions, which results in every teacher having the power to dictate how a student may or may not be gendered within the classroom.[6] In practice, this means that two teachers in the same school could implement two opposing policies regarding the usage of personal pronouns in the classroom. This approach potentially disregards and disrespects the student's autonomy to choose their pronouns and their dignity to present themselves in a way that is consistent with their thoughts and feelings on their self-identification.[7] On the flip side, this method protects teachers' First Amendment rights by not forcing them to go against their sincerely held beliefs. Given the First Amendment issues of free speech and religious liberty at stake and the controversial nature of this topic, some form of guidance is necessary.

Part II will review the background and history of substantive due process, along with the cases involving the implied constitutional right to privacy. This includes the current Court's decisions in *Kennedy v. Bremerton School District*[8] and *Dobbs v. Jackson Women's Health Organization*.[9] These cases highlight the Court's broad protection of religious liberty in the school context and the use of history and tradition as dispositive factors when analyzing due process cases. It will further present the recently adjudicated cases concerning the usage of personal pronouns in schools. Part III will analyze the various factors schools and districts should consider when implementing policy for the use of personal pronouns in school and the impact their policy has on the health, safety, and well-being of students. It will also consider the arguments of those against a policy allowing the usage of personal pronouns as a deprivation of a teacher's First Amendment rights.

Lastly, Part IV will propose that the legislative branch is best positioned to enact policy that enables students to use their personal

5. *See* discussion *infra* Part II (discussing the various results from different courts with regards to the usage of preferred pronouns in public schools).

6. *See* discussion *infra* Part III (illustrating how a Chicago Public School teacher integrates inclusive practices within her classroom).

7. *See* discussion *infra* Part II.B (discussing the policy arguments of dignity, intimacy, and autonomy).

8. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411 (2022).

9. Dobbs v. Jackson Whole Women's Health, 142 S. Ct. 2228, 2234 (2022).

pronouns in public school classrooms. Given the moral issue surrounding the transgender community[10] and personal pronouns, Congressional or state legislative action is the best approach to create policy through the democratic process and avoid judicial activism. With the recent litigation over personal pronouns in schools, if a case addressing this issue were to come before the Supreme Court, It should grant certiorari to make clear that whether to allow or not allow preferred pronouns in public schools is a determination better left to Congress or state legislatures. If the Supreme Court were to apply the analytical framework from *Kennedy* and *Dobbs*, It would find that students have no constitutional right to use their personal pronouns in public schools.

II. BACKGROUND

Part A of this section will provide a brief history of substantive due process and its use to establish the implied constitutional right to privacy. Part B will outline the policy arguments litigants will make when arguing cases involving the right to privacy and how the Court has applied these policies in landmark decisions. Parts A and B will provide the foundation to understand substantive due process as a judicial doctrine, and how it has been used by litigants in the past. Part C will shift to a brief discussion on free speech issues arising in public schools. Part D will explain the linguistical significance of pronouns[11] and provide contextualization to how they are currently used by individuals to self-identify. Finally, Part E will draw from Parts A through D to discuss recently adjudicated cases that address the issue of whether a public school teacher's free speech and free exercise of religion outweighs a student's right to use their personal pronouns.

A. Substantive Due Process and the Implied Fundamental Right of Privacy

Underlying the discussion of a constitutional right to preferred pronouns for school children is the judicially created implied right of privacy[12] Over the past 50 years, the Supreme Court has wrestled with the doctrine of substantive due process and the creation of implied rights

10. *What does transgender mean?*, AM. PSYCHOLOGICAL ASS'N, www.apa.org/topics/lgbtq/transgender [perma.cc/TE7R-36KQ] (last visited Feb. 15, 2023) (defining "transgender" as, "an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth.").

11. Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021, 6:01 AM), www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq [perma.cc/YK7S-V53N] (defining and discussing personal pronouns).

12. *See* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 U. FLA. L. REV. 519, 524 (2008) (noting the history and development of substantive due process).

not explicitly stated or found within the text of the Constitution.[13] The concept of substantive due process is almost as controversial as the topics themselves, and some Justices have questioned the authenticity of substantive due process in the Constitution.[14] At its core, substantive due process asks whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose.[15] For example, the right to use contraception, engage in same-sex marriage, and allowing a parent to choose their children's place of education are not explicitly found within the text of the Constitution.[16] However, the Supreme Court has described these as implied fundamental rights protected by the Constitution and the Due Process clause.[17] Therefore, the use of preferred pronouns could potentially fall within the scope of these other implied fundamental constitutional rights, even though it is not found within the text of the Constitution.[18]

In June 2022, the Supreme Court overturned *Roe v. Wade*[19], which protected the right to abortion.[20] There, the Court noted that the Constitution does not take sides on the issue of abortion and that the right to abortion is not deeply rooted in American history and tradition.[21] Abortion is also not found in the text of the Constitution, and therefore, *Roe* was deemed "egregiously wrong" the day it was decided.[22] Additionally, in his concurring opinion, Justice Thomas directly challenged the notion of substantive due process by noting the Court should "reconsider" cases like *Griswold v. Connecticut*, *Lawrence v. Texas*,

13. *Id*.

14. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1998) (stating that substantive due process has been a controversial concept in American law); *see also* Curtis Thomas, *Substantive Due Process: the Power to Grant Monopolies in the Federalist Marketplace of State Experimentation*, 2013 BYU L. REV. 393, 393 (2013) ("The doctrine [of substantive due process] is so controversial that its very name has been called a 'contradiction in terms,' an 'oxymoron', and even 'a momentous sham." (first quoting John Harrison, *Substantive Due Process and the Constitutional Test*, 83 VA. L. REV. 493, 494 (1996); then quoting Mays v. City of E. St. Louis, 123 F.2d 999, 1001 (7th Cir. 1997); and then quoting Robert H. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990))). The controversial nature around substantive due process is the expansion of protections under the Constitution based without clear limits. *Id.*

15. Timothy M. Tymkovich, et al., *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1965 (2020).

16. Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275, 300, 322 (2014).

17. Chemerinsky, *supra* note 14, at 1506-07**.**

18. *Students: Your Right to Privacy*, ACLU, www.aclu.org/other/students-your-right-privacy [perma.cc/JAK8-JQJ4] (last visited Feb. 23, 2022) (noting that the right to privacy is not mentioned in the Constitution).

19. Roe v. Wade, 410 U.S. 113, 154 (1973) (holding the right to choose to have an abortion involves personal privacy, although the right is not unqualified and is subject to state regulation).

20. *Dobbs*, 142 S. Ct. at 2242 ("We hold that *Roe* and *Casey* must be overruled.").

21. *Id.* at 2304 (Kavanaugh, J., concurring) ("But a right to abortion is not deeply rooted in American history and tradition.").

22. *Id.* at 2265 ("*Roe* was also egregiously wrong and deeply damaging.").

and *Obergefell v. Hodges*.[23] He further stated that any decision tethered to substantive due process is "demonstrably erroneous" and that the Court should correct that error.[24] Therefore, *Dobbs* has casted enormous doubt about the Court's willingness to read substantive due process into the Constitution. [25]

While the right of abortion is no longer protected by the Constitution, the following topics demonstrate how the Supreme Court has used the doctrine of substantive due process to establish the implied constitutional fundamental right of privacy. The topics also reflect the implementation of that implied constitutional fundamental right in various social situations connected to using one's preferred pronoun in public schools.[26]

The Supreme Court has used substantive due process to uphold and establish various liberties.[27] *Griswold* was a watershed case establishing the implied right of privacy.[28] In *Griswold*, the Court struck down Connecticut's ban on the use of contraception by married couples.[29] Furthermore, *Griswold* established three different tests that allow the Court to find an implied fundamental right even if it is not expressly found in the Constitution.[30] These tests consist of: (1) the Penumbral Approach, which looks to the "shadows"[31] of the First, Third, Fourth, and Fifth Amendments to derive an implied right; (2) the Ninth Amendment

23. *Id.* at 2302 (Thomas, J., concurring) ("We should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

24. *Id.* ("Any substantive due process decision is 'demonstrably erroneous.'" (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring in judgment)).

25. Kenji Yoshino, *After the Supreme Court's Abortion Ruling, What Could Happen to Other Unwritten Rights*, WASH. POST (Nov. 30, 2022, 5:34 PM), www.washingtonpost.com/magazine/interactive/2022/substantive-due-process-dobbs/ [perma.cc/KVJ3-E88X].

26. Chemerinsky, *supra* note 14 at 1506-07.

27. *Id.*

28. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[V]arious guarantees [in the Bill of Rights] creates zones of privacy."). "This law, however, operates directly on the intimate relation of husband and wife and their physician's role in one aspect of that relation." *Id.* at 482.

29. *Id.* at 506.

30. *Id.* at 484, 491, 500. The majority opinion written by Justice Douglas articulates the Penumbral approach, which states that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. In concurrence, Justice Goldberg articulates a second test which is rooted in the Ninth Amendment, "to hold that a right so basic and fundamental . . .as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment." *Id.* at 491 (Goldberg, J., concurring). The final test is outlined by Justice Harlan in concurrence who stated that "[t]he Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom." *Id.* at 500 (Harlan, J., concurring).

31. *Penumbra*, MERRIAM WEBSTER DICT., www.merriam-webster.com/dictionary/penumbra [perma.cc/BH7Y-Z23H] (last visited Feb. 13, 2023) (defining penumbra as, "a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light.").

Approach, which emphasizes there are protected rights not explicitly found in the Constitution; and (3) the Due Process Clause Approach, which can also find a protected implied right.[32] In 1972, this notion of an implied right of privacy was extended to include single and non-married person's right to obtain contraception.[33] This implied right of privacy was later applied in *Obergefell*, which involved the right of same-sex marriage in 2015.[34] Finally, the Supreme Court has used substantive due process to establish a parent's right to choice of schools.[35] A further example includes the Supreme Court's recognition of the constitutional right of teachers to instruct students in the German language.[36] The Court also found the implied fundamental constitutional right of parents to choose parochial schools for their children.[37]

B. Policies Involving Implied Fundamental Constitutional Rights

Throughout the litigation of these substantive due process cases, three key policy arguments have been articulated by those seeking to have the Court recognize an implied fundamental constitutional right.[38] These include the policies of intimacy, autonomy, and personal dignity.[39]

The first policy argument in support of establishing an implied constitutional right of privacy is intimacy.[40] Intimacy relates to the emotions and thoughts that a person possesses.[41] Therefore, the decisions a person may make regarding contraception and marriage is one that reflects the personal values, feelings, and emotions that a person forms through life experiences.[42] One example of how this policy was

32. Griswold, 381 U.S. at 484, 491, 500.

33. Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (holding that unmarried people may use contraceptives and not just married couples).

34. Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that same-sex couples have the fundamental right to marry).

35. Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020) (holding that prohibiting religious options in school choice programs violates the First Amendment).

36. Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that a teacher has a right to teach the German language in schools).

37. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (holding that parents have a right to choose the schooling for their children).

38. *Griswold*, 381 U.S. at 484.

39. *Id.*

40. *See Planned Parenthood*, 505 U.S. at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."); *see also Obergefell*, 576 U.S. at 663 (citing *Eisenstadt*, 405 U.S. at 453; *Griswold*, 381 U.S. at 484-86) ("The fundamental liberties protected by th[e Due Process] Clause [of the Fourteenth Amendment] . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

41. Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."). "The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id.*

42. *Obergefell*, 576 U.S. at 681 ("No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family."). "As some of the petitioners in these cases demonstrate, marriage embodies a love that may

successfully argued was in *Lawrence* when the Court noted that the right for sexual conduct between two same-sex people is a liberty protected under the Constitution.[43] Additionally, in *Obergefell*, the Court recognized the intimacy found in marriage should be a right that is shared between same and opposite sex couples.[44] Furthermore, Justice Kennedy suggested that the policy of intimacy could go beyond that found in *Lawrence*.[45] Kennedy suggested the nexus between one's intimate choices and the liberty to which one is constitutionally entitled involves the notion of inclusion and not exclusion.

The second argument supporting a right to privacy is the principle of autonomy.[46] The Founding Fathers feared re-establishing a tyrannical government that infringed on people's liberty and autonomy.[47] This notion of autonomy is therefore integral in cases involving substantive due process.[48] In *Obergefell*, the Court noted that the right of marriage is a personal choice and should not be constrained to only heterosexual couples.[49] Additionally, the Court noted in *Obergefell* how the historical view of marriage might have been between two individuals of the opposite sex, but also recognized that the institution of marriage has changed over time.[50] Therefore, the general concept is that individuals should be able to maintain control over their life decisions, which could logically extend to autonomy over pronouns, and that the government's control over private and autonomous choices should be limited.[51]

The third policy argument is personal dignity.[52] Webster's Dictionary defines dignity as, "the quality or state of being worthy of honor and respect."[53] Personal dignity sets forth the notion that the government should not overstep its role by disrespecting an individual.[54] In *Obergefell*, the Court noted that same-sex couples are not trying to disrespect the institution of marriage, but merely seek to have their love

endure even past death." *Id.*

43. *Lawrence*, 539 U.S. at 567.

44. *Obergefell*, 576 U.S. at 681.

45. *Id*. at 667 ("But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.").

46. *Planned Parenthood*, 505 U.S. at 851.

47. Chemerinsky, *supra* note 14, at 1501.

48. *Planned Parenthood*, 505 U.S. at 851.

49. *Obergefell*, 576 U.S. at 665 ("A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."). "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Id.* at 666.

50. *Id.* at 670 ("The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.").

51. *Id.* at 665.

52. *Id.*

53. *Dignity*, MERRIAM WEBSTER, www.merriamwebster.com/dictionary/dignity [perma.cc/2DB2-WHJX] (last visited Jan. 9, 2023).

54. *Obergefell*, 576 U.S. at 670 ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.").

respected and recognized through marriage.[55] This policy's principle is that people wish to have their personhood recognized and respected, whether it be the right to marry or choosing the pronoun that best represents them.[56]

C. General Free Speech Issues in Schools

The Supreme Court has opined on the teacher's role in the classroom: a public official's free speech rights are only protected when they are acting as private citizens, not while performing official duties.[57] However, it has been established that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[58] Additionally, the Court has weighed in on the extent to which schools may regulate free speech outside of schools on social media platforms.[59] In *Mahanoy Area School District v. B.L.*, the Court held that a public high school violated a student's First Amendment right by suspending her from the school's cheerleading team because of language she used on social media[60] Although a school may have a significant interest in the school may have a significant interest in regulating some off-campus speech made, the school's interest does not outweigh the student's interest of free expression.[61] Most recently, the Fourth Circuit Court of Appeals ruled on a case that involved the use of transgendered bathrooms in *Grimm v. Gloucester County School Board.* There, the Fourth Circuit applied Title IX to determine the school unlawfully prevented Gavin Grimm from using the boys' bathroom, and that Grimm was protected under Title IX.[62]

The complication in this analysis arises from the Establishment Clause of the First Amendment, which schools must not infringe upon even as they try to respect other rights. [63] Here, a public school, as a component of the government, cannot take a particular stance or endorse

55. *Id.* at 681. ("[Same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

56. *Id.*

57. Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

58. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). "This has been the unmistakable holding of this Court for almost 50 years." *Id*.

59. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

60. *Id.* at 2042.

61. *Id.* at 2048.

62. Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020) ("At the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender."). "We join a growing consensus of courts in holding that the answer is resoundingly yes." *Id.*

63. Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1053 (9th Cir. 2003) (quoting Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979, 983-85 (9th Cir. 2003)) (stating that the "establishment Clause concerns can justify speech restrictions in order to avoid the appearance of government sponsorship of religion.").

one religion over another.[64] The Supreme Court has addressed issues such as school prayer and the potential First Amendment violation that could occur if this type of speech is permitted.[65]

Also in 2022, the Supreme Court in *Kennedy vs. Bremerton School District* determined that a school district's disciplinary action against a coach's quiet, brief, personal midfield prayer following a football game violated that coach's First Amendment Rights.[66] The Court found that the Free Exercise and Free Speech Clauses of the First Amendment protect an individual's personal religious activity from government intervention.[67] Here, Justice Gorsuch, writing for the majority, noted that "the Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike."[68] In her dissent, Justice Sotomayor criticized the majority for establishing a new "history and tradition" test when analyzing Establishment Clause issues.[69] These cases show that there are many factors a school must consider when deciding which speech is permissible or not permissible.

D. What are Pronouns?

Pronouns are one of the fundamental topics taught in English Language Arts ("ELA") classrooms in the United States.[70] At its most basic definition, a pronoun is "any of a small set of words . . . in a language that are used as substitutes for nouns or noun phrases."[71] Traditionally, students have been taught to only use "he" when referring to a male and "she" when referring to a female.[72] The concept of "they" and "them" was

64. Lee v. Weisman, 505 U.S. 577, 604-05 (1992) ("The Establishment Clause proscribes public schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.").

65. Jaffree v. Bd. of Sch. Comm'rs, 459 U.S. 1314, 1315 ("There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions.").

66. *Kennedy*, 142 S. Ct. at 2433.

67. *Id.*

68. *Id.* at 2416.

69. *Id.* at 2345 (Sotomayor, J., concurring) ("[T]he Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new 'history and tradition' test.").

70. *See, e.g.*, *They She He Me: Free to Be! Understanding Pronouns*, HUM. RTS. CAMPAIGN FOUND., assets2.hrc.org/welcoming-schools/documents/WS_They_She_He_Me_Discussion_Guide.pdf [perma.cc/9399-RCVQ] (last visited Jan. 18, 2023) (providing a discussion guide to instruct children on using pronouns).

71. *Pronoun*, MERRIAM WEBSTER DICT., www.merriamwebster.com/dictionary/pronoun [perma.cc/2NJ9-2EWF] (last visited Jan. 9, 2023).

72. Amy M. Blackstone, *Gender Roles and Society*, *in* HUM. ECOLOGY: ENCYCLOPEDIA CHILD., FAM., CMTY., AND ENV'T 335, 338 (Julia Miller, Richard Lerner, & Lawrence Schiamberg eds., 2003) (discussing how gender roles are the product of one's interactions with other individuals and the environment). This provides cues as to what behavior is deemed appropriate for which sex. *Id.* Furthermore, gender roles are sometimes created based on stereotypes about gender which could include an oversimplification of the role of a male and female. *Id.* at 337. Gender roles are often

also traditionally used in reference to multiple people.[73] However, shifts in society have increased the recognition of the concept of gender fluidity and non-binary individuals.[74] Now, people may identify using various compounds of different pronouns such as "he/they," "she/they," "they/them," "ze/zie," "xem/xyr," among many other combinations.[75]

E. Cases Involving the Use of Personal Pronouns in Schools

There is currently a split among courts regarding the use of personal pronouns in schools.[76] There is a conflict between the teacher's First Amendment rights to free speech and religion and the student's rights to free speech and association.[77] This dissonance has resulted in some cases where the student prevails, and in others where the teacher prevails.[78] One example in which a student's use of personal pronouns was protected is *Kluge v. Brownsburg Community High School*.[79]

In *Kluge*, John Kluge was an orchestra teacher at Indiana's Brownsburg Community High School ("BCHS") who had to resign after refusing to use transgender students' preferred pronouns and names due to religious beliefs that conflicted with the transgender identity.[80] Kluge was a Christian, a member of Clearnote Church, and part of the Evangel

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discussed in terms of an individual's gender role orientation, which is either traditional or non-traditional. *Id.* at 337-38. A traditional gender role heightens the differences between a man and a woman and creates the assumption that certain behaviors are attributed to certain sexes. *Id.* at 338.

73. *See, e.g.*, *Pronouns and Inclusive Language*, UC DAVIS LGBTQIA RES. CTR., lgbtqia.ucdavis.edu/educated/pronouns-inclusive-language [perma.cc/S8P7-YGDN] (last visited Jan. 9, 2023) (explaining how someone might at first think of "they/them/theirs" as a plural pronoun, but it may also be used to refer to an individual). For example, when someone states "I got a call from the doctor today," the typical response is "what did *they* say?" (emphasis added). *Id.* Thus, this illustrates how "they/them" works as a pronoun in reference to a single individual. *Id.*

74. *A brief history of gender neutral pronouns*, BBC NEWS (Sept. 22, 2019), www.bbc.com/news/newsbeat-49754930 [perma.cc/6F7F-87DE] (noting how the first academic paper on the use of pronouns in a non-binary way was published in 2017 and that in the modern era, the use of preferred pronouns has "been a fairly new development.").

75. *Pronouns and Inclusive Language*, *supra* note 73; *see also "Ze" Pronouns*, RES. PERS. PRONOUNS, www.mypronouns.org/ze-hir [perma.cc/E4GX-GMCK] (last visited Jan. 9, 2023) (explaining that, "a person who goes by 'ze' could actually be a man, woman, both, neither, or something else entirely.").

76. *Compare* Meriwether v. Hartop, 992 F.3d 492, 518 (6th Cir. 2021), *with* Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, 2021 Va. LEXIS 141, at *27-31 (Va. Aug. 30, 2021) (coming to different conclusions on whether a student's right to use their preferred pronouns or a teacher's First Amendment rights should prevail).

77. *Meriwether*, 992 F.3d at 511-12 (holding that Shawnee State University violated Professor Meriwether's free speech and free exercise rights when they punished him for not addressing a student by their preferred pronouns).

78. *Id.* at 32.

79. Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2021).

80. *Id.* at at 819.

Presbytery.[81] Kluge held various positions within the church.[82] Prior to the 2017-2018 academic year, Dr. Jessup, the assistant superintendent of the school district where Kluge worked, stated, "the high school community at Brownsburg Community School Corporation ("BCSC") began to be more and more aware of the needs of transgender students."[83] Kluge and three other faculty met with the BCHS Principal Dr. Daghe and presented a letter expressing their religious objections to recognizing the transgender identity.[84] They asked that faculty not be required to use students' preferred pronouns.[85] However, the school implemented a policy that required all staff to address students by their preferred pronouns as listed in PowerSchool, the database—used to record and store student information.[86] Therefore, transgender students could change their names in PowerSchool if they provided a letter from a parent and healthcare professional for a name change.[87] A similar process was utilized for a pronoun change.[88]

When Kluge met with Principal Dr. Daghe in July 2017 and stated he could not comply with the name-change policy, he was given three options: (1) comply with the policy; (2) resign; or (3) be suspended pending termination.[89] Kluge proposed he be allowed to call students by their last names (similar to a sports coach) and the administrators agreed.[90] On Aug. 29, 2017, Dr. Daghe began learning about concerns through another teacher, Craig Lee, regarding Kluge addressing students by their last name.[91] Lee was the faculty advisor of the Equality Alliance, a group that discusses LGBTQ issues and provides a safe space.[92] Two of the students in the Equality Alliance were Aidyn and Sam.[93] Aidyn and Sam found the practice by Kluge of using only last names to be

81. *Id.*

82. *Id.* at 820-21.

83. *Id.*

84. *Id.* at 821. *See, e.g.*, *Teacher X interview*, *infra* note 206.

85. *Kluge*, 548 F. Supp. 3d at 821.

86. *Id.* at 821-22. *Compare* discussion *infra* Part III.

87. *Kluge*, 548 F. Supp. 3d at 822; *see also* Katie J.M. Baker, *When Students Change Gender Identity, and Parents Don't Know*, N.Y. TIMES (Jan. 22, 2023), www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html [perma.cc/QL79-R8RN] (noting the challenges schools face when implementing policies regarding preferred pronouns). Each school district, like the one mentioned in *Kluge*, creates their own policies and procedures for recognizing personal pronouns.

88. *Kluge*, 548 F. Supp. 3d at 822.

89. *Id.* at 822-23.

90. *Id.* at 823; *see also Indiana music teacher forced to resign over pronoun usage asks court to uphold religious accommodation*, ALL. DEFENDING FREEDOM (Oct. 1, 2021), www.adflegal.org/press-release/indiana-music-teacher-forced-resign-over-pronoun-usage-asks-court-uphold-religious [perma.cc/YW8L-7X8T] (presenting a statement made from the Alliance Defending Freedom group who represented Mr. Kluge in his matter). The article conveys how Mr. Kluge "had an excellent reputation as a fun and caring teacher" and through his leadership, he was able to improve the school's orchestra. *Id.*

91. *Kluge*, 548 F. Supp. 3d at 823-24.

92. *Id.* at 824.

93. *Id.*

"disrespectful and insulting."[94] Sam stated, "Mr. Kluge's use of last names in class made the classroom environment very awkward."[95] "[M]ost of the students knew why Mr. Kluge had switched to using last names, which contributed to the awkwardness and [Sam's] sense that [he] was being targeted because of [his] transgender identity."[96] Kluge eventually resigned, and the board accepted his resignation, ending his employment.[97]

In *Kluge*, the court held that the school could not accommodate Kluge's religious belief without undue hardship on the students.[98] Here, the court found that the power of a name overrides a public school's duty to accommodate a teacher's sincere religious belief when the student's preferred name is supported by their parents and a healthcare provider.[99]

The Virginia Supreme Court reached the opposite conclusion in *Loudoun County School Board, et al., v. Cross*.[100] Bryon Cross worked for the Loudoun County Public Schools as a P.E. teacher for 8 years.[101] The school board was debating whether to adopt a policy that (1) allowed students to use a different name from their legal one; (2) allowed students to use different gendered pronouns from their corresponding biological sex; and (3) required that the staff and faculty use the student's chosen name and pronouns.[102] Cross attended a board meeting and argued, "I'm a teacher but I serve God first. And I will not affirm that a biological boy can be a girl and vice versa because it is against my religion."[103] Cross also stated, "it's lying to a child. It's abuse to a child. And it's sinning against our God."[104] Cross was placed on administrative leave with pay due to his comments made at the board meeting.[105] The court considered 4 factors in its analysis of Cross' case, which were (1) Cross' likelihood of success on his claims; (2) whether he would suffer irreparable harm absent an injunction; (3) the balance of the equities; and (4) the public interest.[106] The court held that the interests the school raised did not override Cross' interest in exercising his constitutional right to speak on the proposed

94. *Id.*

95. *Id.* at 826.

96. *Id.* at 826-27; *see also Bullying and TGNC Youth*, LAMBDA LEGAL, www.lambdalegal.org/know-your-rights/article/youth-bullying-and-tgnc [perma.cc/M6Z7-98CW] (last visited Feb. 13, 2023) (noting that the National Transgender Discrimination Survey reported that 78% of transgender youth reported being harassed).

97. *Kluge*, 548 F. Supp. 3d at 828.

98. *Id.* at 844-45. *Contra Meriwether*, 992 F.3d at 511-12 (holding that a college professor was not required to use a student's preferred pronouns).

99. *Kluge*, 548 F.3d at 849.

100. *Cross*, 2021 Va. LEXIS 141, at *27-31.

101. *Id.* at *1.

102. *Id.* at *1-2.

103. *Id.* at *2-3.

104. *Id.*; *see also* Natanson, *infra* note 129.

105. *Cross*, 2021 Va. LEXIS 141, at *2.

106. *Id.* at *11-12. *See also* Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008) (laying out the four factors involved in determining if a temporary injunction is warranted).

policy.[107]

A third case involving the use of personal pronouns in schools differed from the previous two cases in that it involved a professor at a public university, and was heard by the United States Court of Appeals for the Sixth Circuit.[108] In *Meriwether v. Hartop*, Nicholas Meriwether was a philosophy professor at Shawnee State University, a small public college in Ohio.[109] He was also a devout Christian who believed that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that cannot be changed, regardless of an individual's feelings or desires."[110] In 2016, school administrators emailed faculty stating they must refer to students by their preferred pronouns and would be subject to disciplinary action if they refused.[111]

Meriwether continued to teach without any issues until January 2018.[112] On the first day of class, Meriwether, who used the Socratic method in his Political Philosophy class, would call students by "Mr." or "Ms."[113] During class, he called on Doe using the words, "Yes sir."[114] Doe was "female" but did not outwardly appear to be female.[115] After class, Doe approached Meriwether and requested that he "use feminine titles and pronouns."[116] Meriwether then stated that he could not comply with the request because of his religious beliefs.[117] After Meriwether reported the incident to senior university officials, the Dean advised Meriwether to "eliminate all sex-based references from his expression."[118] Meriwether proposed a compromise in which he would continue to use gendered language in class but call Doe by her last name.[119] On one occasion, Meriwether accidentally called Doe using "Mr." before correcting himself.[120] Doe continued to attend class and Meriwether would call on

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107. *Cross*, 2021 Va. LEXIS 141, at *30.

108. *Meriwether*, 992 F.3d at 498.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 499.

113. *Id.*

114. *Id.*

115. *Id.*; *see also* Sarah Parshall Perry, *The 6th Circuit Reached the Right Conclusions on 'Preferred Pronouns.' Other Courts Should Follow Suit*, THE HERITAGE FOUND. (April 1, 2021), www.heritage.org/gender/commentary/the-6th-circuit-reached-the-right-conclusion-preferred-pronouns-other-courts [perma.cc/3V7X-BWWR] ("The court's decision is the first of its kind, and establishes a needed boundary against American culture's new, brutish sexual orthodoxy.").

116. *Meriwether*, 992 F.3d at 499.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 500; *see also* Karen Levit, *Anti-Trans Legislation and Rulings Are Part of a Bigger Picture*, ABOVE THE LAW (Apr. 16, 2021, 10:47 AM), www.abovethelaw.com/2021/04/anti-trans-legislation-and-rulings-are-part-of-a-bigger-picture/ [perma.cc/Z3GM-ASXK] (discussing various state legislation that targets transgender people). It also notes that anti-transgender laws challenge the legitimacy of transgender and non-binary people's existence and therefore, is a method to discriminate against them. *Id.*

her using her last name, and she ended the semester with a "high grade."[121]

Shortly after the semester ended, the Dean informed Meriwether that she was initiating a formal investigation and referred the issue to Shawnee State's Title IX office.[122] Meriwether was formally charged with violating the faculty's collective bargaining agreement, and a warning was placed in his file stating that he could face suspension without pay and termination among other possible punishments.[123]

In their opinion, the Sixth Circuit wrote "traditionally, American universities have been beacons of intellectual diversity and academic freedom."[124] The Court ultimately held that Meriwether had properly shown that Shawnee State burdened his First Amendment rights.[125] The Court also applied strict scrutiny as the standard of review. Under a strict scrutiny analysis, the university must prove that it (1) had a compelling interest and (2) pursued that interest in the narrowest way possible.[126] Here, the Sixth Circuit found that the school did not meet its burden of proof under this standard.[127] Thus, according to the Court, the student's right to use preferred pronouns was outweighed by Professor Meriwether's freedom of religion.[128] This is an example of how courts have protected the speech of teachers under the notion of academic freedom.[129] Collectively, these cases show the disagreement concerning whose rights should prevail between a student's right to use their preferred pronouns and a teacher's free speech and exercise rights. This disagreement also begs the question of whether there is (or should be) a balance between the two.

III. ANALYSIS

The deeply contested debate over the use of personal pronouns has created a series of problems for schools and school districts across the country.[130] First, schools have wrestled with how to reinvent or

121. *Meriwether*, 992 F.3d at 500.

122. *Id.*

123. *Id.* at 501.

124. *Id.* at 498.

125. *Id.* at 511-12; *see also* Mark Joseph Stern, *Trump Judge: Professor Has a First Amendment Right to Misgender a Trans Student in the Classroom*, SLATE (March 29, 2021, 2:47 PM), www.slate.com/news-and-politics/2021/03/amul-thapar-meriwether-trump-transgender-first-amendment.html [perma.cc/AA3S-E498] (discussing how Judge Thapar's opinion places anti-transgendered speech over the freedom of religious speech of Professor Meriwether).

126. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007).

127. *Meriwether*, 992 F.3d at 514.

128. *Id.*

129. *Academic Freedom*, AFT, www.aft.org/position/academic-freedom [perma.cc/J3GZ-K8EN] (last visited Jan. 9, 2023) (stating that academic freedom is the notion that there must be a free exchange of ideas to promote a good education and for teachers to be able to challenge ideas).

130. Linda K. Wertheimer, *'A very scary thing to tell someone': The debate over*

reimagine school policy to promote inclusivity in the English curriculum.[131] Second, and most importantly, schools have struggled to craft policy regarding students who seek to use different pronouns from their biological gender.[132] This has sparked great controversy among school districts in balancing the rights of students and the rights of faculty and staff.[133] Under the currently decided cases, faculty and staff have argued that they should not be forced to call students by their personal pronouns due to First Amendment protections.[134] For some faculty and staff members in the teaching profession, being required to use a student's name or pronouns that does not reflect that student's biological sex at birth violates their sincerely held religious beliefs, which embodies more traditional views on gender and sexuality, rather than evolving views.[135] Given the recent litigation on this issue, a case may be appealed or one day reach the Supreme Court. In that case, the following section will outline the key arguments litigants would make and the analytical framework they would most likely ask the Court to adopt.

Part A of this section will outline the core policies showing the implications of creating an implied constitutional fundamental right of respecting chosen pronouns in schools. The policies will illustrate how implementation in support of respecting chosen pronouns is an efficient way to ensure that the government will not overly intrude on students' personal decisions. This will also show how someone opposing the creation of such a policy would argue that the decision should be left to local politicians and elected school boards at the state level, not the federal government.

Part B will analyze different ways that teachers can integrate more

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gender pronouns in schools, explained, BOSTON GLOBE (Sept. 28, 2021, 11:48 AM), www.bostonglobe.com/2021/09/28/magazine/very-scary-thing-tell-someone-why-gender-pronouns-matter-schools/ [perma.cc/KY5N-LHHE] (discussing how some school districts have been hesitant because the concept of using pronouns is novel to many teachers and the potential community backlash).

131. *See Guidelines for Affirming Gender Diversity through ELA Curriculum and Pedagogy*, NTCE (Mar. 24, 2021), www.ncte.org/statement/guidelines-for-affirming-gender-diversity-through-ela-curriculum-and-pedagogy/ [perma.cc/G68F-9CAY] (noting that people of all gender identities are already present in many English Language Arts classrooms). It is important that those individuals not only see themselves in the stories and texts in the classroom but also that teachers discuss various perspectives and allow students to think critically about binary gender systems in diverse texts. *Id.* However, the article merely articulates recommendations, and does not endorse forcing teachers to include this in their classroom teaching. *Id.*

132. Wertheimer, *supra* note 130.

133. *See* discussion *supra* Part I.

134. *See* discussion *supra* Part I.

135. Hannah Natanson, *Va. Supreme Court affirms judge's ruling reinstating Loudoun teacher who refused to use transgender pronouns*, WASH. POST (Aug. 31, 2021), www.washingtonpost.com/local/education/tanner-cross-virginia-supreme-court-transgender-pronouns/2021/08/31/52f94c62-0a71-11ec-9781-07796ffb56fe_story.html [perma.cc/UX5Q-EXNM] (quoting Attorney Langhofer, attorney for Cross in *Loudoun Cnty. Sch. Bd. v. Cross*). Langhofer states that "[t]eachers shouldn't be forced to promote ideologies that are harmful to their students and that they believe are false." *Id.*

inclusive practices into their classrooms. Since school districts have no clear policies on the usage of personal pronouns, teachers are forced to innovate and create their own solutions. Some teachers use this broad exercise of discretion as an opportunity to create inclusive practices and allow students to use their personal pronouns. Conversely, other teachers, because of their sincerely held beliefs, use this discretion to create policies that do not recognize the usage of personal pronouns. This inconsistency is not an efficient way to solve the issue, irrespective of one's personal viewpoints, and reflects an increased need for a solution. While advocates for preferred pronouns might try to enact change through the courts, this is not the optimal solution. Rather, advocates should turn to their elected officials and effect change through the democratic process. Ultimately, this will ask either (1) Congress or (2) state legislatures to be responsible for enacting or not enacting laws that address the usage of personal pronouns in public schools.

A. Core Policies Conveying the Implications of Creating an Implied Constitutional Fundamental Right of Using Personal Pronouns

Three policies that frequently weave themselves throughout Supreme Court arguments relating to substantive due process are tyranny, efficiency, and laboratories of democracy.[136] Litigants from opposing sides will argue different policies or may assume a different position on the same policy.[137]

Regarding the use of pronouns in public schools, a litigant arguing against the creation of an implied fundamental right of chosen pronoun usage would likely argue the policies of tyranny and the laboratories of democracy. [138] In contrast, the argument that the use of chosen pronouns should be an implied fundamental constitutional right might be supported by the arguments of tyranny and efficiency.[139]

1. Policies that Oppose the Creation of an Implied Right

At the forefront, a party opposing the creation of an implied fundamental right of preferred pronouns would use the policies of laboratories of democracy and tyranny. The core argument would be that

136. Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L J. 175, 175-77 (1990) (discussing the development of term of the "separation of powers" which does not appear in the Constitution). However, this instinctively creates distinctive branches with various checks and balances. *Id.*

137. Ellie Margolis, *Teaching Students to Make Effective Policy Arguments in Appellate Briefs*, *in* 9 PERSPECTIVES: TEACHING LEGAL RSCH. AND WRITING 5 (2001) (arguing that policy argumentation is used when an advocate is asking the court to adopt a legal rule for a new situation and address novel issues of law).

138. *See supra* notes 140-161 and accompanying text.

139. *See supra* notes 162-184 and accompanying text.

local and state governments should be the level of democracy responsible for crafting policy tailored to the respective local community or state. Together, these policies highlight the notion underlying the Tenth Amendment that each state holds the power to regulate matters involving the "health, peace, morals, and safety" of its citizens.[140] This argument supports the position that the use of preferred pronouns should be left to local democracies and states to decide, and not to the federal government.[141] The rationale is that local and state school boards are better positioned to understand the needs and interests of their students, parents, teachers, and community members instead of the federal government or the unelected federal judiciary.[142] Specifically, litigants would argue that the use of preferred pronouns falls under the umbrella of state "morals," since there could potentially be a religious disagreement.[143] Additionally, educational matters are under state control, and therefore the federal government should allow states and individual school boards to create policy tailored to their communities.[144]

Additionally, a party against the creation of this implied fundamental right would argue that elected school boards, as local democracies, are the appropriate bodies to create policies tailored to their constituents.[145] Therefore, the federal government should not intrude upon and tyrannize the state's rights on matters best solved by the local democracies who know their communities.[146] Simply put, because pronoun usage is framed as a moral issue, recognizing a right to use chosen pronouns should be decided by citizens through their local

140. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

141. Bradley A. Blakeman, *States are the laboratories of democracy*, THE HILL (May 7, 2020, 7:30 AM), thehill.com/opinion/judiciary/496524-states-are-the-laboratories-of-democracy [perma.cc/5LGJ-8KQY] (explaining how the laboratories democracy's rationale is that what might be good for one state, like California, may not be good for Kentucky).

142. *The Federal Role in Education*, U.S. DEP'T. OF EDUC.**,** www2.ed.gov/about/overview/fed/role.html [perma.cc/3XAK-HQWK] (last accessed Jan. 27, 2023) (emphasizing that education is primarily a State and local responsibility in the United States). Additionally, the U.S. Dep't. of Educ. recognizes that local communities and States determine things such as curriculum and requirements for enrollment. *Id.*

143. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113-14 (2001) ("[A] state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination." (quoting Widmar v. Vincent, 454 U.S. 263, 271 (1981)); *see also* Lee v. Weisman, 505 U.S. 577, 604-05 (1992) (proscribing "public schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.").

144. *About School Board and Local Governance*, NEB. ST. BAR ASS'N, www.nsba.org/About/About-School-Board-and-Local-Governance [perma.cc/8M99-YTJ9] (last visited Jan. 9, 2023) (highlighting that the school board "represents the community's voice in public education, providing citizen governance and knowledge of the community's resources and needs, and board members are the policy-makers closest to the student.").

145. *Id.*

146. *Id.*

elected officials and not through the unelected federal judiciary.[147]

Here, litigants against the requirement of using pronouns would stress the Court's analytical reasoning and holdings in *Kennedy* and *Dobbs*. First in *Kennedy*, the Court held that Bremerton School District ("District") violated Coach Kennedy's First Amendment rights when he lost his job for kneeling at the midfield after games to conduct a quiet and personal prayer.[148] The Majority was not persuaded by the District's argument that Coach Kennedy's prayers violated the Establishment Clause.[149] Here, the Establishment Clause must be analyzed through a historical lens and ultimately criticized the position the District advanced: that "the only acceptable government role models for students are those who eschew any visible religious expression."[150] Justice Gorsuch stated that such a rule would illustrate "that our Establishment Clause jurisprudence had gone off the rails."[151] The decision also noted the absence of any evidence that Coach Kennedy coerced his students to participate in any of his quiet, personal prayers.[152] This case stands as a beacon for protecting a teacher's First Amendment right to maintain their sincerely held religious beliefs, even if they are in school. As applied to personal pronouns, *Kennedy* reminds litigants that teachers' First Amendment rights should not be disregarded or disrespected. It also reaffirms that school districts cannot tyrannize their teachers by forcing them to refrain from all religious practices. If a school were to enact a policy that "required" teachers to use their preferred pronouns, teachers who oppose the policy on religious grounds should not be compelled to use chosen pronouns. Instead, schools should ensure that other means exist to accomplish the same goal. Further, as the Court notes, a "role model" (including a teacher) can come from diverse backgrounds.[153] Just because a teacher refuses to use a student's preferred pronoun does not make them a "bad" teacher or taint their ability to deliver a quality education.

In *Dobbs*, Justice Alito's majority opinion quotes Justice Rehnquist's explanation in *Casey*, stating, "the Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution."[154] Thus, regardless of what societal

147. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942-43 (2011).

148. *Kennedy*, 142 S. Ct. at 2432-33.

149. *Id.* at 2428-29.

150. *Id.* at 2341.

151. *Id.*

152. *Id.* at 2430 (stating "[t]here is no indication in the record that any expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers.").

153. *Id.* at 2431 (explaining the "long constitutional tradition" of "learning how to tolerate diverse expressive activities" as being part of living in a diverse society).

154. *Dobbs*, 142 S. Ct. at 2278 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Casey*, 505 U.S. at 963).

opinion is about gender identity or pronoun choice, this should not be determinative when the Court renders a constitutional decision. Rather, judicial restraint is needed to ensure that the Court does not go beyond its role and tyrannize the other coordinate branches of government.[155] If the Court were to hear a case about pronoun choice and use, there would be a strong argument that this moral issue is inappropriate for the judicial branch to address.

Next, litigants opposing a right to required pronoun recognition would invoke the history and tradition standard applied in *Dobbs*. There, Justice Alito pointed out "the inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions."[156] He explained that the criminalization of abortion existed at the "earliest days of the common law."[157] The Justice also noted that when the Fourteenth Amendment was adopted, over three-quarters of the states had statutes criminalizing abortion.[158] Here, litigants would argue that the right to use preferred pronouns is not "deeply rooted" in our Nation's history or traditions.[159]

Finally, litigants would point to the controversial nature of using preferred pronouns. As Justice Kavanaugh noted in concurrence, "instead of adhering to the Constitution's neutrality, the Court in *Roe* took sides on the issue . . . the Court's decision today properly returns the Court to a position of neutrality and restores the people's authority to address the issue of abortion."[160] Therefore, the issue of using preferred pronouns is not one the Court should answer, rather, It should allow people to create policy through the democratic process.[161] This is in alignment with the laboratories of democracy that allow states to experiment. If Illinois wants to require the recognition of pronoun choice in schools and Texas finds the opposite, the diversity should be permitted. Or, Congress, through bipartisanship, could pass a law to protect students' use of preferred pronouns.

2. Policies in Favor of Creating an Implied Right

In contrast, a party litigating in favor of creating an implied fundamental right for the recognition of pronoun choice would oppose a tyranny argument by asserting that the government—state or federal—and local school boards should not be making decisions that pertain to an

155. *Id.* at 2279 ("We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly. We therefore hold that the Constitution does not confer a right to abortion.").

156. *Id.* at 2253.

157. *Id.* at 2253-54.

158. *Id.* at 2254. *See, e.g.*, 1861 R.I Acts & Resolves 133 (explaining that it was a crime in Rhode Island to "procure the miscarriage" of "any pregnant woman" or "any woman supposed by such person to be pregnant.").

159. *Dobbs*, 142 S. Ct. at 2253.

160. *Id.* at 2305 (Kavanaugh, J., concurring).

161. *Id.* at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

individual's autonomous, private, and personal choice.[162] Thus, by telling a student their selected pronouns may not be recognized by some teachers due to the teacher's sincerely held religious beliefs, the government is abusing its power and tyrannizing its citizens.[163] Pronoun proponents would therefore argue that an individual should have the choice to decide which name or pronouns with which they identify. In a democratic republic, where governmental authority emanates from the people, it follows that individuals should be able to make their own autonomous decisions.[164] In short, an individual who wants to be identified with a different pronoun should have the autonomy to make that individualized decision, and the government should not intrude on that individual's privacy by dictating which pronoun(s) they should or should not use.[165] Furthermore, they might also assert that personal pronouns cannot be determined by a local election or community, but rather this is a universal human right.

The last policy argument by those in favor of establishing the fundamental right for the use of preferred pronouns would be efficiency.[166] Under this policy, one would argue that there are a significant number of individuals across the country who identify by a different pronoun than the one ascribed by societal expectations based on gendered understanding of biological sex.[167] This has become a serious and widespread issue and advocates bringing an efficiency argument would assert that it would be more efficient for the court to decide the issue, creating a uniform, nationwide standard.[168] This not only saves time, but also state resources.[169] A party advocating against the creation of an implied fundamental right would not choose this argument because it conflicts with the policy of the laboratories of democracy, which sacrifices efficiency in order to preserve the rights of the state.[170]

Here, litigants in favor of a right to use personal pronouns would

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162. *Griswold*, 381 U.S. at 484 (establishing an implied Constitutional right of privacy).

163. *Id.*

164. Andrew G.I. Kilberg, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061, 1098 (2014).

165. *Supporting and Working with Transgender and Gender-Diverse Individuals*, ASHA, www.asha.org/practice/multicultural/supporting-and-working-with-transgender-and-gender-diverse-individuals/ [perma.cc/Z3GK-F67Z] (last visited Jan. 9, 2023) (emphasizing that research shows that respecting a person's personal pronouns allows for better health outcomes such as building rapport and increased feeling of inclusion).

166. *Contra* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.").

167. Jody L. Herman, et al., *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INST. (June 2022), williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [perma.cc/24Y2-U7BL] (noting that an estimated 300,000 teens, ages 13 to 17, identify as transgender).

168. Entin, *supra* note 136, at 182-83.

169. Levinson, *supra* note 12, at 558.

170. *Myers*, 272 U.S. at 293.

turn to the Court's analysis and holdings in *Obergefell* and *Griswold*. They would argue that under the Penumbral Approach, the First Amendment encapsulates the concept of decisional privacy.[171] First, the freedom of thought includes the pronouns individuals may use and is indicative of how they view themselves. Self-identity is deeply connected to the way people identify themselves and associate with others. This directly relates to the usage of preferred pronouns in school.[172] The First Amendment includes the freedom of association.[173] The friends, family, and people with whom you choose to form relationships are deeply intimate and personal choices. The way a student identifies extends to the classroom setting, including both peers and teachers, and is an important way for that student to feel a greater sense of inclusivity.[174] By choosing to not use a student's pronouns correctly, a teacher is socially isolating the individual and infringing on their personal dignity.[175]

Justice Douglas in *Griswold* recognized that the zones of privacy established by the penumbras could also be derived from the Third, Fourth, and Fifth Amendments.[176] The Third Amendment, which protects against the quartering of soldiers in a citizen's home without the owner's consent, encompasses both decisional privacy and spatial privacy.[177] In application to the constitutionality of recognizing pronouns, it means that the government should not intrude on the personal decisions of one's life, such as their name or the way they wish to present themself. The Fourth Amendment discusses the notion of spatial privacy.[178] Here, one should have the freedom to keep certain information private. Finally, the Fifth Amendment creates a zone of privacy that ensures the government is not

171. *Griswold*, 381 U.S. at 484-86.

172. *Gender Identity and Gender Expression*, ONTARIO HUM. RTS. COMM'N, www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression/3-gender-identity-and-gender-expression [perma.cc/HKA8-E9BD] (last visited Jan. 9, 2023) (defining "gender expression" as "how a person publicly expresses or presents their gender…include[s] a person's chosen name and pronoun . . . which others perceive a person's gender through these attributes.").

173. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting . . . the right of the people peaceably to assemble . . .").

174. Fagell, *supra* note 3 (noting the mental health benefits of affirming a student's pronoun identity).

175. *Id.*

176. *Griswold*, 381 U.S. at 484 ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give the life and substance. Various guarantees create zones of privacy.").

177. *Lawrence*, 539 U.S. at 562 (stating "freedom extends beyond spatial bounds"); *see also* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner . . ."); *Griswold*, 381 U.S. at 584 ("The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy.").

178. *Lawrence*, 539 U.S. at 562; *see also Griswold*, 381 U.S. at 584 ("The Fourth Amendment explicitly affirms the 'right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures.'"); U.S. CONST. amend. IV (protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .").

forcing someone to say something that would work to their detriment.[179] A teacher who does not respect a student's pronoun choice puts that student into a daily reminder of pronoun usage incompatible with their self-identity.

The second approach the Supreme Court could utilize is the Ninth Amendment in conjunction with the Fourteenth Amendment, Fifth Amendment, or the Penumbral Approach.[180] Those advocating for a right to recognize pronoun choice would argue that the Court has interpreted the Ninth Amendment as a reminder that the Constitution need not expressly state something within the text for it to constitute as an implied fundamental right.[181] Structurally, coming toward the end of the Bill of Rights, the Ninth Amendment acts as an emphasis that the enumerated rights are not exclusive.[182] While the right of pronoun choice does not appear anywhere in the text of the Constitution, the recognition of personal pronouns, like other privacy rights, should not preclude it from being recognized.

The third and final approach the Court could use is the Fourteenth Amendment.[183] The Court would look at the liberty interest and compare it to the historical tradition.[184] Here, students and advocates for the use of pronouns will argue a broad liberty interest. They will argue that public schools have always been institutions that promote tolerance, inclusivity, and safety, and including pronouns is another way to extend this historical tradition.[185]

B. Teaching, Pedagogical Approaches, and Classroom Practices that Incorporate the Usage of Personal Pronouns

The constitutional use of pronouns in public school has two parts. The first part is the burden a student bears by not being recognized by

179. *Griswold*, 381 U.S. at 584 ("The Fifth Amendment in its Self-Incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment"); *see also* U.S. CONST. amend. V (prohibiting any individual from being "compelled in any criminal case to be a witness against himself . . .").

180. *Griswold*, 381 U.S. at 490.

181. *Id.* (Harlan, J., concurring) ("[T]he Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.").

182. *Id.* at 488-89 ("[The Ninth Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.").

183. *Id.* at 502 (White, J. concurring) (stating that he would have reached the holding of *Griswold* based solely on the Fourteenth Amendment).

184. *Cf.* John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 NYU J.L. & LIBERTY 172, 173-74 (2009) (criticizing the use of American history and tradition when addressing a substantive due process issue).

185. Carl F. Kaestle, *Moral Education and Common Schools in America: A Historian's View*, 13 J. MORAL EDUC. 101, 102 (1984) (noting moral education was a key purpose of common schools in the nineteenth-century).

their appropriate pronouns.[186] The second part is the burden potentially placed on teachers who are not comfortable recognizing students by their pronouns due to religious conflicts.[187] Thus, there is a delicate balance between a student's right to be called by their chosen pronoun and the teacher's First Amendment rights.[188] This balance has not been directly addressed by the Supreme Court, Congress, or the Executive Branch.[189] Many teachers across the nation have recognized the key role teachers play in the lives of their students and, more important, have taken tangible steps to create more inclusive and safe classroom environments for all students.[190] As this issue has gained more attention in multiple academic fields such as education, psychology and sociology, studies have been conducted that support and encourage teachers to adopt these more inclusive practices.[191] However, that is not to say that students' rights should automatically trump teachers' rights, irrespective of what the studies show.

1. Arguments to Promote More Inclusive Practices

The key arguments teachers and researchers have made to promote inclusive practices relating to transgender students and those using gendered or non-gendered pronouns is the ease of implementing these practices and their impact on students.[192] Names, and especially pronouns, are a powerful way to identify oneself.[193] This allows a person to present themselves to others and to communicate how the person identifies.[194] Additionally, a person's choice to be named in a specific manner demonstrates the way that person thinks of themselves within their mind and heart.[195] The choice of an individual to identify with a

186. *Id.* at 191, 196.

187. *Meriwether*, 992 F.3d at 517 (holding that a college professor was not required to use a student's preferred pronoun).

188. *Id.*

189. *See id.* at 504-07 (applying Supreme Court precedent to Meriwether's free speech claim arguing academic freedom but not to the student's preference of using their preferred pronoun).

190. Erin Cross & Amy Hillier, *Respecting pronouns in the classroom*, THE EDUCATOR'S PLAYBOOK, www.gse.upenn.edu/news/educators-playbook/erin-cross-pronouns-gender-identity [perma.cc/C3XC-SQWK] (last visited Jan. 9, 2023).

191. *Id.*

192. *Trans Inclusive Practices in the Classroom*, NEW YORK UNIV., www.nyu.edu/life/global-inclusion-and-diversity/learning-and-development/toolkits/trans-inclusive-classrooms.html [perma.cc/ZHX5-C3SS] (last visited Jan. 9, 2023) (outlining ways that teachers can integrate inclusive practices into their classrooms).

193. *E.g.*, Gemma Martin, et al., *What are Gender Pronouns? Why Do They Matter?*, NAT'L INST. HEALTH (May 28, 2020), www.edi.nih.gov/blog/communities/what-are-gender-pronouns-why-do-they-matter [perma.cc/67GX-DZ5Y] (noting that 56% of Generation Z respondents in the study know someone who uses gender neutral pronouns).

194. Veronica Zambon, *What to know about gender pronouns*, MED. NEWS TODAY (Feb. 11, 2021), www.medicalnewstoday.com/articles/gender-pronouns#definition [perma.cc/N65C-BNNW].

195. JOSEPH G. KOSCIW, ET AL., GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY:

different pronoun from their biological pronoun is a very intimate and personal choice. It is one that evokes great emotion as to the way the individual chooses to associate with others, such as teachers and classmates.[196]

Teachers can have an integral role in advocating for their students.[197] One way is to advocate and present policies to the school district, urging the local officials to adopt policies that are not overly burdensome but are still respectful of student choice. Such policies could be easily incorporated within the established activities, curriculum, and classroom management policies the teacher already uses.[198]

There is also a practical impact that more inclusive practices can have on students. There is not only a greater feeling of acceptance in the classroom, but a greater rapport between each student and teacher.[199] This relationship is paramount to running a successful classroom environment.[200] The result of pronoun inclusion allows one to respect the way others identify themselves.[201] If someone identifies as him/they or she/they, that individual should be respected in the way they identify.[202] Within the school context, respecting a student's pronoun is a way for them to feel more comfortable in the school environment.[203] It is also a

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THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS xvii (2016) (stating that half of the trans* students surveyed said they were prevented from using names or pronouns that align with their gender identity).

196. *Id.* (stating 65% of the trans* students surveyed said they had been verbally harassed at school).

197. Davis, *infra* note 211 (emphasizing that the role of a teacher is to educate and affirm a student's identity in the classroom).

198. *See infra* notes 206-22 (illustrating how a Chicago Public School teacher includes inclusive practices in her classroom).

199. Kosciw, *supra* note 195 (noting that a quarter of trans* students said they'd been physically harassed at school, and 12% said they'd been physically assaulted).

200. *See, e.g.*, Katie Reilly, '*This Isn't Just About a Pronoun.' Teachers and Trans Students Are Clashing Over Whose Rights Come First*, TIME (Nov. 15, 2019, 6:00 AM), www.time.com/5721482/transgender-students-pronouns-teacher-lawsuits/ [perma.cc/JQ5M-QF9Q] (analyzing the *Kluge* case and how Aidyn was called "the fag that got Kluge fired" and has since withdrawn from Brownsburg and takes online classes through Indiana Connections Academy).

201. *See, e.g.*, *id.* (quoting Aidyn's mother who responded to the case saying, "[h]e's going through the process of identifying who he is as a person."). "That's something that everybody goes through," says Laura Sucec [Aidyn's mother]. *Id.* "But when somebody identifies as being transgender, that's much more difficult to go through, because that's something that not everybody understands." *Id.*

202. Zambon, *supra* note 194.

203. *Using Chosen Names Reduces Odds of Depression and Suicide in Transgender Youths*, UT NEWS (Mar. 30, 2018), www.news.utexas.edu/2018/03/30/name-use-matters-for-transgender-youths-mental-health/ [perma.cc/88E9-JQTA] (presenting how the study "showed that the more contexts or settings where [transgendered kids] were able to use their preferred name, the stronger their mental health . . ."). The researchers also found that transgender youth who were allowed to use their chosen name in any context [school, home, work and with friends] experienced 71% fewer symptoms of severe depression, a 34% decrease in reports of suicide, and 65% decrease in suicidal attempts. *Id.*

way for them to express and be their authentic self.[204]

One instructive and illustrative example of how simple it is to incorporate these inclusive practices comes from a high school history teacher at Lane Technical High School in the Chicago Public School ("CPS") system.[205] Teacher X discussed her practices regarding recognizing students' preferred pronouns and the way her school administration has dealt with the issue.[206] First, Teacher X noted that Aspen, which is the grading and student information system, is slow to change pronouns.[207] This includes cases in which the student's gender is legally changed.[208] Therefore, as a practical matter, the student management system may not be an accurate representation of how a student chooses to be identified.[209] She also noted that there are students who are in the process of transitioning and one student wears a pin that reminds students and teachers of their pronouns.[210]

Regarding her classroom management, Teacher X conducts a survey during the first day of class that includes asking students if they are comfortable sharing their pronouns.[211] Additionally, many other teachers in her school and department also ask students if they have a name different than on the roster or if they wish to be called something different when the teacher calls home to parents.[212]

The administration is also positive about the use of pronouns in school.[213] The administration asks teachers during their professional development how to address bias and counter stereotypes in the school.[214] The goal behind this is to limit bias from faculty and staff when in the building.[215] CPS has published a Gender Diversity Toolkit that states, "[s]taff should always use the gender pronouns which affirm a student's gender identity." [216]

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204. *Understanding Pronouns*, LGBT LIFE CTR., www.lgbtlifecenter.org/pronouns/ [perma.cc/4YRP-8JZ9] (last visited Jan. 9, 2023) (providing a hypothetical to someone who goes by their given pronoun and asks someone to imagine another person repeatedly calling you by the wrong pronoun and how one might feel).

205. *Lane Tech History*, www.lanetech.org/about/history/ [perma.cc/2VFP-TBK4] (last visited Jan. 9, 2023) (detailing the history of the school, which serves over 4,200 students between seventh to twelfth grade and employs more than 250 teachers).

206. Interview with Teacher X, History Teacher at Lane Tech High School, in Chicago, IL (Sept. 14, 2021) (notes on file with author) (name of teacher withheld for anonymity) [hereinafter *Teacher X Interview*].

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*; *see, e.g.*, Mellie Davis, *Trend Lines: The Importance of Pronouns in Lower School*, NAT'L ASS'N INDEP. SCH. (Summer 2020), www.nais.org/magazine/independent-school/summer-2020/trend-lines-the-importance-of-pronouns-in-lower-school/ [perma.cc/PE8Z-786F] (explaining that by naming gender pronouns at the start of the school year, the stigma behind them lessens and reduces stress).

212. *Teacher X Interview*, *supra* note 206.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Supporting Gender Diversity Toolkit*, CHI. PUB. SCH., www.cps.edu/

Teacher X sees her job as making students feel more comfortable in the classroom.[217] Further, the purpose of teachers is not to give their personal opinions when working with students.[218] She believes calling students by their appropriate pronouns as a way of creating rapport with students and encouraging better collaboration among teachers and parents.[219]

Teacher X also noted how there also is a push for staff, and not just students, to feel included by using their chosen pronouns.[220] Some of the teachers who identify with a different pronoun use the title "Mx." instead of the traditional "Mr./Ms./Mrs."[221]

While this illustrative example demonstrates how teachers can integrate inclusive practices in their classroom, there is still great opposition to the recognition of transgender identities and pronouns in school.[222] Those in opposition argue (1) that using certain pronouns violates their religious beliefs;[223] and (2) that the usage of pronouns could be extended too widely.[224]

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globalassets/cps-pages/services-and-supports/health-and-wellness/healthy-cps/healthy-environment/lgbtq-supportive-environments/supportinggenderdiversitytoolkit2.pdf [perma.cc/73EA-46PJ] (last visited Feb. 16, 2023).

217. *Id.*; *see also* Davis, *supra* note 211 (emphasizing the role of a teacher is to educate and affirm the students that the teacher works with in the classroom).

218. *Teacher X Interview*, *supra* note 206.

219. *Id.*

220. *Id.*

221. *Id.*; *see, e.g.*, Steven Petrow, *It's time to add 'Mx.' into the daily mix of titles we use to address each other*, USA TODAY (Feb. 28, 2019, 7:00 AM), www.usatoday.com/story/opinion/2019/02/28/mx-honorific-courtesy-title-nonbinary-non-comforming-transgender-folks-identity-column/2993966002/ [perma.cc/5LXZ-CTQ5] (noting the rarity of "Mx." as a gender non-conforming title but arguing it is time to add it to the daily mix of common titles).

222. Minyvonne Burke, *Teacher on leave after speaking out against pronoun policy for students*, NBC NEWS (June 1, 2021, 11:01 AM), www.nbcnews.com/feature/nbc-out/teacher-leave-after-speaking-out-against-pronoun-policy-students-n1269212 [perma.cc/9T2W-TE5W] (discussing the *Cross* case and quoting Bryan Cross, the teacher who was fired, who stated "I will not affirm that a biological boy can be a girl and vice versa because it's against my religion.").

223. *See, e.g.*, *Cross*, 2021 Va. LEXIS 141, at *2-3 (noting that Cross was opposing the school's gender-confirming policy at a school board meeting since he was concerned his freedoms of expression and religion were being threatened). Cross stated that by requiring him to speak and interact with students using their chosen pronouns, it would affirm the notion of gender transition which was against his religion and harmful for youth. *Id.* at *3. The Supreme Court of Virginia found that Cross' interest in making his public comments was compelling. *Id.* at *19-21. The court also noted his claim encapsulated concerns regarding "fundamental societal values." *Id.* at *21.

224. Lindsey Bever, *Students were told to select gender pronouns. One chose 'His Majesty' to protest 'absurdity.'*, WASH. POST (Oct. 7, 2021), www.washingtonpost.com/news/education/wp/2016/10/07/a-university-told-students-to-select-their-gender-pronouns-one-chose-his-majesty/ [perma.cc/B4V9-UEBP] (highlighting the story of a University of Michigan student who protested the university's recent policy). The student raised the question, "[w]hen will that end? How much is the university willing to sacrifice its pursuit of truth and its mission for

2. Teachers Should Not Be Forced to Use Preferred Pronouns

First, given the cases presented above in Part II, teachers who opposed the use of preferred pronouns argued that they were protected under the First Amendment's free speech and religious freedom clauses.[225] While there are potentially other religions that oppose the transgender community or gender non-conforming pronouns, the cases solely involve a conflict with Christianity.[226] In those cases, the teachers argued that God created men and women uniquely and that it was not God's design for people to be able to "choose" their gender identity.[227] Those teachers believe that the use of pronouns makes teachers accept a belief that contradicts their religion.[228]

The second argument teachers made is that if schools were to require recognition of pronoun choice, at what point does a school determine if a student has the requisite maturity to make those very serious decisions?[229] While some studies show the benefit of inclusive practices, there are also famous psychological and educational academic

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this fantasyland of political correctness?" *Id.* In this instance, the university's online roster database allowed students to choose any pronouns and so the student chose "His Majesty" to show how the system was solely to promote political correctness. *Id.*

225. *See, e.g.*, *Kluge*, 548 F. Supp. 3d at 834 (teacher who sued the school district argued that as a Christian, he did not want to comply with the school's policy requiring the usage of preferred pronouns).

226. *Id.*

227. *See, e.g.*, Austen Hartke, et al., *What Does the Bible Say About Transgender People?*, HUM. RTS. CAMPAIGN, www.hrc.org/resources/what-does-the-bible-say-about-transgender-people [perma.cc/G6XQ-27V3] (last visited Jan. 9, 2023) (noting that the Book of Genesis states that God created "man" and "woman"); *see, e.g.*, *Kluge*, 548 F. Supp. at 820-21 (highlighting Mr. Kluge's religious beliefs are "drawn from the Bible" and that "his Christian faith governs the way he thinks about human nature, marriage, gender sexuality, morality, politics, and social issues."). This includes the notion that "God created mankind as either male or female, that this gender is fixed in each person from the moment of conception, and that it cannot be changed." *Id.* at 821; *see also Cross*, 2020 Va. LEXIS 141, at *28-30 (holding that the students' rights did not override Cross' constitutional right to speak against the school's transgender policy).

228. *Transgenderism, Transsexuality, and Gender Identity*, RELIGIOUS INST., www.religiousinstitute.org/denom_statements/transgenderism-transsexuality-gender-identity/ [perma.cc/622T-WTPK] (last visited Feb. 17, 2023) (noting how Christians tend to view Genesis as creating a gender binary system); *see, e.g.*, *Kluge*, 548 F. Supp. at 821 (noting that according to Mr. Kluge, affirming the notion of gender fluidity are concepts that he deems, "untrue and sinful"); *see also Meriwether*, 992 F.3d at 498 (acknowledging that Professor Meriwether was a devout Christian who wished to live in faith each day). This included the belief that "God created human beings as either male or female, that sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." *Id*. Furthermore, Meriwether believed he could not "affirm as true ideas and concepts that are not true." *Id.* It was also noted in the prior twenty-five years of Meriwether's university career, his faith posed no issue for the institution until 2016. *Id.* The Sixth Circuit Court of Appeals found that Meriwether sufficiently showed that Shawnee State University had burdened his free-exercise rights. *Id.* at 517.

229. *See* Bever, *supra* note 224 (showing how there are students that do not take the usage of pronouns seriously if given too much choice).

studies that clearly establish stages of learning and development that children go through.[230] Therefore, the dilemma becomes whether a school district accepts a policy that only high school students can choose their pronouns? Or are middle school students, who are old enough to be aware of topics such as drugs and sex, also mature enough to choose their own pronouns?[231]

Thus, the policy response to the use of pronouns may not be as bright-lined as some might think.[232] Districts that are unified, such as CPS, may struggle to find a "one-size-fits-all" solution when they bear the responsibility of managing elementary, middle school, and high school levels.[233] Therefore, even if a district accepts a policy that only permits high school students to decide their pronoun, then they could be perceived as discriminatory toward others who do not fall into the permitted category.[234]

The cases that have been adjudicated on the matter are split on whether the student's interest or the teacher's interest should prevail.[235] In *Kluge*, the district court held that Kluge's rights did not outweigh the students' right to choose their preferred pronouns.[236] Additionally, in *Cross,* the court held that the school's interests did not override Cross' interest in experiencing his constitutional right to speak against the proposed transgender policy.[237] In contrast, in *Meriwether*, the Sixth Circuit ruled that the professor's freedom of speech and academic freedom overcame Doe's right to use their preferred pronoun.[238] As cases

230. Fatima Malik & Raman Marwaha, *Cognitive Development*, STATPEARLS PUBL'G (July 31, 2021), www.ncbi.nlm.nih.gov/books/NBK537095/ [perma.cc/TUF6-69W8] (explaining Jean Piaget's learning theory of development which holds that an individual 7 to 11 years old becomes more aware of world events and develops greater operational thought). However, they are not as developed as someone who reaches adolescence and adulthood capable of grasping more abstract concepts. *Id.* The notion of gender can be quite complex with many considerations and thus, a middle schooler may not be able to understand the gravity of their decision to choose their pronoun. *Id.*

231. *D.A.R.E. is Substance Abuse Prevention Education and Much More!*, www.dare.org/about/#MissionVision [perma.cc/NR37-ERQT] (last visited Jan. 9, 2023) (explaining how millions of children around the world benefit from learning how to avoid drugs, gangs, and violence).

232. *See* discussion *supra* Part I (discussing the different outcomes in judicial jurisprudence regarding the use of gender pronouns).

233. *School Districts, Elementary and Unit*, IECAM, www.iecam.illinois.edu/data-definitions/school-districts/ [perma.cc/MF58-9FDD] (last visited Jan. 9, 2023) (defining a "unified district" as one that "no elementary or secondary school district exists.").

234. *See, e.g.*, *Know Your Rights Office for Civil Rights*, U.S. DEP'T OF EDUC., www2.ed.gov/about/offices/list/ocr/know.html [perma.cc/4HQL-YY73] (last visited Jan. 9, 2023) (stating that there is a prohibition on the basis of sex and that these laws extended to both elementary and secondary school systems which receive U.S. Department of Education funds).

235. *See* discussion *supra* Part II (discussing different adjudicated cases regarding the usage of preferred pronouns and which have come to different results).

236. *See* discussion *supra* Part II (discussing the different adjudicated cases involving the use of preferred pronouns in public schools).

237. *Cross*, 2021 Va. LEXIS 141, at *27-30.

238. *See* discussion *supra* Part II (discussing the different adjudicated cases

potentially go for appeal or more cases are litigated on this issue, students and other advocates are concerned that they may not find protection from the Court in seeking recognition of their pronouns.[239] Since the composition of the Supreme Court has become more conservative-leaning, in addition to the Court's recent decisions in *Dobbs* and *Kennedy*, it is understandable that litigants might be unsure how their privacy argument would fare in the nation's highest court. However, to maintain judicial legitimacy, the Supreme Court should rule against finding a constitutional right for students to use their chosen pronoun and make it clear that either the state or federal legislature should be the branch of government to address the issue.

IV. PROPOSAL

A. The Supreme Court Should Grant Certiorari on the Issue of Students' Right to Use Their Personal Pronouns in Public Schools and Apply Kennedy and Dobbs

This Comment ultimately proposes that the legislative branch is the best-positioned branch of government to address the policy of whether students should or should not be able to use their chosen pronouns in public schools. If a case were to address this question, the Supreme Court should find they are the inappropriate institution for creating and enacting this change. Given the moral and controversial nature of pronouns, this issue is best decided either (1) on a federal level through Congress; or (2) through state legislatures. This ensures that the Supreme Court avoids judicial legislation and that any policy changes arise from the democratic process.

While Congress is the most appropriate institution to address the usage of preferred pronouns in public schools, the recent litigation on the issue might result in a case reaching the Supreme Court. If this were to happen, the Court should grant certiorari to provide a definitive answer to whether or not a student has a right to use their personal pronouns in schools. Ultimately, the Court should continue the analytical framework used in *Kennedy* and *Dobbs*. Because (1) there is no historical tradition of using personal pronouns in schools; (2) the text of the Constitution makes no mention of using pronouns, and; (3) the highly controversial nature of the subject matter is best decided through the democratic process.

1. Arguments to Find an Implied Fundamental Right

If the Court were to grant certiorari, a wing of the Court might utilize

involving the use of preferred pronouns in public schools).

239. Letter from Kenneth L. Marcus, Assistant Secretary for Civil Rights, to Mark E. Green, U.S. House of Representatives (R-TN) (March 9, 2020) (on file with the Department of Education) (stating by itself, refusing to use chosen pronouns will not automatically take away a school's federal funding).

some of the Court's past jurisprudence involving implied constitutional fundamental rights involving privacy.[240] Here, the analytical framework found in *Griswold* provides three avenues for the Supreme Court to reach an implied fundamental right.[241] The question of pronouns is similar to *Griswold*, where the Court applied the Penumbral approach to find an implied right to contraception.[242] Under this approach, the Court would consider the "shadows" around the First, Third, Fourth, and Fifth Amendments of the United States Constitution.[243] This line of analysis would most likely result in finding an implied constitutional right.

The second approach the Supreme Court could utilize is the Ninth Amendment in conjunction with the Fourteenth Amendment, Fifth Amendment, or the Penumbral Approach.[244] The Ninth Amendment stands for the proposition that rights need not be explicitly mentioned in the Constitution to constitute as an implied fundamental right.[245] Structurally, the Ninth Amendment's position and the end of the Bill of Rights emphasizes that the enumerated rights are not exclusive.[246] Thus, while the usage of preferred pronouns does not appear anywhere in the text of the Constitution, the usage of personal pronouns, like other privacy rights, should not preclude it from being included.

The third and final approach the Court could use to recognize an implied fundamental right is the Fourteenth Amendment.[247] The Court would look at the liberty interest and compare it to the historical tradition.[248] Here, Justices could find a broad liberty interest at stake and that institutions, like public schools, are designed to promote tolerance, inclusivity, and safety, and including preferred pronouns is another way to extend this historical tradition.

2. Arguments to Deny an Implied Fundamental Right Exists

However, on the other side and as discussed in Part II, courts are split as to whether a student's right to use their preferred pronoun or a teacher's right to free speech and free exercise should prevail. Recently,

240. *See supra* notes 28-37 and accompanying text (presenting different cases that litigate under the implied right of privacy and the usage of substantive due process).

241. *Griswold*, 381 U.S. at 484, 491, 500.

242. Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1334 (1992).

243. *Id.* at 1335.

244. *Griswold*, 381 U.S. at 490.

245. *Id.* (Harlan, J., concurring) (stating "the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.").

246. *Id.* at 488-89 (recognizing that the Ninth Amendment "was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.").

247. *Id.* at 502 (White, J. concurring) (stating that he would have reached the holding of *Griswold* based on the Fourteenth Amendment).

248. *Cf.* Toro, *supra* note 184, at 173-74 (criticizing the use of American history and tradition when addressing a substantive due process issue).

in *Kennedy*, the Court broadly protected Coach Kennedy's religious expression to pray after football games.[249] Justice Gorsuch articulated that "respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head."[250] Therefore, there is great protection for a teacher's religious exercise rights in the school context. Additionally, given the Court's recent decision in *Dobbs*, which overturned *Roe*, there is enormous doubt about the future of substantive due process as a judicial doctrine.[251] In *Dobbs*, the Court returned the decision of abortion back to the states after finding the right of abortion is not found within the text or history of the Constitution.[252]

To maintain the legitimacy of the Court, an application of its most recent decisions in *Kennedy* and *Dobbs* should control if this issue ever came before the Court. Under the analysis in *Kennedy* and *Dobbs*, it is likely that no constitutional right exists for a student to be called their personal pronoun in the school setting. Under *Kennedy*, the case stood as a beacon to protect a teacher's First Amendment rights. The Kennedy Court reaffirmed that the Establishment Clause must "refer[ence] . . . historical practices and understandings."[253] There is no history in either public schools or the Constitution that supports the assertion that a student's use of personal pronouns is constitutionally protected. Additionally, under *Dobbs*, Justice Kavanaugh denotes that the Constitution is neither pro-life nor pro-choice, and that the justices as unelected members cannot override the democratic process. [254]

B. Actions Taken by the Legislative Branch

1. Federal Level

If the Supreme Court declines to consider the constitutionality of the usage of preferred pronouns or were to rule against their usage, the legislative branch of the government should be the institution to address the issue.[255] Congress could codify statutory protections for students

249. *Kennedy*, 142 S. Ct. at 2416-33.

250. *Id.* at 2432-33.

251. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (noting "substantive due process" is an oxymoron that "'lack[s] any basis in the Constitution.'" (citing Johnson v. United States, 576 U. S. 591, 607–08 (2015) (Thomas, J., concurring))).

252. *Id.* at 2305 (Kavanaugh, J., concurring).

253. *Kennedy*, 142 S. Ct. at 2414 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014).

254. *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring) ("The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.").

255. Reynolds, *supra* note 242, at 1336 (noting how "Conservatives have denounced it [the penumbral approach] as thoroughly unprincipled, and even many liberals have seemed to be far more comfortable with *Griswold*'s outcome than with

requiring that public schools provide students the opportunity to express themselves in line with their personal identities. Furthermore, creating a law that applies across the country would set a standard policy to ensure that all students feel included in the classroom and school community. As a preliminary step to create more inclusivity in classrooms, Congress could pass a statute that, for example, gives students the choice to select their pronoun from the most common ones (he/him, she/her, they/them, he/they, or she/they).

Furthermore, Congress, through the Necessary and Proper Clause in conjunction with the Spending Clause could create federal grants to states and localities for implementing inclusive policies in schools.[256] So long as the conditions do not amount to commandeering[257], then this is another avenue for Congress to promote the usage of preferred pronouns in public schools.[258] Given the representative aspect of Congress, this would be the best route to prevent judicial legislation or judicial activism.

A recent analogous example would be in the same-sex marriage context. Recently, the Respect for Marriage Act (2022) was passed by Congress and signed into law by President Biden.[259] This Act repealed the Defense of Marriage Act ("DOMA") and requires that the U.S. federal government and states recognize same-sex and interracial marriages.[260] Given the Supreme Court's recent overturning of *Roe*, Congress wanted to codify *Obergefell* in the case the Supreme Court was to overturn it. [261]

Justice Douglas's methodology.").

256. *See* U.S. CONST. art. I, § 8, cl. 18 (providing that Congress has the authority "to make all Laws which shall be necessary and proper for [executing its enumerated] Powers [under Article I of the Constitution], and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof. . ."); U.S. CONST. art. I § 8, cl. 1 ("The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.").

257. Mike Maharrey, *The Anti-Commandeering Doctrine: An Introduction*, TENTH AMENDMENT CTR. (Jan. 4, 2021), www.tenthamendmentcenter.com/2021/01/04/the-anti-commandeering-doctrine-an-introduction/ [perma.cc/H2NM-NTPE] (detailing how this doctrine prevents the federal branch from "commandeering" state resources or personnel for federal purposes.).

258. *Anti-Commandeering Doctrine*, CONST. ANN., www.constitution.congress.gov/browse/essay/amdt10-4-2/ALDE_00013627/ [perma.cc/8L5T-97A6] (last visited Dec. 26, 2022).

259. Michael D. Shear, *Biden Signs Bill to Protect Same-Sex Marriage Rights*, N.Y. TIMES (Dec. 13, 2022), www.nytimes.com/2022/12/13/us/politics/biden-same-sex-marriage-bill.html [perma.cc/AJT8-GJER].

260. Delphine Luneau, *Respect for Marriage Act: What It Does, How It Interacts with Obergefell Ruling, and Why They're Both Essential to Protecting Marriage Equality*, HUM. RTS. CAMPAIGN (Nov. 16, 2022), www.hrc.org/press-releases/respect-for-marriage-act-what-it-does-how-it-interacts-with-the-obergefell-ruling-and-why-theyre-both-essential-to-protecting-marriage-equality [perma.cc/ZH8R-BUGQ] (describing the timeline between the passing of DOMA in 1996 and the Respect for Marriage Act in 2022).

261. James Esseks, *Here's What You Need to Know About the Respect for Marriage Act*, ACLU (July 21, 2022), www.aclu.org/news/lgbtq-rights/what-you-need-to-know-about-the-respect-for-marriage-act [perma.cc/M5BD-NATP] (discussing that the push behind the Respect for Marriage Act was Justice Thomas' concurring opinion in *Dobbs*

Importantly, the Respect for Marriage Act is not a complete codification of *Obergefell*.[262] If the Supreme Court were to overturn *Obergefell*, individual states could vote to refuse marriage licenses to same-sex couples.[263] However, if a state began refusing marriage licenses for same-sex couples, that couple could get married in another state that does issue same-sex marriage licenses, and the couple's home state would have honor that marriage license.[264] Therefore, this is an example of how Congress, through bipartisanship and the democratic process, could craft legislation that protects the rights of students to use their preferred pronouns in public schools.

2. State Level

The Court in *Dobbs* held that the authority to regulate abortion should be returned to the people and their elected officials. After that decision, Kansas voted to protect abortion in their Constitution.[265] Conversely, eleven (11) states, including Texas, Tennessee, and Idaho have "trigger" bans in place.[266] Notably, the Court in *Dobbs* did not "ban" abortions in all 50 states, but rather allowed the people and states to make their own decisions on the issue.[267] In application to pronouns, individual states could enact laws that protect the usage of pronouns if that is what the people want. However, if the people wish to maintain traditional views on gender, then that should be respected. If people feel strongly about wanting to protect personal pronouns, then they can lobby their state politicians, vote for politicians who share their ideological platform, and canvass neighborhoods to gain support. Either way, since the Constitution is empowered by the voice of the people, they are the appropriate policy makers and not courts.

V. CONCLUSION

As the United States becomes more socially progressive, there is increasing tension among those who wish to keep their sincerely held

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which challenged *Obergefell*). Further, Congress wanted to protect the right to marry and the bill passed the House in July 2022 with a bipartisan vote of 267-157. *Id.*

262. *Id.* (describing the shortcomings of the Respect for Marriage Act, if the Supreme Court were to overturn *Obergefell*).

263. *Id.*

264. *Id.*

265. Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html [perma.cc/9CP9-U3KW].

266. *Abortion Is Now Illegal in 11 U.S. States*, CTR. FOR REPRODUCTIVE RTS. (Aug. 30, 2022), www.reproductiverights.org/abortion-illegal-11-states/ [perma.cc/K8RA-QSMB].

267. *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., reproductiverights.org/maps/abortion-laws-by-state/ [perma.cc/4EKW-KALU] (last visited Feb. 15, 2023) (illustrating a map showing the different degrees of abortion bans by state and noting that abortion policies and reproductive rights are a state by state decision now).

religious beliefs and those advocating for more profound change.[268] While there may be a growing acceptance of gender fluidity in society, the topic remains highly controversial. The role of the teacher is not to solely provide curricular content, but to be an advocate, resource, role model, and leader for students. While psychological research shows the benefits of students being affirmed by their personal pronouns, this feeling of inclusion cannot be at the expense of teachers' First Amendment rights. Furthermore, advocates of recognizing personal pronouns are not without remedy. If they wish to enact these inclusive policies, they are free to turn to the democratic process by lobbying their elected officials to pass legislation.

Given the recent litigation in lower courts on this issue, if a case were to go before the Supreme Court, It would grant certiorari and apply *Kennedy* and *Dobbs* to find that no implied constitutional right exists. Etched on the Supreme Court building are the words, "Equal Justice Under Law."[269] This illustrates the Court should not be in the business of policing moral decisions, playing political favorites, or basing decisions on "popular" opinions. Rather, that is the role of the legislative branch, since its members are popularly elected by the people. Just like blowing up a balloon, there are limitations to creating new constitutional rights before something pops. By expanding the text of the Constitution too far, it delegitimizes both the document itself, the Court, and the legislative branch. By following history and tradition, the Court ensures that their interpretation of the Constitution does not go too far astray.

268. Tyler Cowen, *Why Wokeism Will Rule the World*, BLOOMBERG (Sept. 19, 2021, 7:00 AM), www.bloomberg.com/opinion/articles/2021-09-19/woke-movement-is-global-and-america-should-be-mostly-proud [perma.cc/D93A-XD8E] (arguing that the "woke" movement could be the next U.S. cultural import).

269. *Information Sheet: The West Pediment*, SUP. CT., www.supremecourt.gov/about/WestPediment9-10-21.pdf [perma.cc/3R5D-EQQY] (last accessed Dec. 26, 2022).