AGREEING TO DISAGREE: RESTORING AMERICA
BY RESISTING CANCEL CULTURE

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You can learn a lot about cancel culture just by having children. Our children are the joy of our lives. But man do they squabble. They squabble over anything and everything you can imagine. And when they fight, it’s inevitable what happens. In a word, retaliation. Retaliation with the full force of every asset and resource the child has at his or her disposal. If you won’t agree with me, you can’t come into my room. You can’t play with my toys. You can’t borrow my books. And I won’t talk to you—other than, of course, to tell you that I won’t talk to you.

So cancel culture is nothing new. Cancel culture is alive and well anywhere there are children.

But here’s the thing: Kids are supposed to grow out of it. Parents are supposed to teach them how to tolerate and disagree with one another. This lesson is supposed to be reinforced by teachers, colleges, and universities. The lesson that disagreement is inevitable in life. That learning how to disagree is essential to good citizenship. That you have to learn how to get along with others.

In short, you have to learn how to agree to disagree. You have to be able to disagree with someone about issue A—yet still work with that person on topics B, C, and the rest of the entire alphabet. Even if issue A is something you feel really, really strongly about.

But here’s the problem. As Senator Ben Sasse has written, we’ve become a society of children who don’t grow up.¹ More and more people are trapped in what he calls “perpetual adolescence”—leading us into a “collective coming-of-age crisis

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* Circuit Judge, U.S. Court of Appeals for the Fifth Circuit. Based on remarks delivered before the Sixth Annual Kentucky Chapters Conference of the Federalist Society on September 29, 2022. The speaker has altered the introduction and added Part VIII.

without parallel in our history.”

I would submit that cancel culture is a perfect illustration of this phenomenon. We’ve stopped teaching the next generation how to agree to disagree. And we’re starting to see the consequences—not just on campus, but across American life.

I.

I’ve spoken on university campuses since well before becoming a judge. I’ve seen how campus life has changed dramatically since I graduated from law school in 1999. Speakers are disrupted, and scholars are punished—not for expressing views on the edge of societal debate, but for mainstream ideas that are essential to our nation’s Founding and embraced by millions of Americans.

Earlier this year, I spoke at Georgetown. It was a few weeks after Ilya Shapiro found himself in a firestorm for saying that federal judges should be selected on merit, not skin color. Students demanded his ouster. So I focused my remarks on Ilya.

I recognize that reasonable minds can differ on these issues. But on what Earth is it beyond the pale to echo the principles of Dr. Martin Luther King, Jr.? In what world is it unacceptable to embrace Brown v. Board of Education? Before law school, I volunteered on the Prop. 209 campaign in California. How can a ballot measure endorsed by a majority of citizens in our largest

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2. Id. at 2.
4. Id.
6. See Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 101, 104 (James Melvin Washington ed., 1st ed. 1992) (“I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”).
state a few decades ago, and reaffirmed just two years ago, now be too extreme for a college campus?

Ilya is not the only legal scholar to face campus vitriol for doing nothing more than standing up for mainstream principles. At another law school, students disrupted a talk by Professor Josh Blackman. (I use the term *disruption*, not *protest*, on purpose. Protest is an exercise of your freedom of speech. Disruption is a violation of another person’s freedom of speech.)

Dozens of students angrily shouted down Professor Blackman in hopes of intimidating him and preventing him from speaking. Ironically, his topic was the importance of free speech on campus. Students shouted profanities at him, demanded that he leave campus at once, and pressured others not to attend his talk if he refused.

Judges David Stras and Patrick Bumatay of the Eighth and Ninth Circuits, respectively, have both faced similar dynamics during law school talks. Judge Stras was disrupted while discussing what his grandparents’ experiences in the Holocaust taught him about the First Amendment. Judge Bumatay was interrupted while speaking on the value of dissent.

This is not just one school. These events took place at different schools nationwide. There are countless other examples. And the cumulative impact of these incidents is sad

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11. Id.

12. Id.


15. Examples have been compiled by the National Association of Scholars, the Foundation for Individual Rights and Expression (FIRE), and the College Fix. David
but not surprising.

The Foundation for Individual Rights and Expression recently published a study on free speech on college and university campuses, in which they found that 55% of students engage in self-censorship—they censor what they say to others for fear of campus retaliation.\(^6\) That includes 44% of Democrats, 58% of Independents, and 73% of Republicans.\(^7\) Moreover, 63% of students reported that they worry about damaging their reputations based on what they might say.\(^8\) That includes 62% of Democrats, 64% of Independents, and 63% of Republicans.\(^9\)

It doesn’t have to be like this. Law schools can make clear that disruption will lead to discipline.\(^{20}\)

I’ll give you an example. At another law school, a professor spoke in defense of anti-boycott laws that protect the State of Israel.\(^{21}\) The students knew that the school has a robust free speech and anti-disruption policy. But one student thought he found a clever loophole. Instead of disrupting the speech himself, he recruited non-students to campus to disrupt the speech.\(^{22}\) I’m told the student was forced to leave the law school for the rest of the academic year.

But discipline for disruption appears to be the exception, not
the rule. All too often, law schools appear to be run by the mob—whether out of sympathy or spinelessness.

II.

This problem is nationwide. And it is increasing. But there’s one particular law school where cancellations and disruptions seem to occur with special frequency.

A few years ago, I’m told that Judge Bill Pryor tried to speak at Yale Law School. I say tried, because he was disrupted by loud, angry law students in the classroom. After several minutes, a Yale administrator finally asked them to leave. But the students continued to disrupt the event from outside the classroom. They disrupted the event because, back when Pryor was attorney general of Alabama, he participated in *Lawrence v. Texas* by filing an amicus brief dutifully defending the laws of his state—consistent with the traditions of the very profession Yale claims to train its students to enter.

That was a few years ago. Things have apparently gotten only worse at Yale since then. Earlier this year, over a hundred Yale law students—undoubtedly encouraged by the lack of any consequences for those who disrupted Judge Pryor—disrupted another event. Kristen Waggoner of the Alliance Defending Freedom and Monica Miller of the American Humanist Association spoke on a panel designed, ironically again, to showcase the broad consensus in support of free speech. Disruption was expected. So police officers were present at the

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25. See infra Part V.
27. Id.
Moreover, the disruption became so intense that the officers actually had to call for backup. They had to escort the panelists out of the building. Students reported being threatened and even physically grabbed for wanting to attend the event. The associate dean was present throughout the entire event—and did nothing.

Yale not only tolerates the cancellation of views—it practices it. In another recent incident, a law student sent an invitation for a party that referred to his apartment as a “trap house.” Yale administrators threatened to destroy his career if he didn’t apologize. They even warned him that his membership in the Federalist Society was “very triggering for students” and that his only saving grace was that he’s not white.

We know about these particular stories because someone happened to record them. The reality may be even worse. David Lat, a prominent legal commentator and Yale alum, spoke to students and alums who indicated that “the administration is far more strongly aligned with the protesters—and far more indifferent to free speech—than [he] realize[d].” Yale law professor Kate Stith said that “[l]aw schools are in crisis . . . . The truth doesn’t matter much. The game is to signal one’s virtue.”

29. Id.
30. David Lat, Free Speech at Yale Law School: One Progressive’s Perspective, ORIGINAL JURISDICTION (Mar. 23, 2022), https://davidlat.substack.com/p/free-speech-at-yale-law-school-one (called by their plainclothes colleagues, who presumably felt that a larger and more visible presence was needed in light of the size and rowdiness of the crowd.).
32. Id. (“At times, things seemed in danger of getting physical. The protesters were blocking the only exit from the event, and two members of the Federalist Society said they were grabbed and jostled as they attempted to leave.”).
33. Id. (“Ellen Cosgrove, the associate dean of the law school, was present at the panel the entire time, . . . [But] she did not confront any of the protesters.”).
34. Aaron Sibarium, A Yale Law Student Sent a Lighthearted Email Inviting Classmates to His ‘Trap House,’ The School Is Now Calling Him to Account, WASH. FREE BEACON (Oct. 13, 2021, 5:58 PM), https://freebeacon.com/campus/a-yale-law-student-sent-a-lighthearted-email-inviting-classmates-to-his-trap-house-the-school-is-now-calling-him-to-account/ (called by their plainclothes colleagues, who presumably felt that a larger and more visible presence was needed in light of the size and rowdiness of the crowd.).
35. Id.
36. Id.
37. Id., supra note 30.
III.

It would be one thing if this phenomenon were limited to the university campus. If it were all just part of the collegiate experience, like bad cafeteria food and cramped dorm rooms. Just survive your four years of college, three years of law school, and then move on with your life—and leave it all behind.

But it turns out that when elite law schools like Yale teach their students that there are no consequences for their intolerance and illiberalism, the message sticks with them.

As David Lat puts it, “‘[W]okeness’ is taking over not just American law schools but the legal profession more broadly . . . .” It “spread[s] beyond the legal academy and into the world of practice, with significant consequences for our system of justice.”

David Boies recently echoed this theme, telling a reporter that law firms are changing for the worse “because they’re afraid that their associates will get mad.”

Here are a few anecdotes that I’ve personally come across over this past year alone:

- A major international law firm told a summer associate that some of her colleagues had complained about her. Not for anything she did at the office or in their presence, but because, months before she joined the firm, she expressed her conservative Christian belief that the transgender movement is not good for women. The firm made clear that if she wanted an offer, she must keep quiet about her views.
- At another respected firm, a clerk for a federal district judge interviewed for an associate position. During one of the

[https://perma.cc/W73K-KQ4W]. Sicilian observed similar concerns by other law professors:

“I got into this job because I liked to play devil’s advocate,” said [a]
  tenured [law] professor [at a top law school], who identifies as a
  liberal. “I can’t do that anymore. I have a family.”

Other law professors—several of whom asked me not to identify
  their institution, their area of expertise, or even their state of
  residence—were similarly terrified.

Id.

39. Lat, supra note 30.
40. Id.
41. Ross Todd, David Boies: ‘Who Gets to Decide What the Righteous Causes Are?,” Am L.
interviews, one of the firm’s lawyers harshly criticized the clerk, demanding to know how he could justify working for anyone appointed by President Trump. The clerk didn’t get an offer from the firm.

- Attorneys at a major international firm have told participants in the Blackstone Fellowship that if they want to have any shot at working there, they had better remove Blackstone from their resume.42

- Students who wish to interview for a summer position at yet another major international firm must first fill out a form that includes, among other things, one’s preferred pronouns. The firm made clear that the form is not optional.

There’s no public account of any of these incidents, to my knowledge. But that’s not surprising. Cancel culture and code of silence go hand in hand.

Moreover, that suggests these incidents are not isolated, but illustrative. They’re almost certainly just the tip of the iceberg, as the Supreme Court has repeatedly warned.43

So cancel culture will sink us if we don’t change course quickly and immediately. Because here’s what’s happening: Colleges aren’t teaching students how to disagree. They’re teaching students how to destroy. And then they launch them into the world.

To quote Bari Weiss, our whole country has now become a campus.44

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42. The Blackstone Legal Fellowship seeks “to bring together the best Christian law students from around the United States, train them in legal theory and practice, equip them with the professional skills and networks to thrive in the legal profession, and inspire them to reimagine their careers as a way of serving God.” BLACKSTONE LEGAL FELLOWSHIP, https://blackstonelegalfellowship.org/ [https://perma.cc/4L94GWL].

43. See Hollingsworth v. Perry, 558 U.S. 183, 185 (2010) (per curiam) (reporting that citizens “have been forced to resign their jobs” and businesses have been “blacklist[ed]” and “boycott[ed]” in “retaliation” for holding certain personal views); Citizens United v. FEC, 558 U.S. 310, 370 (2010) (reporting that citizens have been “blacklisted, threatened, or otherwise targeted for retaliation” based on their support for certain organizations). Examples have been collected by various organizations and individuals. E.g., Brief of Amicus Curiae Center for Competitive Politics in Support of Appellant at 13-16, Citizens United, 558 U.S. 310 (No. 08205), 2009 WL 132719, at *13-16; Douglas Blair, 12 People Canceled by the Left After Expressing Conservative Views, HERITAGE FOUND (Sept. 20, 2021), https://www.heritage.org/progressivism/commentary/12-peoplecanceledbythe-leftafterexpressingconservativew [] [https://perma.cc/576H-068TQ]; Bari Weiss, The New Founders America Needs, COMMON SENSE (July 10, 2022), https://www.commonsense.news/p/the-new-foundersamerica-needs [https://perma.cc/RG84TW2].

44. Weiss, supra note 43 (“[N]ow, the whole country is a campus.”).
And so a pattern is emerging. The world is changing. “Doxxing” has gone mainstream. The Merriam-Webster dictionary added the term “deplatform” this past October.

So cancel culture affects everything—even the English language. It plagues a wide variety of institutions. I’ve written judicial opinions noting how cancel culture has infected our educational institutions, the legal profession, corporate America, public health, and how even the criminal justice system has been weaponized to cancel disfavored political viewpoints. Cancel culture is also deeply embedded in journalism, sports, and the arts.


47. See, e.g., Lefebure v. D’Aquilla, 19 F.4th 843, 849-44 (5th Cir. 2021) (Ho, J., concurring in denial of rehearing en bane) (collecting examples) (“It’s a sad fact of modern life in America that the culture wars are no longer limited to skirmishes between elected officials . . . . They are increasingly fought by students and parents in classrooms and before school boards across America.”); id. at 853-54 (same).

48. See, e.g., Lelubre v. D’Aquilla, 15 F.4th 670, 674 (5th Cir. 2021). I point out: [T]he legal profession traditionally respects the right of attorneys to represent clients, regardless of one’s personal views . . . . Unfortunately, this tradition is not widely honored today . . . . Lawyers and firms defend this “hallowed, essential tradition of the profession”—but not if there are “repercussions from certain well-heeled corporate clients if they take positions disfavored” in certain circles.

49. See, e.g., Sambrano v. United Airlines, Inc., 45 F.4th 877, 883 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en bane) (per curiam) (discussing the “new model of capitalism” as “a dangerous expansion of corporate power that threatens to subvert American democracy” (quoting VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA’S SOCIAL JUSTICE SCAM 18 (2021))).

50. See, e.g., Whole Woman’s Health v. Paxton, 44 F.4th 450, 465-68 (5th Cir. 2021) (en banc) (Ho, J., concurring) (collecting examples) (“[S]cientists are, first and foremost, human beings. They’re susceptible to peer pressure, careerism, ambition, and fear of cancel culture, just like the rest of us . . . .”)

51. See, e.g., Villarreal v. City of Laredo, 44 F.4th 363, 382 (5th Cir. 2022) (Ho, J., concurring) (“It’s bad enough when private citizens mistreat others because of their political views. It’s beyond the pale when law enforcement officials weaponize the justice system to punish their political opponents. One is terrible. But the other is totalitarian.”).

The consequences for America are significant. I would contend that cancel culture is one of the leading reasons why citizens no longer trust a wide variety of once-leading institutions. Because it turns out that when elite institutions announce that people with certain views shouldn’t even exist, those people return the favor.

IV.

America is the greatest nation in human history. An essential reason for America’s success is not that we’re all the same, but that we’re so different—different races, religions, backgrounds, and cultures.

In this large and diverse nation of ours, we disagree passionately about many issues. We fight it out in the political arena, with great energy and vigor. But then we come together as one nation. We have different views and different voices, yet we harness this diversity in order to get the best out of everyone.

But we’ve forgotten what makes America unique. We’re not content to engage with one another in the political sphere—we expel people from social and economic life. We live in a culture of cancellation, not conversation. We don’t talk—we tweet. We don’t disagree—we destroy.

This is not just wrong. It’s antithetical to our nation’s Founding. It’s unsustainable—and existential. Because if one person does it, others will do it. And if we all do it, then the logical consequence is this: No more interaction or cooperation with anyone who disagrees with us. Which is a lot of people.

That’s not the country our Founders envisioned.

Let’s begin with the First Amendment. As a strictly legal matter, the First Amendment applies only to the government. It doesn’t force private citizens to respect the free speech rights of


No. 1  

Agreeing to Disagree

others.\(^55\)

But if you think that’s the whole story, you have an impoverished understanding of what it means to live in a nation based on freedom.\(^56\) The First Amendment doesn’t just protect freedom of speech. It protects “the” freedom of speech.\(^57\) It’s a freedom that preexists the First Amendment.\(^58\)

The word “speech” appears in the original Constitution. Article I, Section 6 protects “[s]peech or [d]ebate” by members of Congress.\(^59\) So the original Constitution recognizes that legislators must be able to debate issues fearlessly and vigorously.\(^60\)

But why only legislators? Our system of government is premised on popular sovereignty. Citizens govern themselves.\(^61\) The Constitution begins not with “We the Congress,” but “We the People.”\(^62\) So if we’re to govern ourselves, we must be able to debate ourselves, just as fearlessly and vigorously as members of Congress are entitled to do.

Moreover, remember how the Constitution came to be in the first place. It came into being as the result of the state ratifying conventions.\(^63\) These were robust, open debates where people actually listened to one another. Where even if you didn’t win, at least you were heard.\(^64\)


\(^56\) See, e.g., id. (“The First Amendment is more than just a legal provision: It embodies the most important value of American Democracy.”); see also Laurence H. Silberman, Free Speech Is the Most Fundamental American Value, WALL ST. J. (Sept. 30, 2022, 5:47 PM), https://www.wsj.com/articles/free-speech-is-the-most-fundamental-american-value-constitution-day-first-amendment-political-unity-communism-values-1166456078 [https://perma.cc/7TFP-D5CK] (“[The First Amendment’s guarantee of free speech is not just a legal doctrine. It represents the most fundamental value in American democracy.”).

\(^57\) U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . .”).


\(^59\) U.S. Const. art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.”).

\(^60\) See Amar, supra note 58, at 507 (noting that the central focus of the Speech and Debate Clause is to protect political speech).

\(^61\) Id.

\(^62\) U.S. Const. pmbl.

\(^63\) Id. art. VII.

\(^64\) Amar, supra note 58, at 509. As Amar explains:
In fact, it was precisely because people listened, and admitted when they were wrong, that we even have a First Amendment in the first place. It happened because the state ratification debates forced the Federalists to agree to a Bill of Rights to ensure ratification. To quote Professor Akhil Amar, "[T]he textual guarantee of freedom of speech arose precisely because of the actual practice of freedom of speech."

There’s another aspect of the debate between the Federalists and the Anti-Federalists worth noting. The Federalists supported the Constitution because they wanted a federal government—one of limited, enumerated powers, to be sure—that would unify the several states into one great country. They emphasized the significant advantages that flow from scale.

If you read the first dozen or so Federalist Papers, you’ll see how John Jay and Alexander Hamilton note the countless military, foreign policy, and economic benefits that accrue from establishing one large, stable nation. You ensure national and domestic security and safety. You avoid foreign wars and entanglements. You achieve greater economic gains by having

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Even in conventions where one side—Federalist or Anti—entered with an apparently decisive majority, delegates on the other side freely spoke their piece, as a rule. Often, a speech or argument on a particular issue prompted an apt counterargument. At times, delegates even pronounced themselves persuaded by something said by men on the other side.

Id. at 509–10 (describing how the constitutional debates were fostered by free speech and led to support for the idea of a Bill of Rights guaranteeing free speech).

Id. at 515.

See THE FEDERALIST No. 14, at 62–65 (James Madison) (George W. Carey & James McClellan eds., Liberty Fund 2001) (noting “the necessity of the union” under a “general government [that] is not to be charged with the whole power of making and administering laws” but “limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any”).

See, e.g., THE FEDERALIST No. 4 (John Jay), supra note 67, at 15 (“[O]ne government can apply the resources and power of the whole to the defence of any particular part, and that more easily and expeditiously than state governments, or separate confederacies can possibly do, for want of concert and unity of system.”); THE FEDERALIST No. 6 (Alexander Hamilton), supra note 67, at 21, 26 (noting that a union is the best way to counteract inimical tendencies of neighboring nations).

See, e.g., THE FEDERALIST No. 3 (John Jay), supra note 67, at 12 (“[A] cordial union under an efficient national government, affords [the people] the best security that can be devised against hostilities from abroad.”). John Jay also argued:

Wisely therefore do [the people of America] consider union and a good national government as necessary to put and keep them in such a situation as instead of inviting war, will tend to repress and discourage it. That situation consists in the best possible state of
free and open trade over a larger population of customers and providers.\textsuperscript{70} You get to pull the best talent from a larger pool of citizens for purposes of governance as well as industry.\textsuperscript{71}

In response, the Anti-Federalists questioned the ability to establish such a large, stable nation. One leading Anti-Federalist, writing under the name Brutus, said in his Essay I that a republic can “have only a small territory, otherwise it cannot long subsist.”\textsuperscript{72} He believed that “a free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants” as the proposed United States.\textsuperscript{73}

His concern was this: Too many people means too much conflict and not enough cohesion. “In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other.”\textsuperscript{74} “The laws and customs of the several states are, in many respects, very diverse, and in some opposite . . . .”\textsuperscript{75} So “a legislature, formed of representatives from the respective parts, would not only be too numerous to act with any care or decision, but would be composed of such heterogenous and discordant principles, as would constantly be contending with each other.”\textsuperscript{76}

To sum up: The Federalists believed in the benefits of scale. And the Anti-Federalists countered with the difficulty of diversity.
and the fear of faction and balkanization.

How did the Federalists prevail, then? By assuring the people that our Constitution would respect our nation’s diversity. We would respect community differences and local rules. We would have a national government, but it would be limited. We would do at the national level only what had to be done at the national level. And we’d leave everything else to state and local governance, to reflect the great diversity of our nation.77

Our Founders understood that in such a large country, disagreement is inevitable. But the Federalists assured us that we would tolerate our diversity and encourage interaction and discourse in the face of our differences. And that’s why we have the country and the Constitution that we have today.

That was our founding vision. It’s reflected in our founding document. It’s why Congress included the words *e pluribus unum* in the Great Seal of the United States—“out of many, one.”78 It’s why Alexis de Tocqueville observed in *Democracy in America* that Americans are not easily offended, but instead work together to accomplish great undertakings, despite our differences.79

But it’s not enough that our country is governed by the same constitutional text as our forefathers were. We must also share their constitutional values. We must nurture and pass down those values from one generation to another—or else our Founders’ vision won’t work. As President George Washington

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77. See *The Federalist* No. 14 (James Madison), *supra* note 67, at 65 (“The subordinate governments, which can extend their care to all those other objects . . . will retain their due authority and activity.”).


79. *2 Alexis De Tocqueville, Democracy in America* 542 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1840). De Tocqueville observed:

   The social state naturally disposes Americans not to be easily offended in little things. And on the other hand, the democratic freedom they enjoy makes this indulgence pass into the national mores.

   The political institutions of the United States constantly put citizens of all classes in contact and force them to pursue great undertakings in common. People thus occupied scarcely have time to think of the details of etiquette, and besides they have too much interest in living in accord to be stopped by them. So they easily become accustomed to considering sentiments and ideas rather than manners in those whom they meet, and they do not allow themselves to be aroused by trivialities.

*Id.*
explained in his farewell address, “[V]irtue . . . is a necessary spring of popular government.” President John Adams echoed these sentiments in his 1789 address to the Massachusetts militia: “Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other.”

V.

Cancel culture is not just antithetical to America. It’s also antithetical to the academy.

As the Supreme Court has observed, “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.”

Why is a “robust exchange of ideas” so important? Because that’s the only way to learn how to think. To be able to articulate your views—and then test them on the battlefield of ideas.

So if you’re conservative, you should engage regularly with liberals—and if you’re liberal, you should engage regularly with conservatives. Because that’s the only way you can improve and strengthen your ideas—to adjust when you’re proven wrong and to bolster when you’re not. You should be constantly testing and challenging your principles and your priors. That’s true throughout life. But it’s especially true when you’re in school. Iron sharpens iron.

83. See JOHN STUART MILL, ON LIBERTY 21 (London, Longmans, Green, Reader, and Dyer 1878) (1859). Mill observes: He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.

Id.
It reminds me of Fred Shero, the head coach of the Philadelphia Flyers during the 1970s, who said that his favorite game was not an NHL game, but an exhibition game, of all things, against the Soviet Union’s Red Army team.84 In his mind, if “[y]ou haven’t played the Russians, . . . how do you know you’re the best?”85

Finally, if cancel culture is antithetical to the academy, then it’s especially antithetical to legal education. After all, the whole point of a legal education is to train the next generation of lawyers—and to train them in our highest legal traditions.

Our adversarial system of justice is premised on the fact that everyone deserves zealous representation. We believe that’s the best way to ensure that we discover the truth—only after everyone has had a full and fair opportunity to engage in robust dialogue and debate, with zealous advocates on all sides.86

Our Founders understood this well. John Adams represented the British soldiers who were accused of taking part in the Boston Massacre.87 It was a deeply controversial representation at the time.88 But Adams later called it “one of the best pieces of service I ever rendered my country.”89

VI.

So if we believe that cancel culture is the cancellation of the American spirit, what should we do about it? What can we do about it?

As citizens, it’s incumbent upon each of us to speak out against cancel culture. We can stand up for free speech, for open and rigorous debate, and for diversity and tolerance of opposing viewpoints. So let’s start there.

85. Id.
86. See Lefebure v. D’Aquilla, 15 F.4th 670, 674–75 (5th Cir. 2021) (“[T]he fundamental assumption of our adversary system is that ‘strong (but fair) advocacy on behalf of opposing views promotes sound decision making.’” (quoting Neonatology Assocs., P.A. v. Comm’n, 293 F.3d 128, 131 (3rd Cir. 2002))).
88. See id. (observing that it was “obvious” that Adams would be “incurring a clamor and popular suspicions and prejudices”).
89. Id. at 68.
Moreover, as citizens, we can also stop censoring ourselves. Because that’s how cancel culture wins. If we have views we’d otherwise express, we should try not to be afraid to express them. I know it’s hard. Most people don’t have life tenure. I’m especially sensitive to the students just starting out, not wanting to end their careers before they even begin. It’s okay to be careful. But also know this: There may be others who share your views, whom you can embolden with your voice. Silence is contagious. But so is courage.

And if you can’t be the first voice, at least try to be the second. One of my favorite movie speeches comes from the food critic at the end of *Ratatouille*. As he puts it: “The new needs friends.”

Is there anything else we can do? Because we’re not just citizens. We’re also customers. Customers can boycott entities that practice cancel culture. But all too often, that seems utterly futile. A big company won’t care if a bunch of my neighbors and I boycott. We’re not even a drop in the bucket. So boycotting is often tantamount to just de-platforming yourself.

But I wonder how a law school would feel if my fellow federal judges and I stopped being its customers. Instead of millions of customers, there are only 179 authorized federal circuit judgeships and 677 authorized federal district judgeships.

So here’s what I’m going to do. Starting today, I will no longer hire law clerks from Yale Law School. And I hope that other judges will join me as well.

To be clear, I’m not talking about students who are currently at Yale or who have already graduated. I’ve hired from Yale myself, and they’re great kids. I’m talking about going forward

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90. “[T]he first follower is actually an underestimated form of leadership in itself. It takes guts to stand out like that. The first follower is what transforms a lone nut into a leader.” Derek Sivers, *How to Start a Movement*, TED (Feb. 2010), [https://www.ted.com/talks/derek_sivers_how_to_start_a_movement?language=en](https://www.ted.com/talks/derek_sivers_how_to_start_a_movement?language=en). So “have the courage to follow and show others how to follow. And when you find a lone nut doing something great, have the guts to be the first one to stand up and join in.” Id.


Across the country, there are thousands of young people who are about to apply to law school. I would encourage them to think about the kind of legal education they want—and the kind of academic environment that will help them grow. If they want the closed and intolerant environment that Yale embraces today, that’s their call. But I want nothing to do with it. 94

VII.

I do not undertake this decision lightly. I can think of at least four criticisms.

1. How can you condemn cancel culture when you’re proposing to cancel Yale?

   Well, I would say that I’m doing the exact opposite of what Yale is doing. Cancel culture is about excluding people. I want institutions of higher learning to *include* people.

   It reminds me of what Bill Buckley said when someone argued that the U.S. invasion of Grenada was the moral equivalent of the Soviet invasion of Afghanistan: “That is like saying that the man who pushes a little old lady into the path of a bus is morally equivalent to the man who pushes her out of its path, because they both push little old ladies around.” 95

   I don’t want to cancel Yale. I want Yale to stop cancelling people like me.

2. You’re a federal judge, not a law school dean. Stay in your lane. You have no business telling a law school what to do.

   But many federal judges tell litigants which lawyers they should hire. There’s a whole website devoted to listing the

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94. In my private discussions with various individuals who have encouraged and persuaded me to deliver these remarks, Yale alumni have been among the most enthusiastic. Similarly, Ed Whelan recently observed that he “spoke the other day with three conservative lawyers who are recent Yale law school grads. They all agreed that they would tell conservative students not to go to Yale. They see sharp decline there.” Ed Whelan (@EdWhelanEPPC), TWITTER (Sept. 29, 2022, 12:12 PM), https://twitter.com/EdWhelanEPPC/status/1575334999401669329 [https://perma.cc/M3VK-NU83]. “Indeed, these recent Yale law students despair that Yale will only get worse, as intolerant younger progressives replace the older liberals.” Ed Whelan (@EdWhelanEPPC), TWITTER (Sept. 30, 2022, 7:41 AM), https://twitter.com/EdWhelanEPPC/status/1575828062830317568 [https://perma.cc/PTK8-Z2P3].

federal judges who promise special benefits like oral argument if litigants are willing to have younger lawyers represent them.\footnote{See, e.g., Anne Cullen, More Judges Are Demanding Diversity Among Class Counsel, LAW360 (July 16, 2020, 10:00 PM), https://www.law360.com/articles/1292926/more-judges-are-seeking-diversity-among-class-counsel\footnote{[https://perma.cc/GD6M-6XY]} (collecting examples); Kellie Lerner & Chelsea Walcker, Judges Can Demand Diversity in Rule 23(g) Applications, LAW360 (Aug. 15, 2018, 10:50 AM), https://www.law360.com/articles/1073189/judges-can-demand-diversity-in-rule-23-g-applications\footnote{[https://perma.cc/FSFE-DVLV]} (relaying how a judge sought details on the races of the attorneys before him); Michael Baylson & Cecily Harris, Equal Opportunity? Increasing Diversity in Complex Litigation Leadership, JUDICATURE, Winter 2017, at 65, 68 (describing how a judge ordered counsel to have a diverse staff based on race and gender).}

There’s also an increasing trend of federal judges insisting that litigants hire lawyers based on race and sex as plaintiff class action lawyers or as multi-district litigation counsel.\footnote{See, e.g., Joan Biskupic, Federal Judge Says Chief Justice John Roberts Is ‘Undermining Democracy,’ CNN (Mar. 12, 2020, 2:40 PM), https://www.cnn.com/2020/03/12/politics/john-roberts-lynn-adelman/index.html (reporting that “Justice Ginsburg ... chastised the Senate for refusing to act on President Obama’s Supreme Court nominee” and said that “I can’t imagine what [the Supreme Court] would be ... with Donald Trump as our president”). Federal judges like U.S. District Judge Lynn Adelman have also criticized the Justices themselves. See Joan Biskupic, Federal Judge Says Chief Justice John Roberts Is ‘Undermining Democracy,’ CNN (Mar. 12, 2020, 2:40 PM), https://www.cnn.com/2020/03/12/politics/john-roberts-lynn-adelman/index.html (reporting that “Justice Ginsburg ... chastised the Senate for refusing to act on President Obama’s Supreme Court nominee” and said that “I can’t imagine what [the Supreme Court] would be ... with Donald Trump as our president”). Federal judges like U.S. District Judge Lynn Adelman have also criticized the Justices themselves. See Joan Biskupic, Federal Judge Says Chief Justice John Roberts Is ‘Undermining Democracy,’ CNN (Mar. 12, 2020, 2:40 PM),} The trend has become sufficiently prominent that Justice Alito has felt compelled to express his views on the practice.\footnote{See Martin v. Blessing, 571 U.S. 1040, 1041 (2013) (statement of Alito, J., respecting the denial of the petition for writ of certiorari) (describing a district judge who insisted that counsel in a class action “ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics”).} The trend has become sufficiently prominent that Justice Alito has felt compelled to express his views on the practice.\footnote{See, e.g., Anne Cullen, More Judges Are Demanding Diversity Among Class Counsel, LAW360 (July 16, 2020, 10:00 PM), https://www.law360.com/articles/1292926/more-judges-are-seeking-diversity-among-class-counsel\footnote{[https://perma.cc/GD6M-6XY]} (collecting examples); Kellie Lerner & Chelsea Walcker, Judges Can Demand Diversity in Rule 23(g) Applications, LAW360 (Aug. 15, 2018, 10:50 AM), https://www.law360.com/articles/1073189/judges-can-demand-diversity-in-rule-23-g-applications\footnote{[https://perma.cc/FSFE-DVLV]} (relaying how a judge sought details on the races of the attorneys before him); Michael Baylson & Cecily Harris, Equal Opportunity? Increasing Diversity in Complex Litigation Leadership, JUDICATURE, Winter 2017, at 65, 68 (describing how a judge ordered counsel to have a diverse staff based on race and gender).}

There are even federal judges who have criticized current and future Presidents over who they would appoint as judges.\footnote{See, e.g., Ariane de Vogue, Meet the Judge Who Took on Donald Trump, CNN (Apr. 17, 2019, 9:47 AM), https://www.cnn.com/2019/04/17/politics/judge-carlton-reeves-donald-trump\footnote{[https://perma.cc/9PJU-BL5N]} (“[D]uring a speech Thursday at the University of Virginia, ... [Judge Carlton] Reeves publicly criticized the lack of diversity of the President’s judicial nominees ...”); Adam Liptak, Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term, N.Y. TIMES (July 10, 2016), https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no­fan-of-donald-trump-critiques-latest­term.html (reporting that “Justice Ginsburg ... chastised the Senate for refusing to act on President Obama’s Supreme Court nominee” and said that “I can’t imagine what [the Supreme Court] would be ... with Donald Trump as our president”). Federal judges like U.S. District Judge Lynn Adelman have also criticized the Justices themselves. See Joan Biskupic, Federal Judge Says Chief Justice John Roberts Is ‘Undermining Democracy,’ CNN (Mar. 12, 2020, 2:40 PM), https://www.cnn.com/2020/03/12/politics/john-roberts-lynn-adelman/index.html (reporting that “Justice Ginsburg ... chastised the Senate for refusing to act on President Obama’s Supreme Court nominee” and said that “I can’t imagine what [the Supreme Court] would be ... with Donald Trump as our president”). Federal judges like U.S. District Judge Lynn Adelman have also criticized the Justices themselves. See Joan Biskupic, Federal Judge Says Chief Justice John Roberts Is ‘Undermining Democracy,’ CNN (Mar. 12, 2020, 2:40 PM),} If judges can tell litigants which lawyers they should hire—and Presidents which judges they should appoint—then surely I can say whose graduates I will hire as law clerks in my own chambers.

Or put it this way. Suppose a law school discriminates on the
basis of race. Could a judge publicly refuse to hire from that school, in hopes of spurring change? Surely a judge could do so. And if so, why can a judge stand up for color blindness, but not freedom of speech? Why can a judge advocate for equal treatment of a racial minority group, but not a religious one?

And suppose, despite all of this, you still conclude that my solution is not the right one. I would welcome the conversation. I would just ask you this: What do you propose to do?

If you’ve got a better idea, I am all ears. But you better have a better idea. Because I refuse to do nothing.

3. Why Yale? And why only Yale?

Simple: Because Yale presents itself as the best, most elite institution of legal education. Yet it’s the worst when it comes to legal cancellation. As one of its own professors admits, it’s in crisis. Moreover, Yale sets the tone for other law schools and for the legal profession at large.

I certainly reserve the right to add other schools in the future. But my sincere hope is that I won’t have to. My sincere hope is that this will send the message to Yale and every other college and university that they should celebrate intellectual diversity and respect free speech and debate.

4. Finally: You can’t change Yale by yourself. You’re wasting your time.

Well, if I’m the only one who stops hiring from Yale, I agree it’s not going to make a difference. In that sense, it’s just like my day job. As an appellate judge, I can’t do anything by myself. I need my colleagues to join me—or at least enough of them to form a majority of a three-judge panel or a majority of our en banc court. And so too here.

I’m confident that a critical mass would have an influence on law schools. But I’m not confident that a critical mass will

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100. See, e.g., Sweatt v. Painter, 339 U.S. 629, 631 (1950) (explaining that a law school rejected an applicant solely because he was black).

101. You will find alternate suggestions below in Part VIII.

102. See The Impact of Local Laws, YALE L. SCH. (Sept. 7, 2017), https://law.yale.edu/yls-today/news/impact-local-laws [https://perma.cc/6BV5-Y4BL] (reporting Yale Law School Professor David Schleicher’s statement that “Yale is the finest law school in the country, and as a result, we are able to admit students who will become leaders in this country, and indeed around the world, in many fields”).

103. See, supra note 38.

104. See, e.g., Pamela Oliver, Gerald Martin & Ruy Teixeira, A Theory of the Critical Mass: 1. Interdependence, Group Heterogeneity, and the Production of Collective Action, 91 AM. J.
No. 1

Agreeing to Disagree

indeed emerge.\textsuperscript{105} Remember Judge Silberman’s boycott effort just a few months ago, which ultimately failed to materialize.\textsuperscript{106} To be sure, I don’t know what others will do. I suspect this will be another lonely dissent. But dissent I must.

VIII.

In the days since I delivered these remarks, two alternative proposals have been suggested, and two major criticisms have been leveled.

1. I’ll begin with the suggested alternatives. The first is that, instead of judges no longer hiring clerks from Yale, the entire federal government should simply deny federal funding to Yale. And not just Yale, but any school that does not support freedom of speech. Just get Congress to amend Title VI of the Civil Rights Act—or the President to issue an executive order—to protect free speech.

In other words, the suggestion is that my proposal doesn’t go far enough. To which I say, fair enough. But the suggested broader measures are for the political branches to debate and decide. I have no idea (and it’s none of my business) if—much less when—Congress would enact or the President would enforce such broader measures.

But here’s what I do know: Cancel culture is here right now. And there are things Article III judges can do right now to help, consistent with our limited judicial function. Shouldn’t we at

\textsuperscript{105} A Kentucky Federalist Society conference attendee suggested that the effectiveness of this proposal will turn on dynamics akin to a labor strike—and whether workers cross the picket line to effectively undermine labor’s leverage with management. See, e.g., Joshua L. Rosenbloom, Strikebreaking and the Labor Market in the United States, 1881–1894, 58 J. Econ. Hist. 183, 184 (1998) (“Employers’ ability to replace striking workers has long been regarded by labor historians as one of the most potent weapons available to them in their efforts to defeat labor’s demands for improvements in employment conditions.”); Jack London, The Scab, 93 Atlantic Monthly 54, 56 (1904), https://www.theatlantic.com/magazine/archive/1904/01/the-scab/306194/ [https://perma.cc/QK2F-7CUS] (“[T]he man who breaks strikes . . . causes all the trouble. Without him there would be no trouble, for the strikers are willing to remain out peacefully and indefinitely so long as other men are not in their places . . . .”).

least try to stop the bleeding, while we wait for the doctors to arrive?

2. It’s also been suggested that alums should simply stop donating to Yale.

Once again, I don’t see why we can’t pursue all of these options at the same time, especially considering how alumni donors are less likely to have any real impact. To quote Vivek Ramaswamy, who literally wrote the book on woke institutions,107 “The response of the marketplace for talent can be an important lever to drive positive change at universities . . . often even more impactful than reforming universities from within.”108

3. I’ll turn now to the criticisms. The first is this: Boycotting Yale will hurt future Yale students. So better that nothing be done.

But countless students are being hurt right now. And that number will only grow under current trends. More students and graduates will be told to abandon their views (especially conservative Christian views) or face professional sanction and social ostracism.

And here’s the kicker: Most of the students being hurt today have far less ability to negotiate these dynamics successfully than future Yale grads. Who’s worrying about hurting these students?

Moreover, it bears emphasizing how modest this effort is. It’s not difficult for Yale to restore order. All I’m asking is that students be able to invite speakers—including conservative Christian speakers—without having to worry about police protection, public opprobrium, and professional intimidation. Is that really too much to ask—that Yale teach its students to respect religious liberty and celebrate the rigorous exchange of ideas? I don’t think it’s a big ask.

4. Finally, there’s the criticism that boycotting Yale amounts to viewpoint discrimination and retaliation.

I don’t know if this criticism is the result of extreme naivete or gross deceit. But either way, it misses something fundamental about the state of our world today: Viewpoint discrimination and

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retaliation are already occurring right now. I’ve provided numerous examples here, and I’ve explained why they are illustrative rather than isolated.

So the only question for us today is whether we should just continue to suffer viewpoint discrimination and retaliation—or put a stop to it. It’s the Bill Buckley line all over again: We’re trying to push the little old lady away from the bus, not toward it.109

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The purpose of these remarks is to protect students. But it’s also to protect the rest of us. Because the spillover effects—on the legal profession, on corporate America, and on any number of other leading American institutions—are very real and very harmful. When we teach students to cancel others in the classroom, they take those lessons and use them on their employers, co-workers, and fellow citizens across the country. What happens on campus doesn’t stay on campus.

The objective here is not to advance a particular viewpoint, but to ensure that students are exposed to all viewpoints. The goal is not to hamper anyone’s career, but to protect everyone’s careers. Cancel culture is a cancer on our culture. And we need a cure now, before it’s too late.

We’ve reached the point where powerful law firm leaders and distinguished legal academics confess that they’re “afraid” of their own associates and “terrified” of their own law students.110 Let that marinate for a moment. Why are they so afraid? These are not foolish people. What is it they fear that cancel culture can do to their lives, their careers, and their families? And what does that say about the state of the world we’re living in today?

In this job, I often find myself inspired by the Russian novelist and dissident Aleksandr Solzhenitsyn and his famous essay, Live Not by Lies.111 For it seems that the lies are all around us.

I’m sure you’re familiar with Grutter v. Bollinger.112 In that case,
Yale assured the Supreme Court that it wants “a diverse and inclusive educational experience, teaching students to view issues from multiple perspectives” and “preparing a generation of public and private leaders for an increasingly pluralistic national and global economy.”

Any school that refuses to stand up against cancel culture—and instead caters to it, and even engages in it—is not a school that is interested in educational diversity. And it’s not a school I want to have anything to do with.

I hope others will join me. But I will not live by the lie.

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