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## The Dark Side of Due Process: Part I, A Hard Look at Penumbral Rights and Cost/Benefit Balancing Tests

Joshua J. Schroeder

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## ARTICLE

# THE DARK SIDE OF DUE PROCESS: PART I A HARD LOOK AT PENUMBRAL RIGHTS AND COST/BENEFIT BALANCING TESTS

JOSHUA J. SCHROEDER\*

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\* Joshua J. Schroeder is owner and founder of SchroederLaw in Oakland, California, where he practices immigration law, constitutional law, and intellectual property law. He holds a J.D. from Lewis & Clark Law School, and is admitted to practice in the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Southern District of California, the United States District Court for the District of Oregon, the State Bar of California, and the Oregon State Bar. This series is dedicated to my friendships with Angela Klein, PhD, and Jon Patterson, Esq. whose conversations with me over the years kept me sane enough to author this project.

*This is Part I of a three-part series known as “The Dark Side of Due Process,” published in the St. Mary’s Law Journal. Parts II and III will follow this Article in consecutive issues of this volume of the St. Mary’s Law Journal. An Abstract and Foreword for this project are printed at the beginning of Part I, and a general conclusion is printed at the end of Part III.*

#### ABSTRACT

*Due process is the fountainhead of legitimate government coercion. When an individual’s rights of life, liberty, or property are at stake, the government is meant to apply due process of the law or suffer reversal of its intrusions as a plain trespass. However, such reversals are merely theoretical, premised upon the willingness of federal judges to interpose their power for the protection of ordinary individuals.*

*The willingness of federal jurists to check the other branches of government for individual rights is transient at best. They do not usually check the global, dragnet United States surveillance programs that clearly violate the holding in *Kyllo v. United States*. Prophylactic measures like *Miranda* warnings and the exclusionary rule have proven mere symbols of contradiction and irony.*

*Whenever our institutions appear to be overrun with injustice, well-meaning lawyers always seem to suggest that a Mathews balancing test could solve everything. The seductive belief that a utopia lies just on the other side of a balancing test confirms our doom under the ironies of panoptic Benthamism. As Justice Brennan argued, in dissent of Mathews’ sister case *Stone v. Powell*, the new cost/benefit balancing tests could be a mere “garb” to add an air of respectability to judicial error.*

*Justice Powell, the author of Mathews and Stone, was himself a trained Bernaysian propagandist. While on the bench, Powell’s public relations agenda seemed to favor the normalization of injustice through cost/benefit due process ideologies. If Justice Brennan searched a little further into the claims Justice Powell made about the *Lochner* era, he might have exposed Mathews even more effectively. For it appears that Mathews balancing tests were derived from *Buck v. Bell* and eugenic pseudo-science.*

*Despite an aversion to the darkness, this project does not seek to excoriate the dark side of due process. Rather, like Goethe’s Faust, it positions a listening ear in the direction of dark spaces. The aim of this project is to illuminate the substance of penumbral rights and cost/benefit balancing tests—especially their role in systems of oppression. The intended result will be a foothold for seekers of justice in one of our darkest eras yet.*

## FOREWORD: THE PROBLEM OF INHERENT HUMAN INSANITY

In 1793, as Madame Roland was dragged off to the guillotine to have her head removed, she adopted a Thomas Paine-ism and cried out: “O my friends! may propitious fate conduct you to the United States, the only asylum of freedom!”<sup>1</sup> In the era of present-day common sense, the word “asylum” conjures the image of a mental institution.<sup>2</sup> This new connotation seems to fit the cautionary tale of Madame Roland well because when the French listened to American Rationalists in 1793, they began chopping off their own heads.<sup>3</sup>

Speaking of America, James Baldwin once remarked “Black people . . . were the first psychiatrists here.”<sup>4</sup> It was, therefore, auspicious that James Baldwin chose to inhabit France while diagnosing America’s worst psychoses because it is possible that a black man like Baldwin might also be able to explain why France was so deluded by the announcement of

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1. MARIE-JEANNE ROLAND DE LA PLATIÈRE, THE PRIVATE MEMOIRS OF MADAME ROLAND 113–14 (Edward Gilpin Johnson ed., 3d. ed. 1901). See THOMAS PAINE, COMMON SENSE 32 (1776) [hereinafter PAINE, COMMON] (“O ye that love mankind; ye that dare oppose, not only the tyranny, stand forth; every spot of the old world is overrun with oppression. Freedom hath been hunted round the globe. Asia and Africa, have long expelled her[—]Europe regards her like a stranger, and England hath given her warning to depart. O! receive the fugitive, and prepare in time an asylum for mankind.”); THOMAS PAINE, RIGHTS OF MAN: PART I 82 n.\* (2d ed., 1791) [hereinafter PAINE, RIGHTS] (referring to the French “UNIVERSAL RIGHT OF CONSCIENCE, AND UNIVERSAL RIGHT OF CITIZENSHIP” as an expansion upon the limited “asylum” that was offered in England at that time).

2. ROLAND, *supra* note 1, at 113–14.

3. See ROLAND, *supra* note 1, at 113 (remarking on the great number of people killed by the French authorities); cf. Gary Kates, *From Liberalism to Radicalism: Tom Paine’s Rights of Man*, 50 J. HIST. IDEAS 569, 585–86 (1989) (discussing the contrast between the two parts of Thomas’s Paine’s *Rights of Man*); Joshua J. Schroeder, *Leviathan Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations*, 15 FLA. A&M U.L. REV. 1, 223–24 (2021) [hereinafter Schroeder, *Leviathan*] (examining how the American Revolution was premised on “counter-rationalist principles”). America’s other most notable Rationalists, Thomas Jefferson and John Adams, both sent treatises to France in hopes they might influence the French Revolution. See generally THOMAS JEFFERSON, NOTES ON VIRGINIA (1785) (responding to French inquiries about the State of Virginia); 1–3 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA (1794) [hereinafter ADAMS, A DEFENCE] (responding to a letter written by the French economist Turgot and published in France). But see JOHN HECTOR ST. JOHN CRÈVECŒUR, LETTERS FROM AN AMERICAN FARMER (1904) (demonstrating that some tracts claiming to represent American Rationalism did not come from Americans, because Crèvecoeur published these fictional letters as if he were still an American farmer, when he actually was a counterrevolutionary French Comte who abandoned his American farm to burn, left his American wife to die, and his American children to grow up orphaned, all so he could flee America for the comforts of French court).

4. JAMES BALDWIN, THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS 79 (Randall Kenan ed., 2010) [hereinafter BALDWIN, THE CROSS].

American freedom in 1776 that it seemed to self-destruct.<sup>5</sup> From his haven in France, Baldwin strongly disputed American racism—a reality every bit as insane as the French Terror and much longer-lasting.<sup>6</sup>

Baldwin's literary contemporary, Flannery O'Connor, grew up near Georgia's central insane asylum, and she gave us striking material to consider regarding American insanity.<sup>7</sup> O'Connor began her career with this prayer: "Dear Lord please . . . give us some kind of weapon, not to defend us from them [i.e., the psychologists] but to defend us from ourselves after they have got through with us."<sup>8</sup> O'Connor came of age in the county where Leo M. Frank, a party in *Frank v. Mangum*,<sup>9</sup> was held in prison before being lynched—a tale as gruesome in its facts as the French Terror, and as inspiring for gothic prose.<sup>10</sup>

In mid-20th century America, it was clear to both O'Connor and Baldwin that a racial reckoning was due.<sup>11</sup> This reckoning began its progress in earnest on Bloody Sunday in Selma, Alabama.<sup>12</sup> Baldwin hoped that as a

5. *See id.*, at 136 ("It bears terrifying witness to what happened to everyone who got here, and paid the price of the ticket. The price was to become 'white.' No one was white before he/she came to America. It took generations, and a vast amount of coercion, before this became a white country . . . White men—from Norway for example, where they were "Norwegians"—became white by slaughtering the cattle, poisoning the wells, torching the houses, massacring Native Americans, raping black women."); *cf.* 1 THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE: RACIAL OPPRESSION AND SOCIAL CONTROL* 17–18, 23, 28 (2012) (naming the events and laws that invented the white race, as well as locating its invention in America: "The pivotal events are seen to be Bacon's Rebellion in 1676 and the 1705 revision of the Virginia laws, in particular, the 'Act concerning Servants and Slaves'").

6. *See* JAMES BALDWIN, *THE FIRE NEXT TIME* 89 (2021) [hereinafter BALDWIN, *THE FIRE*] (explaining Baldwin's occupation and the reason he moved to France from the United States).

7. Doug Monroe, *Asylum: Inside Central State Hospital, Once the World's Largest Mental Institution*, ATLANTA (Feb. 18, 2015), <https://www.atlantamagazine.com/great-reads/asylum-inside-central-state-hospital-worlds-largest-mental-institution> [<https://perma.cc/3Q5C-MCW3>] ("Mab Segrest, a visiting scholar . . . explored the hospital's impact on the fiction of author Flannery O'Connor, who lived just seven miles from the asylum.").

8. FLANNERY O'CONNOR, *A PRAYER JOURNAL* 15–16 (2013) [hereinafter O'CONNOR, *A PRAYER*].

9. *Frank v. Mangum*, 237 U.S. 309 (1915).

10. *Id.* at 311–12; *see also* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 58 (2000) ("Frank was then seized by a mob from the state prison farm at Milledgeville and taken back to Marietta, where he was lynched.").

11. BALDWIN, *THE CROSS*, *supra* note 4, at 78–79; FLANNERY O'CONNOR, *Everything that Rises Must Converge* (1961), *reprinted in* EVERYTHING THAT RISES MUST CONVERGE 20–23 (1965) [hereinafter O'CONNOR, *EVERYTHING*]; *cf.* 1 ALLEN, *supra* note 5, at 17–18, 23 (noting that such reckonings in America trace back at least as far as Bacon's Rebellion).

12. SELMA (Paramount Pictures 2014). Under Ava DuVernay's direction, this movie remains the most true-to-fact depiction of the events of Bloody Sunday. *Id.*

result of facing our racism, Americans might “descend deeper than [we] have ever before descended” into the contemplation of the insanity that besets us as we prepare to scale our “highest mountain” of racial and gender equality and equity.<sup>13</sup>

Rising at Baldwin’s call, this Article proceeds to descend deep into darkness, armed with only the kind of flawed hope generated by Tarwater’s prophesy in O’Connor’s second novel: “Go warn the children of God of the terrible speed of mercy.”<sup>14</sup> Our best hope is only a flawed kind of virtue rising from tar-waters.<sup>15</sup> Accepting the flaws of human virtue is, if we believe O’Connor and Baldwin’s prognoses, essential to our eventual success.<sup>16</sup>

Prior to the founding of the United States, the Puritans rejected flawed, human virtues and embraced the Platonic pursuit of perfection,<sup>17</sup> which became central to Hobbes’s rational theory of inherent human madness.<sup>18</sup> From it, notable American Hegelians, including Ralph Waldo Emerson and Justice Oliver Wendell Holmes, Jr., theorized about humanity’s rational

13. BALDWIN, THE CROSS, *supra* note 4, at 78.

14. FLANNERY O’CONNOR, THE VIOLENT BEAR IT AWAY 242 (1960) [hereinafter O’CONNOR, THE VIOLENT].

15. *Id.*

16. *See id.* (EP); BALDWIN, THE CROSS, *supra* note 4, at 34 (“Not everything that is faced can be changed; but nothing can be changed until it is faced.”); *see also* YaleCourses, 3. Flannery O’Connor, *Wise Blood*, YOUTUBE (Nov. 22, 2008), <https://www.youtube.com/watch?v=PjplQUPhES4> [<https://perma.cc/HSSL-DWCG>] (lecturing on Flannery O’Connor’s *Wise Blood*, Yale Professor Amy Hungerford demonstrated O’Connor’s devout belief that, regardless of her characters’ imperfections, “the concerns of the transcendent are seeping their way into the concerns of the material world below”).

17. *See* HENRY MORE, *Psychodia Platonica* 73 [1642] (presenting a vision of Puritanical perfection inspired by Platonic Rationalism throughout; for example, speaking of human reason as “a light far brighter [than the Sun]! . . . As that light doth the Sun. So perfect clear[,] [s]o perfect pure it is, that outward eye”); Frank A. Doggett, *Donne’s Platonism*, 42 SEWANEE REV. 274, 275 (1934). *Cf.* Claudia D. Johnson, *Hawthorne and Nineteenth-Century Perfectionism*, 44 AM. LITERATURE 585, 586–87 (1973) (examining the puritanical obsession with perfection that inspired Nathaniel Hawthorne in nineteenth-century America); RALPH WALDO EMERSON, ESSAYS, FIRST SERIES 241 (1850) [hereinafter EMERSON, FIRST SERIES] (quoting Henry More, *Psychodia Platonica* 21 [1642]).

18. *See* THOMAS HOBBS, LEVIATHAN 46–4 (explaining his concept of “Madnesse”); *Id.* at 268 (comparing himself to Plato for using the imperfections of government as the basis for perfecting it); Robert Lamb, *The Paradox of System Builders: Plato and Hobbes*, 40 SOC. RSCH. 708, 709 (1973) (comparing Hobbes and Plato); *cf.* Patricia Springborg, *Hobbes, Donne and the Virginia Company: Terra Nullius and ‘The Bulimia of Dominionium’*, 36 HIST. POL. THOUGHT 113, 158–60 (2013) (noting Hobbes’s use of the imperfection in the Puritan government, including the imperfection evident in the Jamestown massacre, to pivot his thinking towards the creation of the most perfect government possible, i.e., an absolute monarchy, as a bulwark against the inevitable dangers of human insanity).

double-consciousness.<sup>19</sup> However, none of these Hegelians managed to rise with the marvelous elocution of the founding poetess Phillis Wheatley, who resisted Hobbes's conclusion of inherent human "Madnesse."<sup>20</sup>

Thomas Hobbes taught his students how to manipulate others by defining terms so that certain desired conclusions were forced.<sup>21</sup> For example, Hobbes theorized that all humans experience pride and dejection as the same emotional experience, ergo all humans are inherently insane, ergo all humans need to be ruled by absolute kings.<sup>22</sup> In other words,

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19. See HOBBS, *supra* note 18, at 46–48 (asserting inherent human insanity because of the duality of human pride and dejection), *exemplified in* John Milton, *Samson Agonistes* 532–40 [1671] (commenting on Samson's pride as his downfall). See Christopher N. Warren, *When Self-Preservation Bids: Approaching Milton, Hobbes, and Dissent*, 37 ENG. LITERARY RENAISSANCE 118, 119–20, 130, 139 (2007); REGINALD A. WILBURN, PREACHING THE GOSPEL OF BLACK REVOLT: APPROPRIATING MILTON IN EARLY AFRICAN AMERICAN LITERATURE 20–21, 171–72 (2014) (identifying Milton as the origin of black ideas of revolt and revolution in America, especially pointing to Milton's terroristic tract *Samson Agonistes*); Joel Porte, *Emerson, Thoreau, and the Double Consciousness*, 41 NEW ENG. Q. 40, 42 (1968) (discussing Emerson's treatment of dual consciousness); Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U.L. REV. 703, 706, 722 (1992) (noting how Holmes was "strongly influenced by Hegel"); SANDRA ADELL, DOUBLE-CONSCIOUSNESS/DOUBLE BIND 13–15 (1994) (treating W.E.B. Du Bois as subscribing to Hegel); cf. James A. Good, *A "World-Historical Idea": The St. Louis Hegelians and the Civil War*, 34 J. AM. STUD. 447, 448 (2000) (noting Emerson's strong interest in Hegelianism); BERTRAND RUSSELL, UNPOPULAR ESSAYS 20 (1921) [hereinafter RUSSELL, UNPOPULAR] ("Hegel's philosophy is so odd that one would not have expected him to be able to get sane men to accept it, but he did. He set it out with so much obscurity that people thought it must be profound. It can quite easily be expounded lucidly in words of one syllable, but then its absurdity becomes obvious.")

20. HOBBS, *supra* note 18, at 46–48, 70 (comparing humanity to Prometheus as a figure of perpetual fear at the bottom of human psychology), *refuted by* Phillis Wheatley, *An Hymn to Humanity* [1773] (implicitly comparing Prometheus to Jesus Christ as a champion of humankind against the vengeance of the gods), *as expounded in* Joshua J. Schroeder, *We Will All Be Free or None Will Be: Why Federal Power is not Plenary, but Limited and Supreme*, 27 TEX. HISP. J. L. POL'Y 1, 67–68 (2021) [hereinafter Schroeder, *We Will*].

21. See Frederick G. Whelan, *Language and Its Abuses in Hobbes' Political Philosophy*, 75 AM. POL. SCI. REV. 59, 60, 73 (1981) (explaining Hobbes's theory of language). As an advocate of strong government censorship of language, Thomas Hobbes appeared to be the proto-gaslighter. HOBBS, *supra* note 18, at 46–48, 70, 118 (asserting that humankind is inherently insane to justify absolute monarchy). *But see* Kenji Yoshino, *Acts of Oblivion*, 72 STAN. L. REV. ONLINE 65, 65–72 (2020) (appearing to side with Thomas Hobbes, a gaslighter-in-the-extreme, against the Indemnity and Oblivion Act (1660) as if the English government's choosing to forget the collective trauma after their Civil War, for the purposes of staying most (but not all) punishments, is a form of gaslighting).

22. HOBBS, *supra* note 18, at 46–48, 118; cf. BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY xxii (1945) [hereinafter RUSSELL, A HISTORY] (noting that "Hobbes, Rousseau, and Hegel" reacted to "the more insane forms of subjectivism in modern times," with ideologies that amounted "to absolute authority and blind subservience to tradition[,]") and that "their doctrines are embodied practically in Cromwell, Napoleon, and modern Germany," i.e., Hitler).

Hobbes premised his entire political theory on the idea that humanity is incapable of humility.<sup>23</sup>

Hobbes believed that from the contradictory emotions of pride and dejection sprang thoughts and deeds that inevitably lifted kings into absolute power.<sup>24</sup> All that remained was for prideful and dejected humanity to embody the overwhelming power of *Leviathan* to establish absolute monarchies in their image.<sup>25</sup> Of all Hobbes's votaries, Hegel was probably the most effective at spreading Hobbesianism to America,<sup>26</sup> where Justice Oliver Wendell Holmes, Jr. eventually built his “bad man” theory of law upon it.<sup>27</sup> With Holmes in *Buck v.*

23. See HOBBS, *supra* note 18, at 232 (rejecting the idea that government form should be decided by ordinary human beings, in part, because of their lack of humility).

24. HOBBS, *supra* note 18, at 118 (noting that humanity is inherently prideful and dejected); *id.* at 231 (claiming that humanity's “Pride and other Passions have compelled him to submit himself[] to Government,” and suggesting that *Leviathan* is the proper form of government for humanity, a “King of all the children of pride”).

25. See Norman Jacobson, *The Strange Case of the Hobbesian Man*, 63 REPRESENTATIONS 1, 1–2 (1998) (describing the frontispiece of Hobbes's *Leviathan*).

26. Good, *supra* note 19, at 448 (describing the initial American embrace of Hegelianism); Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL'Y 93, 94–99 (2011) (demonstrating the enduring hold of Hegelian thought in the United States as exemplified by the pervasiveness of Professor Margaret Jane Radin's publications in the U.S. legal academy). See Patrick Riley, *Hegel on Consent and Social-Contract Theory: Does He “Cancel and Preserve” the Will?*, 26 WESTERN POL. Q. 130, 146–47 (1973) (noting Hegel's embrace and reiteration of Hobbesian philosophy). Cf. RUSSELL, A HISTORY, *supra* note 22, at 738–40 (noting the clear procession from Hobbes to Hegel, but with a lighter hand about giving Hobbes the credit for state-worship ideologies, and that Hegel thought “that America is the land of the future, ‘where, in the ages that lie before us, the burden of the world's history shall reveal itself—perhaps [he adds characteristically] in a contest between North and South America.’ He seems to think that everything important takes the form of war. If it were suggested to him that the contribution of America to world history might be the development of a society without extreme poverty, he would not be interested. On the contrary, he says that, as yet, there is no real State in America, because a real State requires a division of classes into rich and poor.”).

27. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) [hereinafter Holmes, Jr., *The Path*] (claiming that the law was more than a mere Hegelian dream); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 42, 206–11 (1881) [hereinafter HOLMES, JR.] (citing Hegel liberally to justify his departure from the theories of freedom and justice given in the Declaration of Independence and the Bill of Rights); see also Novick, *supra* note 19, at 706 (noting the Hegelian influence in which Holmes' ideas were developed); Stanford Levinson & J.M. Balkin, *The “Bad Man,” The Good, and the Self-Reliant*, 78 B.U. L. REV. 885, 886 (1998) (using Ralph Waldo Emerson as a key to understanding Holmes' *Path of the Law*); Christopher L. Sagers, *Monism, Nominalism, and Public-Private in the Work of Margaret Jane Radin*, 54 CLEV. ST. L. REV. 219, 244 (2006) (comparing Radin's Hegelianism to Holmes' “bad-man prediction of what courts will do”). But see Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069, 2126 (2011) (distinguishing Holmes' philosophy from Hegelianism); Richard Hyland, *Hegel: A User's Manual*, 10 CARDOZO L. REV. 1735, 1767 (1989) (interpreting Holmes' philosophy as a rejection of Hegel); *id.* at 1785 n.237, 1794 (revealing



Bell,<sup>28</sup> America exemplified Hobbesian madness in the tyrannical style of Nurse Ratched.<sup>29</sup>

Eugenics ideology itself is pervaded by a “bad man” theory of law.<sup>30</sup> This theory of law, which encourages judges to depart from common law *stare decisis*, is premised on the idea that judges are categorically resistant to Hobbesian insanity.<sup>31</sup> However, in the latter half of the 20th century, the

how Holmes’ apparent rejection of Hegel could be “*aufgehoben*” in the sense of Hegelian sublation “*aufhebung*,” in which case Holmes both canceled and preserved Hegel). Cf. Margeret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 975 n.62 (1982) (stating concepts that are “*aufgehoben*” “are at once destroyed, transcended, and incorporated into a new synthesis”); see RUSSELL, A HISTORY, *supra* note 22, at 733–34 (explaining Hegelian *aufgehoben* ideology in the sanest possible way).

28. See *Buck v. Bell*, 274 U.S. 200, 207–08 (1927) (“It would be strange if [the government] could not call upon those who already sap the strength of the [s]tate for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.”); Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) [hereinafter Holmes, *Natural Law*] (“The most fundamental of the supposed preexisting rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. Whether that interest is the interest of mankind in the long run no one can tell, and as, in any event, to those who do not think with Kant and Hegel it is only an interest, the sanctity disappears.”); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 445–47, 449 (1899) [hereinafter Holmes, *Law in Science*] (adopting Social Darwinism as his central common law principle, but this was not the common law either in England or America—it was, rather, a “survival” of Hobbesian feudalism in modern times).

29. See *Angel of Mercy: Nurse Ratched* 11:34 (Netflix 2020); Kimberly Bond, *Ratched: From Lobotomies to Hydrotherapy, the Sinister Truths Behind the Sarah Paulson Netflix Series*, EVENING STANDARD (Sept. 29, 2020), <https://www.standard.co.uk/culture/tvfilm/ratched-netflix-treatments-true-story-a4558656.html> [<https://perma.cc/K8GM-4VRK>]; see also BELLY OF THE BEAST 1:15:41 (Erika Cohn dir., 2020) (showing California Department of Corrections OB Nurse as stating, “[I]he ideal time to do it to them is when you’re already in there. It just takes a couple more minutes and then a couple more snips.”).

30. See *Buck*, 274 U.S. at 205–06 (applying Holmes’ bad man theory of law by closing up loopholes that defective-persons-as-bad-men may exploit to do mischief: “[M]any defective persons who[,] if now discharged[,] would become a menace[,] but[,] if incapable of procreating[,] might be discharged with safety”); Holmes, *The Path*, *supra* note 27, at 457–59 (believing that judges could foretell the future in the style of eugenic theory was essential to Holmes’ idea of the law) cf. HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 328 (1922) (recording Hon. F. W. Hatch, General Superintendent of State Hospitals in Sacramento, California, as saying, “It is not necessary to determine whether ‘any given convict is a member of a[] hereditary criminal group’ in order to show that the prevention of his procreating will be preventive of crime”).

31. See Holmes, *The Path*, *supra* note 27, at 457–59 (explaining the bad man theory is prophesy; it is necessarily future oriented, rather than focused on keeping the promises common law made in the past, which is known as common law *stare decisis*—Holmes’ estimation of the bad man’s future behavior depends upon the bad man’s inherent ability to reason summed up here: “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”). This is a colorful way of relying upon the rational theory of utilitarianism such that, if humans cannot reliably foretell what action will

Nobel Prize-winning psychologist Daniel Kahneman and Amos Tversky explained how humans, including judges, may believe so strongly in their own inherent rationality that they could embrace a panoptic version of Hobbesian madness rather than the ordinary judicial pursuits of truth and justice.<sup>32</sup>

Flannery O'Connor demonstrated how American Rationalists, like Faust, failing to find perfection in the light, plunged themselves ever deeper into the shadows.<sup>33</sup> James Baldwin stood at perhaps the opposite pole of the American experience; ordering us to face what we have become and hoping that by acknowledging our irrational behavior, we might learn to do better.<sup>34</sup> Using James Baldwin and Flannery O'Connor as special guides, this three-part series will take a hard look at the dark side of due process as follows: (I) A Hard Look at Penumbral Rights and Cost/Benefit Balancing Tests; (II) Why Penumbral Rights and Cost/Benefit Balancing Tests are Bad; and (III) How to Use Irreverent Double-Talk to Speak Back to Bad Men.

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benefit them, such Rational theories do not hold together and cannot serve Holmes' project of deciphering the law. *Id.*

32. MICHAEL LEWIS, *THE UNDOING PROJECT* 261, 267, 272–78, 324–27 (2021) (summarizing Kahneman & Tversky's research and noting that economists "'felt that we are right and at the same time they wished we weren't because the replacement of utility theory by the model we outlined would cause them no end of problems'"—statement of Amos Tversky); see DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 377–78, 381 (2011) (debunking Jeremy Bentham's utilitarianism by showing that human beings are incapable of rationally pursuing happiness and avoiding pain, and showing how the delusion that humans can reliably predict pain and pleasure is linked to measurable flaws in our ability to remember experiences accurately); 1 JEREMY BENTHAM, *PANOPTICON* 2–3 (1791); *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting) ("Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."); cf. James E. Crimmins, *Bentham and Hobbes: An Issue of Influence*, 63 *J. OF HIST. OF IDEAS* 677, 685–88 (2002).

33. See FLANNERY O'CONNOR, *WISE BLOOD* 228 (2007) [hereinafter O'CONNOR, *WISE*]; Flannery O'Connor, *The Lame Shall Enter First* (1962), in O'CONNOR, *EVERYTHING*, *supra* note 11 at 190 ("[T]he child hung in the jungle of shadows, just below the beam from which he had launched his flight into space."); cf. Edward Rothstein, *CONNECTIONS; Faust Learns the Painful Truth: Perfection Is Not for the Having*, *N.Y. TIMES* (Jan. 13, 2001), <https://www.nytimes.com/2001/01/13/arts/connections-faust-learns-the-painful-truth-perfection-is-not-for-the-having.html> [https://perma.cc/66YF-L8VF]

34. See BALDWIN, *THE CROSS*, *supra* note 4, at 34 ("Not everything that is faced can be changed; but nothing can be changed until it is faced."); *id.* at 78 ("Let me force you, or try to force you, to observe a paradox.").

## INTRODUCTION: THE PROBLEM OF RATIONALIZED LEGAL PARADOXES

To paraphrase Judge Bork: Who says *Mathews* must say *Buck*.<sup>35</sup> Unfortunately, like Powell in *Mathews*, most judges tend to have a blind spot for their own contradictions.<sup>36</sup> As a result, federal courts continue to apply Holmes' "bad man" ideology to issue paradoxical decisions like *Karingithi v. Whitaker*, for example, which endorsed an oxymoron of illegal jurisdiction in Immigration Court.<sup>37</sup>

35. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 429 n.309 (2011) (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990)) ("Who says *Roe* must say *Lochner* and *Scott*.") (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 32 (1990)). *But see id.* at 462 n.554 (2011) (stating *Buck* was "better known for the shock value of particular phrases in associated opinions than for their contested application of an otherwise acceptable legal norm"). *Roe* actually cited *Buck* as good law, and yet Bork's theory alleging a re-legitimization of *Lochner* was only cited as a theory in Justice Rehnquist's dissent. *Roe v. Wade*, 410 U.S. 113, 154–55 (1973) (citing *Buck v. Bell*, 274 U.S. 200 (1927)) (limiting a woman's right to seek an abortion by citing to *Buck*, and extending a cost/benefits balancing approach saying, "[A]t some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."). *Cf. Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (decided after *Roe*, and upon the same theory of balancing the interests of the state versus individual). As addressed below, *infra* notes 52–55, *Roe's* penumbral theory originally stemmed from Justice Brandeis' *Buck*-inspired dissent in *Olmstead* that was extended in *Griswold v. Connecticut*. See *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (citing to *Buck* on page 472 of *Olmstead*)).

36. *Mathews* hailed itself as a vindication of due process in the same breath that it disclaimed any meaningful judicial review of due process, and ever since it has been used in several attempts to vindicate due process only to fall into sheer irony. See *Mathews*, 424 U.S. at 334–35 (establishing three-factor due process analysis), *extended by* *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion); Dahlia Lithwick, *Nevermind: Hamdi Wasn't So Bad After All*, SLATE (Sept. 23, 2004, 5:37 PM), <https://slate.com/news-and-politics/2004/09/hamdi-wasn-t-so-bad-after-all.html> [<https://perma.cc/79B6-GTAQ>] [hereinafter Lithwick, *Nevermind*] (noting the Supreme Court's confusing due process jurisprudence was futile anyway); see also *Kaley v. United States*, 571 U.S. 320, 340–41 (2014) (using *Mathews* to paper over whatever process was given as "due" process); cf. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 150 (2002) [hereinafter O'CONNOR, *THE MAJESTY*] (speaking of Justice Powell: "For those who seek a model of human kindness, decency, exemplary behavior, and integrity, there will never be a better man").

37. See *Karingithi v. Whitaker*, 913 F.3d 1158, 1161–62 (9th Cir. 2019) (existing as one of several similar circuit court decisions on the same topic, focusing on the bad man view of law, which is second nature in United States courts, in which the court closes loopholes in the law that individuals may use to their benefit, while actively creating a giant loophole for the government by allowing defective NTAs (Notices to Appear) to vest jurisdiction because they are somehow also non-jurisdictional); see also 8 C.F.R. § 1208.2(b) (stating that NTA's are jurisdictional charging documents ordinarily cited for jurisdiction by Immigration Judges); 8 U.S.C. § 1229(a)(1)(G)(i) (requiring legal NTA's to include "[t]he time and place at which the proceedings will be held[]"); cf. *Lopez v. Barr*, 925 F.3d 396, 401 (9th Cir. 2019) ("[N]either we nor DHS can override the clear statutory command that time and place information be included in *all* Notices to Appear."); *id.* at 405 (distinguishing *Karingithi* for the oxymoron of holding that "a defective Notice to Appear vests the Immigration Court with

Another example was *Iqbal* and *Twombly*, which together confirmed Holmes' Hegelian vision for the common law as a way to make the ends justify the means.<sup>38</sup> Like the Court's definition of plausible, between possible and probable,<sup>39</sup> Holmes liked to stare into the mystical space between two extremes to pull out a magical third option from the penumbra.<sup>40</sup> This process is whence Holmes originally drew his concept of "due" process in *Buck v. Bell*.<sup>41</sup>

In *Buck*, Justice Holmes held that factual determinations of executive agents are implicitly unchallengeable in court.<sup>42</sup> He furthermore held that as long as the legally prescribed procedure is followed in reviewing those

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jurisdiction"—i.e., that an illegal NTA can vest proper jurisdiction); *Rodriguez v. Garland*, 15 F.4th 351, 355 (5th Cir. 2021); *Matter of LaParra*, 28 I&N Dec. 425, 436 (BIA 2022) (contending that "*Rodriguez* does not apply here because this case arises in the First Circuit"). The circuit courts offer several examples of a Hegelian sleight of hand in virtually every topic of law. See, e.g., *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (rendering one of the most unintelligible passages in U.S. legal history in a distinct, Hegelian style: "The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and an objective standard. In other words, the actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person."—this *is* unintelligible).

38. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (stating the plausibility standard under *Twombly* as "a context-specific task that requires the reviewing court to draw on its judicial experience"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("[w]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face"—seeming to say, in Hegelian style, that the plausibility standard is both not heightened and heightened). See Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 857–58 (2012) ("The life of the law has not been logic; it has been experience.") (quoting HOLMES, JR., *supra* note 27, at 1); cf. ANON., CONG. RSCH. SERV., R41077, CIVIL PLEADING REQUIREMENTS AFTER *BELL ATLANTIC CORPORATION V. TWOMBLY* AND *ASHCROFT V. IQBAL* 5 (2010) ("Interpretations of *Twombly* differed among the lower federal courts. Some interpreted the decision as having introduced a general heightened pleading standard, while others viewed the holding as more limited . . . . Among legal commentators, a consensus seemed to emerge that despite containing some language to the contrary, the ruling creates a general heightened pleading standard.").

39. See Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard after Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 529 (2009) ("A plausible inference is more than merely possible, but not as strong as a probable inference."). See *Twombly*, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable . . . ."); *id.* at 561 (rejecting the old idea that claims should proceed as long as they could be supported by possible facts).

40. Holmes, *Law in Science*, *supra* note 28, at 457.

41. *Id.*; *Buck v. Bell*, 274 U.S. 200, 207–08 (1927).

42. *Buck*, 274 U.S. at 207.

determinations, “the plaintiff at error has due process at law.”<sup>43</sup> Only after making both these holdings did *Buck* say that an *ad hoc* cost/benefit balancing test can be extended to potentially paper over any given process as “due.”<sup>44</sup>

According to Holmes, costs and benefits are two extremes between which the Court is tasked to draw a bright line.<sup>45</sup> Justice Powell rehabilitated this strategy in *Stone* and *Mathews* so that potentially any process may be considered “due” process.<sup>46</sup> Powell, and those who employed his Bernaysian strategies that were originally derived from the Puritan concept of due process to legitimize Cromwellian terrorism,<sup>47</sup> hoped the public would not notice that balancing tests only required judges to confirm an *appearance* that the benefits outweighed the costs.<sup>48</sup>

43. *Id.*

44. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)) (extending the *Jacobson* cost/benefit rationale used to affirm state vaccine mandates); cf. Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPPERDINE L. REV. 101, 114 (2011) [hereinafter Nourse, *Buck*] (“Holmes . . . believed that the Constitution could be reduced to ad hoc balancing.”).

45. *Buck*, 274 U.S. at 207–08; see also *Jacobson*, 197 U.S. at 24 (“[T]hey generally have considered the risk of such an injury too small to be seriously weighed as against the benefits . . .”).

46. See *Stone v. Powell*, 428 U.S. 465, 488–89 (1976) (discussing a cost-benefit analysis of impeachment using illegally seized evidence); *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 349 (1976) (“We conclude that an evidentiary hearing is not required prior to the termination of disability benefits, and that the present administrative procedures fully comport with due process.”).

47. Confidential Memorandum from Lewis F. Powell, Jr. to the U.S. Chamber of Commerce on the Attack on American Free Enterprise System (Aug. 23, 1971), <https://www.greenpeace.org/usa/democracy/the-lewis-powell-memo-a-corporate-blueprint-to-dominate-democracy/> [<https://perma.cc/V3QD-9LHU>] [hereinafter Powell Memo]. See EDWARD BERNAYS, PUBLIC RELATIONS 20–29 (1945) [hereinafter BERNAYS, PUBLIC]; EDWARD L. BERNAYS, THE BIOGRAPHY OF AN IDEA epigraph (1965) [hereinafter BERNAYS, THE BIOGRAPHY] (quoting John Milton, *Samson Agonistes* 865–68 [1671]) (quoting Milton, “That grounded maxim / So rife and celebrated in the mouths / Of wisest men; that to the public good / Private respects must yield” and containing references to the Puritans’ free use of the printing press to manipulate the people of England in order to justify propaganda as legitimate free speech); John Milton, *Samson Agonistes* preface [1671] (invoking the “power, by raising pity and fear, or terror, to purge the mind of those and such like passions, that is[,] to temper and reduce them to just measure with a kind of delight, stir[ed] up by reading or seeing those passions well imitated”); YaleCourses, 23. *Samson Agonistes*, YOUTUBE 17:46–17:56 (Nov. 23, 2008), <https://www.youtube.com/watch?v=JBYnHy6YxOU> [<https://perma.cc/L9K8-BWER>] [(stating, “*Samson Agonistes* is the intensest . . . expression of misogyny that you will find in the Miltonic Canon,” and also noting in several places that *Samson Agonistes* expresses sexual violence, akin to the violence permitted by *Buck v. Bell*, like mass castrations of gentiles and the idea that Dalila essentially castrated Samson through marriage, thereby justifying his revenge, i.e., a genocide of the Philistines through a righteous suicide by Samson in the end).

48. See *Stone*, 428 U.S. at 475–76 n.7–9, 493 n.35 (extensively referencing a false history of habeas corpus supported by Paul M. Bator’s article *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners* to justify denying habeas corpus to state prisoners through cost/benefit balancing tests

Federal judges do not usually confirm the actual costs and benefits of their *Mathews* decisions, because *Stone* and *Mathews* are completely superficial.<sup>49</sup> In these decisions, Justice Powell adopted Professor Paul Bator's relativistic fatalism, which dispensed with the ordinary judicial pursuits of truth and justice.<sup>50</sup> In *Stone*, it was deemed sufficient for the mere appearance of truth and justice to control federal judicial policy according to a cost/benefit balancing test; in other words, as long as judges appeared to be good it did not matter if they participated in bad.<sup>51</sup>

This signified the fact that, by the time *Mathews* rolled around, Justice Holmes' holdings in *Buck* were second nature.<sup>52</sup> All that remained after adopting Holmes' legal presuppositions, as presented in *Buck* and *Lochner*, was a better description of cost/benefit balancing tests, which *Mathews* clarified.<sup>53</sup> The *Mathews* test, first eclipsed by its sister case *Stone v.*

for the first time); *Mathews*, 424 U.S. at 343 (requiring federal courts to consider “the probable value, if any, of additional procedural safeguards” rather than the basic question of whether equal justice is served by existing legal process); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 448 n.12 (1963) (arguing that the appearance of truth is the best that trials can accomplish); *id.* at 455, 487 (suggesting that federal habeas courts consider merely whether “a reasoned probability that justice was done, rather than whether in some ultimate sense the truth was in fact found”); *id.* at 524–26 (naming “the appearance of fairness” as a sufficient legitimization of his theories); see generally Eric M. Freedman, *Brown v. Allen: The Habeas Corpus Revolution that Wasn't*, 5 ALA. L. REV. 1541 (2000).

49. See *Kaley v. United States*, 571 U.S. 320, 340–41 (2014) (using *Mathews* to paper over whatever process was given as “due” process writing: “If the question in a pre-trial forfeiture case is whether there is probable cause to think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides”); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion) (citing *Mathews* to paper over military trials for United States citizens as “due” process stating that “the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal”—notably the *Hamdi* Court emphasized the superficial nature of both *Mathews* and *Stone* when it cited *Mathews*, a non-habeas case, and not *Stone*, a habeas case).

50. See *supra* notes 48–48; Freedman, *supra* note 48, at 1545 n.9 (citing *Schnecko v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring)) (explaining Bator's influence over Justice Powell and others). I discussed Bator's influence over the post-*Fay v. Noia* Court in my article *The Body Snatchers*, which responded to Bator's position that federal judges should obstruct access to *de novo* review of habeas claims as long as it appears to the public that justice was probably served, and noting that *Stone's* approach was an enigma in habeas corpus jurisprudence at the time it was decided. Joshua J. Schroeder, *The Body Snatchers: How the Writ of Habeas Corpus was Taken from the People of the United States*, 35 QUINNIAC L. REV. 1, 31 n.160, 32 n.173, 100, 105–07 (2016) [hereinafter Schroeder, *The Body*].

51. See *supra* notes 48–50.

52. See *Mathews*, 424 U.S. at 334–35 (citing several “prior decisions” that applied something similar to *Mathews* balancing to questions of due process).

53. *Id.* at 334–35. See *Buck v. Bell*, 274 U.S. 200, 207–08 (1927) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (“The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”)); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes,

Powell,<sup>54</sup> eventually outgrew *Stone* to touch potentially every corner of American law to answer the question of “what process is due.”<sup>55</sup>

Holmes' version of due process was not “of the law,” because his definition of “law” was a literal prophecy, i.e., a guess about what the law may be in the future.<sup>56</sup> Holmes judged the law by what future lawbreakers would think they could do without consequence.<sup>57</sup> He adopted the strategy of bad men who try to secure their futures with perfect crimes as his own—a legal ideology Hannah Arendt called “logicality” that, as she observed, led directly to the holocaust.<sup>58</sup>

Using what bad people may think they can get away with in the future as if it were *the* law explains the *Buck/Mathews* framework.<sup>59</sup> It explains how the court, inspired as it was by *The Slaughterhouse Cases*, opened a back door to Star Chambers in America on a utilitarian basis.<sup>60</sup> And it explains why

J., dissenting) (“The other day, we sustained the Massachusetts vaccination law.”) (referencing *Jacobson*, 197 U.S. 11); *Jacobson*, 197 U.S. at 24 (“[T]hey generally have considered the risk of such an injury too small to be seriously weighed as against the benefits.”) cf. Lewis F. Powell, Jr., *Caroline Products Revisited*, 82 COLUMBIA L. REV. 1087, 1089 (1982) (Justice Powell spread several theories about “the passing of the *Lochner* era,” and constantly implied that Justice Holmes decided *Lochner* correctly, but this did not move the Court past *Buck v. Bell*, which could be read as extremely similar to *West Coast Hotel Company v. Parrish* for upholding a state law that especially concerned women’s health).

54. See, e.g., Sam Boyte, *Federal Habeas Corpus After Stone v. Powell: A Remedy Only for the Arguably Innocent?*, 11 U. RICH. L. REV. 291, 292 (1977) (giving an example of the focus of scholarship being on *Stone* rather than *Mathews* at the time).

55. *Mathews*, 424 U.S. at 333, 349.

56. See Holmes, *The Path*, *supra* note 27, at 461 (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”). If Holmes was not joking, perhaps prophecies could be considered non-pretentious, but announcing oneself able to foretell the future from the bench is certainly presumptuous. Compare *id.* at 461, with KAHNEMAN, *supra* note 32, at 377–78, 381 (debunking the idea that human beings can accurately foretell what will bring them pleasure or pain—a central presumption of Holmes’ bad man theory of law), and Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHIC. L. REV. 883, 894–98 (2006) (citing several sources influenced by Daniel Kahneman to demonstrate why Holmes’ ideologies may not work as a reliable decision-making process).

57. Holmes, *The Path*, *supra* note 27, at 460–61. See Schauer, *supra* note 56, at 886.

58. Compare Holmes, *The Path*, *supra* note 27, at 459 (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .”), with Peter Baehr, *Debating Totalitarianism: An Exchange of Letters Between Hannah Arendt and Eric Voegelin*, 51 HIST. THEORY 364, 377 (2012) (“Is it not almost comic to speak of murder and of ‘Thou shalt not kill’ when one is faced with the building of expensive factories for the manufacture of corpses—and these factories were built by people who had not the slightest interest in these murders and had, so to speak, nothing evil (in the traditional sense) in mind?”).

59. Holmes, *The Path*, *supra* note 27, at 460–61, extended by *Buck v. Bell*, 274 U.S. 200, 207–08 (1927), and *Mathews*, 424 U.S. at 334–35.

60. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (quoting *The Slaughterhouse Cases*, 83 U.S. 36, 71 (1873)). Cf. Powell, Jr., *supra* note 53 53, at 1089 (for all of

there is so little criticism of this development in the law today because most of the key figures in the United States government are Benthamite hedonists, who do not care about what the law actually is, but only what it may do for them (or to them) in the future.<sup>61</sup>

In the law, the idea of being just, proper, or regular is captured by the word “due,” as in *due* process or *duly* enacted law to imply legal legitimacy.<sup>62</sup> *The Dark Side of Due Process: Part I* will begin by focusing on Justice Holmes’ definition of due process in *Buck*. Then it will explain how Holmes’ views differed only very slightly with Justice Brandeis’, such that both confounded the common law with feudal and canon law. Finally, *The Dark Side of Due Process: Part I* will explain how Justice Powell resurrected the views of Justices Holmes and Brandeis using a strategy pioneered in *The Slaughterhouse Cases* to resurrect a racist version of the United States social compact originally expounded in *Dred Scott*.

#### A. A DEFINITION OF “DUE” THAT INSPIRED JUSTICE HOLMES AND ADOLF HITLER

In famed actress Heidi Schreck’s recent stage production *What the Constitution Means to Me*, she presented *Castle Rock* doctrine and reported what she was told: that *Castle Rock* decided against the rights of abused women because a woman’s right not to be abused is a “positive” right.<sup>63</sup> To her credit, Ms. Schreck doubted the explanation as too simple.<sup>64</sup>

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Justice Powell’s focus on *Lochner* as the worst decision of its era, he did not improve upon *Slaughterhouse* or even acknowledge that it was a bad decision).

61. See, e.g., Schauer, *supra* note 56 at 886 (“Holmes himself, although later and less shrill than Bentham [the proto-utilitarian], presaged the Realists by pressing against a picture of the common law as discovery and quasi-logical reasoning. Now, having for generations bathed in the teachings of Holmes and the Realists, we heed their lessons. We no longer deny the creative and forward-looking aspect of common law decisionmaking, and we routinely brand those who do as ‘formalists.’ It is thus no longer especially controversial to insist that common law judges make law.”).

62. *Due*, BLACK’S LAW DICTIONARY, (11th ed. 2019).

63. WHAT THE CONSTITUTION MEANS TO ME 52:40 (Amazon 2020) (presenting *Castle Rock v. Gonzales*, 545 U.S. 748 (2005)).

64. *Id.* at 1:17:27 (“Maybe we could think of the constitution as like that first mother, a constitution that is obligated to actively look out for all of us. . . . Our constitution is really, really old. Oh, there’s a problem with making an all new positive rights constitution, with human rights enshrined from the beginning. It’s a, we would still have to trust the people interpreting that document right? We would still have to trust the people in charge.”). Another problem with positive rights constitutions is that in countries that have them, people still cannot raise their constitutions in court, a tradition the U.S. Supreme Court began in *Marbury v. Madison*. Compare *Marbury v. Madison* 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to



However, nobody told Ms. Schreck that the overt distinctions in *Castle Rock* were also present in *Buck v. Bell*.<sup>65</sup>

The *Buck* Court used distinctions between procedure and substance and law and fact against a backdrop of public versus private rights.<sup>66</sup> However, positive versus negative rights, which sat in the background of *Castle Rock*, would also do for *Buck*'s purposes.<sup>67</sup> As Justice Holmes, the author of *Buck*, once explained in the *Harvard Law Review*, potentially any random dichotomy

afford that protection.”), with XIANFA article 48, § 2 (2019) (China) (“Women in the People’s Republic of China shall enjoy equal rights with men in all spheres of life: political, economic, cultural, social and familial life. The State shall protect the rights and interests of women, implement a system of equal pay for equal work, and train and select female officials.”), and Phoebe Lu, *Possibilities for Constitutional Enforcement: How Compensation Cases Clarify the Role of the Chinese Constitution*, COLUM. UNDERGRAD. L. REV. (Aug. 22, 2021), <https://www.culawreview.org/journal/possibilities-for-constitutional-enforcement-how-compensation-cases-clarify-the-role-of-the-chinese-constitution> [<https://perma.cc/Q5AS-QQEG>] (“The Chinese Constitution . . . is regarded as the supreme legal authority, [but] it is not judicialized, meaning that its articles are not allowed to be used as legal basis in court.”).

65. G. Kristian Miccio, *The Death of the Fourteenth Amendment: Castle Rock and Its Progeny*, 17 WM. & MARY J. WOMEN & L. 277, 288, 296–97 (2011) (“[T]he distinction between procedural and substantive is artificial because ‘all rights, including procedural rights, are ultimately substantive’ . . .” (quoting Roger Pilon, *Tonn of Castle Rock v. Gonzales: Executive Indifference, Judicial Complicity*, 2005 CATO SUP. L. REV. 101, 110 (2005))). Compare *Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005) (quoting *DeShaney v. Winnebago Cnty. Dept. Soc. Servs.*, 489 U.S. 189, 195 (1989)) (“[T]he so-called ‘substantive’ component to the Due Process Clause does not ‘requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors.’”), with *Buck v. Bell*, 274 U.S. 200, 207 (1927) (“The attack is not upon the procedure, but upon the substantive law.”), and John Milton, *Samson Agonistes* 865–68 [1671] (speaking of “that grounded maxim / So rife and celebrated in the mouths / Of wisest men; that to the public good / Private respects must yield”—appearing to have direct import in the consideration of *Buck*, because this was uttered by Dalila to justify her castration and subjugation of Samson, who was thus apparently also justified in committing acts of mass castration and sexual violence against Dalila’s people under the same principle). Cf. Holmes, *Natural Law*, *supra* note 28, at 41–42 (giving an extremely dismal view of preexisting rights, similar to Scalia’s view, that disparaged the drafters and signers of the Declaration of Independence as naïve: “The jurists who believe in natural law seem to me to be in that naïve state of mind . . . accepted by them and their neighbors as something that must be accepted by all men everywhere.”), with THE DECLARATION OF SENTIMENTS para. 2 (U.S. 1848) (the suffragettes sought to include themselves in the rights originally declared on 1776: “We hold these truths to be self-evident; that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights . . .”). The suffragettes did not appear to argue that we needed a positive or negative rights constitution. *Id.*

66. *Buck*, 274 U.S. at 207–08 (using distinctions between law and fact and substantive law versus legal process). See, e.g., Holmes, *Law in Science*, *supra* note 28, at 456 (“In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles.”). Compare *Den ex dem Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855), with John Milton, *Samson Agonistes* 865–68 (1671) (justifying torture and the death penalty), and HOBBS, *supra* note 18, at 46–48, 122.

67. Holmes, *Law in Science*, *supra* note 28, at 456–57.

could be used to draw arbitrary, unwritten, judge-made rules and laws out from the ethereal void between them.<sup>68</sup>

Justice Holmes put cognitive dissonance to work by focusing on extremes to define what Holmes called the penumbra between them—law versus fact, procedure versus substance, day versus night.<sup>69</sup> Like Nietzsche’s version of the Iranian prophet Zarathustra, thus spoke our legal prophet Justice Holmes as he cast his gaze deep into the starless void between the persistent extremes in law and society to divine bright lines in the law,

There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to the mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations. In some regions of conduct of a special sort we have to be informed of facts which we do not know before we can draw our lines intelligently, and so, as we get near the dividing point, we call in the jury.<sup>70</sup>

However, Justice Holmes balked at “leaving nice questions to the jury,” because in his opinion, a judge who did so was weak; a real judge would “state the law” no matter what.<sup>71</sup> Thus spoke Justice Holmes in manly, prophetic tones to avoid dealing with factual determinations and substantive rights that he saw as arbitrary and overtly feminine.<sup>72</sup> Inspired by Hegel

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68. *Id.* at 457 (using the distinction between day and night to develop the original legal “penumbra”). Justice Holmes originally used the idea of the penumbra to *deny* human rights. See *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting) (“[I] am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant[s] . . .”).

69. Holmes, *Law in Science*, *supra* note 28, at 456–57; *Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting).

70. Holmes, *Law in Science*, *supra* note 28, at 457.

71. *Id.*

72. *Id.*; Holmes, *The Path*, *supra* note 27, at 460–61; *Buck*, 274 U.S. at 207–08; *Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting).

and dubbed an American Nietzsche,<sup>73</sup> Holmes redefined the common and natural laws upon manliness and the survival of the fittest by expressing favoritism for written laws and bright-line rules.<sup>74</sup>

Holmes' preference for procedure over substance and laws over facts was arbitrary and unwritten.<sup>75</sup> These preferences came from Holmes' personal bias alone and did not comport with "the very essence of judicial duty," as expounded in *Marbury v. Madison* to protect individual rights.<sup>76</sup> Indeed, even the distinctions between apparent extremes in *Buck v. Bell* were Holmes' arbitrary inventions in order to make eugenic dogma appear reasonable.<sup>77</sup>

73. See *supra* notes 19, 27; Seth Vannatta & Allen Mendenhall, *The American Nietzsche? Fate and Power in the Pragmatism of Justice Holmes*, 85 UMKC L. REV. 187, 194 (2016) (describing Holmes' affinity and regard for Nietzsche); see also Murray James Braithwaite, *A Dynamics Theory of Justice: Nietzsche, Holmes and Self-Organizing Criticality*, 386 (2000) (Ph.D. thesis, University of British Columbia) (suggesting Holmes' reading of Nietzsche informed his views as expressed in his speeches); cf. RUSSELL, A HISTORY, *supra* note 22, at 739 (explaining Hegel's near-worship of manliness and warmongering); *id.* at 767 (speaking of Nietzsche, "It is obvious that in his day-dreams he is a warrior, not a professor; all the men he admires were military. His opinion of women, like every man's, is an objectification of his own emotion towards them, which is obviously one of fear. 'Forget not thy whip'—but nine women out of ten would get the whip away from him, and he knew it, so he kept away from women, and soothed his wounded vanity with unkind remarks.").

74. Holmes, *Law in Science*, *supra* note 28, at 449 (demonstrating "a lively example of the struggle for life among competing ideas, and of the ultimate victory and survival of the strongest"); *id.* at 456–57 (naming his preference for laws over facts and bright-line rules over judges that lack a sufficient backbone to strike forth); Holmes, *Natural Law*, *supra* note 28, at 42 (referring to preexisting natural rights as the mere product of "fighting . . . to maintain them," rather than an actual reality established by God or nature, concluding disparagingly about natural rights, "A dog will fight for its bone."); HOLMES, JR., *supra* note 27, at 238 ("The possession of rights, as it is called, has been a fighting-ground for centuries . . .").

75. Holmes, *Law in Science*, *supra* note 28, at 456–57 (showing these preferences originated as an expression of what Holmes thought science was). In *Buck*, Holmes caused a disaster by explicitly applying these unwritten preferences. *Buck v. Bell*, 274 U.S. 200, 207–08 (1927).

76. *Marbury v. Madison*, 5 U.S. 137, 163, 178 (1803).

77. *Buck*, 274 U.S. at 207–08. *Buck* resembled Chief Justice Taney's logic in *Dred Scott* that also flowed from Hegel's dialectic of master and slave as taken from Hobbes, whence Taney ravished the U.S. social compact with a state of nature theory every bit as corrosive to human rights as Thomas Hobbes's *Leviathan*. See Guyora Binder, *Master, Slavery, and Emancipation*, 10 CARDOZO L. REV. 1435, 1441, 1462–63 (1989) ("For [Chief Justice Taney], subjection without kinship, exclusion without sovereignty, constituted a condition of social death."). Compare *Dred Scott v. Sandford*, 60 U.S. 393, 410 (1857) ("[I]he enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration [of independence]."), with HOBBS, *supra* note 18, at 122 (speaking of compacts, like the American Declaration of Independence, "the major part hath by consenting voices declared a Sovereign; he that dissented must now consent with the rest; that is, [he is] contented to avow all the actions he shall do, or else justly be destroyed by the rest . . . whether his consent be asked, or not, he must either submit to their decrees, or be left in the condition of warre he was in before; wherein he might without injustice be destroyed by any man whatsoever").

Like Nietzsche's prophets of power, Holmes did not follow the old common law rules but redefined the common law according to his personal beliefs in order to push an agenda of Social Darwinism.<sup>78</sup> Unlimited state powers were key to bringing about such an agenda, where only the strong in America would survive.<sup>79</sup> Therefore, Holmes idealized final solutions administered by the government onto the American people and disparaged natural rights.<sup>80</sup>

Richard A. Loeb and Nathan F. Leopold, Jr., members of the Chicago upper class, perfected Justice Holmes' legal ideology when they murdered Bobby Franks.<sup>81</sup> Clarence Darrow declared in open court that Nietzsche

78. Allen Mendenhall, *Oliver Wendell Holmes Jr. and the Darwinian Common Law Paradigm*, 7 EURO. J. PRAGMATISM & AM. PHIL. 1, 2 (2015), <https://doi.org/10.4000/ejpap.411> [<https://perma.cc/MN8R-TTDU>]. See *supra* notes 19, 27, 74.

79. Sandra Day O'Connor, *They Often Are Half Obscure: The Rights of the Individual and the Legacy of Oliver W. Holmes*, 29 SAN DIEGO L. REV. 385, 388 (1992) [hereinafter O'Connor, *They Often*] (Holmes "set out a theory of the Constitution that would enable the government to prevail over the individual most of the time"); *id.* at 389 ("Holmes' point was a different one—it was not that the law was properly aimed, but that the state had the power to pass the law regardless of its aim.").

80. *Id.* at 388–91 (naming Holmes' state powers ideology, but also expressing a false hope that it already faded away). See Hilary Eisenberg, *The Impact of Dicta in Buck v. Bell*, 30 J. CONTEMP. HEALTH L. & POL'Y 184, 192–93 (2013) [hereinafter Eisenberg, *The Impact*] (noting that *Buck v. Bell* did not pass away as O'Connor hoped it did, analyzing the gray area created by *Buck* that was applied in *Stump v. Sparkman*); *Stump v. Sparkman*, 435 U.S. 349, 364 (1978) ("The Indiana law vested in [the judge] the power to entertain and act upon the petition for sterilization."); see also Thomas Halper, *Justice Holmes and the Question of Race*, 10 BRITISH J. AM. LEGAL STUD. 171, 196 (2021) ("In the end, so potent was Holmes' preoccupation with being true to himself that it left little room for caring about others. Had Holmes believed human nature to be essentially cooperative and compassionate, perhaps the self-absorption might have proven more benign. But he dismissed all this as fantasy.").

81. Compare Simon Baatz, *Leopold and Loeb's Criminal Minds*, SMITHSONIAN MAG. (Aug. 2008), <https://www.smithsonianmag.com/history/leopold-and-loeb-criminal-minds-996498/> [<https://perma.cc/6UBH-ZN7X>] ("Leopold also had a tedious obsession with the philosophy of Friedrich Nietzsche. He would talk endlessly about the mythical superman who, because he was a superman, stood outside the law, beyond any moral code that might constrain the actions of ordinary men."), with EMERSON, FIRST SERIES, *supra* note 17, at 255 ("[A]s there is no screen or ceiling between our heads and the infinite heavens, so is there no bar or wall in the soul, where man, the effect, ceases, and God, the cause, begins."); Beniamino Soressi, *6.1 Europe in Emerson and Emerson in Europe*, in MR. EMERSON'S REVOLUTION 325, 326 (Jean McClure Mudge ed., 2015) ("Unfortunately in Germany, Nietzsche misused central Emersonian ideas, which Hitler and the Nazis then further perverted. In Italy, the poet-politician D'Annunzio and Mussolini were closer to Emerson's texts per se, yet similarly corrupted his original intent."), and Adam H. Hines, *Ralph Waldo Emerson and Oliver Wendell Holmes, Jr.: The Subtle Rapture of Postponed Power*, 44 J. SUPREME CT. HIST. 39, 42, 46–47 (2019) (quoting Holmes, *The Path*, *supra* note 27, at 478) ("Holmes' decision in *Buck v. Bell* (1927) embodied an Emersonian premium on self-reliance . . . Emerson labeled the inspiration as the 'Divine Soul,' whereas Holmes named his calling 'an echo of the infinite' and 'the universal law,' thereby emulating the passion and the prose of Emerson.").

poisoned these young boys' minds to believe they were *Übermenschen*.<sup>82</sup> Loeb and Leopold believed, as potentially all eugenicists believed, that they were destined to commit perfect crimes, the kind not yet seen by the world until Hitler took power in Europe.<sup>83</sup>

After World War II and Hitler's attempt to create the *Übermensch* through perfect crimes,<sup>84</sup> *Buck* was rejected permanently by Americans.<sup>85</sup> However, the thought process behind *Buck* was considered disconnected from the monstrousness of the decision.<sup>86</sup> Likewise, the devilishness of the Nazis was believed to have caused their behavior, and only a few dissenting voices led by Hannah Arendt demanded a closer look at the banality of evil.<sup>87</sup>

82. Clarence Darrow, *Plea for Leopold and Loeb* (Aug. 22, 23, and 25, 1924), <https://voices.ofdemocracy.umd.edu/clarence-darrow-plea-for-leopold-and-loeb-22-23-and-25-august-1924-speech-text/> [<https://perma.cc/HZC5-HQ4L>] (“He believed that some time the superman [*Übermensch*] would be born, that everybody was working toward the superman, and some time there would be one, and he often confronted himself with the superman . . . . In formulating a superman he is, on account of certain superior qualities inherent in him, exempt from the ordinary laws which govern ordinary men.”). Nietzsche's *Übermensch* concept came from Hegel and Emerson. Compare RUSSELL, A HISTORY, *supra* note 22, at 739 (noting that in Hegelian thought: “we must also take account of world-historical individuals . . . [t]hese men are heroes, and may justifiably contravene ordinary moral rules”), with RALPH WALDO EMERSON, REPRESENTATIVE MEN 221 (1897) [hereinafter EMERSON, REPRESENTATIVE] (attributing this statement to Napoleon Bonaparte: “‘They charge me,’ he said, ‘with the commission of great crimes: men of my stamp to do not commit crimes.’”).

83. Darrow, *supra* note 82 (“[T]hey began to discuss this question of committing a perfect crime . . . .”); cf. Clarence J. Karier, *G. Stanley Hall: A Priestly Prophet of a New Dispensation*, 7 J. LIBERTARIAN STUD. 35, 55–56 (1983) (providing historical context for the *übermensch* ideology).

84. See Mathew M. Stevenson, *Nietzsche and the Nazis Antipodes or Ideological Kin?: Articulating Chasms and Connections* 20 (1999) (Master of Arts thesis, University of Montana) (“Hitler viewed his ‘Germanism’ as satisfying both Nietzsche’s admiration for the master morality, and his aversion to modern movements and value systems.”).

85. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.”). *But see* *Stump v. Sparkman*, 435 U.S. 349, 364 (1978); *Madrigal v. Quilligan*, No. 75–2057, 1978 U.S. Dist. LEXIS 20423, at \*1 (9th Cir. 1978).

86. See, e.g., Greene, *supra* note 35, at 462; Eisenberg, *The Impact*, *supra* note 80, at 221 (“The inflammatory legacy of *Buck v. Bell* is largely unfounded . . . . Since Holmes’ broad theoretical endorsement of eugenics is tangential to the substantive due process analysis, it is dicta, and merely indicative of societal attitudes of the time.”).

87. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 42 (1963) [hereinafter ARENDT, EICHMANN] (observing how Eichmann was compared to the devil); *id.* at 54 (“Despite all the efforts of the prosecution, everybody could see that this man was not a ‘monster,’ but it was difficult indeed not to suspect that he was a clown.”).

In the meantime, California restarted its eugenic sterilization program at least twice since Hitler committed suicide.<sup>88</sup> Civil rights advocates have strong reasons to believe that eugenic sterilization is still being carried out in the shadows.<sup>89</sup> Thus, it is worth examining the extreme poles in law and society that Justice Holmes carefully groomed in order to invent a strategy for the *ad hoc* endorsement of absolute state powers.<sup>90</sup>

Holmes' strategy of inventing bright-line rules from the apparent penumbra between two clear points arose from Hegelian/Emersonian double-consciousness or cognitive dissonance,<sup>91</sup> which originated in Hobbes and was embraced by John Milton,<sup>92</sup> but which Hegel infused with terms he learned from the occult.<sup>93</sup> The key words in German are the

88. See *Madrigal v. Quilligan*, No. 75–2057, 1978 U.S. Dist. LEXIS 20423, at \*1 (9th Cir. 1978); Bill Chappell, *California's Prison Sterilizations Reportedly Echo Eugenics Era*, NPR (July 9, 2013), <https://www.npr.org/sections/thetwo-way/2013/07/09/200444613/californias-prison-sterilizations-reportedly-echoes-eugenics-era> [<https://perma.cc/7U63-4WNB>] (highlighting investigative reporter Corey G. Johnson's work to expose the reinvigorated California eugenics program).

89. See LULU MILLER, *WHY FISH DON'T EXIST* 138–40 (2020) (“forced sterilization continues to be performed in the ‘quiet way’ all over the country”); Mary Harris, *For the Disability Community, Britney Spears' Situation Is All Too Familiar*, SLATE (June 29, 2021, 12:04 PM), <https://slate.com/human-interest/2021/06/britney-spears-conservatorship-guardianship-disability.html> [<https://perma.cc/VQY7-5V9D>] (highlighting Sara Luterman's dogged reporting of Britney Spears's struggles against her conservatorship to shed light on this issue).

90. Compare Holmes, *The Path*, *supra* note 27, at 460–61, with *Buck v. Bell*, 274 U.S. 200, 207–08 (1927). Cf. Hines, *supra* note 81, at 42, 46–47; O'Connor, *They Often*, *supra* note 79, at 388–91.

91. See Holmes, *The Path*, *supra* note 27, at 460–61 (expounding his strategy of drawing bright lines between two extremes); Holmes, *The Path*, *supra* note 27, at 478 (encouraging his students to use his strategies to “connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law”), *quoted in* Hines, *supra* note 81, at 46–47 (appearing to compare Holmes' legal ideology to Emerson's over-soul concept); Porte, *supra* note 19, at 42; ADELL, *supra* note 19, at 13–15 *cf.* RUSSELL, *A HISTORY*, *supra* note 22, at 731–35.

92. HOBBS, *supra* note 18, at 46–48 (theorizing that humanity is fundamentally broken, exhibiting oxymoron and contradiction symbolized by vices, especially pride and dejection), *embraced by* John Milton, *Samson Agonistes* 865–68 [1671] (“[I]o the public good / Private respects must yield . . .”). See, e.g., O'CONNOR, *A PRAYER*, *supra* note 8, at 22 (“I will always be staggering between Despair & Presumption, facing first one & then the other, deciding which makes me look the best, which fits most comfortably, most conveniently.”).

93. See GLENN ALEXANDER MAGEE, *HEGEL AND THE HERMETIC TRADITION* 92 (2001) (“When Hegel rejects a pair of opposites, however, one can be sure that they have not been rejected: they have been *aufgehoben*; they have been cancelled, but also taken up and preserved.”); *id.* at 148 (“In drinking from the communion cup we become one with God. Hegel believes that he has actually realized this oneness in his *Phenomenology*. For a philosopher like Hegel, who believes that at the end of time we rend and devour our God like the Titans and Dionysus, the cup of Christ's blood is a useful symbol for a dangerous idea.”); *cf.* EMERSON, *FIRST SERIES*, *supra* note 17, at 255; RUSSELL, *A HISTORY*, *supra* note 22, at 733–35 (discussing several of Hegel's dichotomies, between subjective

*Ungrund* or *Abgrund*, which in German philosophy means gulf or abyss,<sup>94</sup> but also means more literally “groundless” as Ciceronian speakers use the term to mean unsubstantiated or untenable.<sup>95</sup> The term was adopted by Hannah Arendt to describe Hitler’s “logicality” here,

In choosing the word “gulf” [*Abgrund*], I was unconsciously adopting an expression of Herder’s, who once spoke of the gulf separating the crime that is merely conceivable or possible, and real crime. You are quite right, murder already lurks within all these ideologies, and logically one can derive almost anything from them. But this logic, when taken to extremes, is itself highly remarkable—I prefer to call it logicality. There is something truly crazy about this, i.e., not only the premises, which may be, and are, untenable, but a form of *real* logic that refuses to be deterred by any reality. And this reliance on the logic that is inherent in a concept, eliminating any judgment, is new and cannot be derived from the ideologies themselves.<sup>96</sup>

Arendt was concerned with how the Nazis managed to bridge the gap between thinking and acting, or, to put it more accurately, between the imagination and reality.<sup>97</sup> Had Arendt searched a little harder into the American Revolution, of which she was a staunch defender, she might have discovered an answer to her question in the Ciceronian poetry of Phillis Wheatley.<sup>98</sup> The poetry of Phillis Wheatley was an object of wonder that countered the Jeffersonian advocates of reason; it showed how the human

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versus objective and *Gegenstand* versus *Objekt*, from which Hegel claimed to derive the Absolute Idea); RUSSELL, UNPOPULAR, *supra* note 19, at 22–23 (discussing Hegel’s “dialectic”).

94. MAGEE, *supra* note 93, at 24, 38, 82.

95. Baehr, *supra* note 58, at 377. See Charles Carroll, *Fourth Letter of First Citizen* [1773], reprinted in ELIHU S. RILEY, CORRESPONDENCE OF “FIRST CITIZEN”—CHARLES CARROLL OF CARROLLTON, AND “ANTILON”—DANIEL DULANY, JR., 1773, at 196, 196 (1902) (“Groundless opinions are destroyed, but rational judgments, or the judgments of nature, are confirmed by time.”) (translating Cicero, *De Natura Deorum* 2.4–5).

96. Baehr, *supra* note 58, at 377.

97. *Id.*

98. Phillis Wheatley, *On Imagination* [1773] (calling the imagination the queen of the “mental train”). Cf. HANNAH ARENDT, *THE LIFE OF THE MIND* 160 (1978) [hereinafter ARENDT, *THE LIFE*] (expressing mild disapproval for Cicero’s expression of the process of imagining given in his celebrated tract *Scipio’s Dream*, that was later expounded by Wheatley in her poem *On Imagination*, considering it a possible basis for totalitarianism, and lamenting “how certain trains of thought actually aim at thinking oneself out of the world”).

imagination bridges the gap between thinking and acting succinctly—without relying on brittle reason to bridge the gulf.<sup>99</sup>

As expounded by Wheatley, reason can be helpful, but reason is *not* “the leader of the mental train.”<sup>100</sup> Reason can help us to dispute Thomas Hobbes’s accusation of inherent human madness,<sup>101</sup> as long as it remains a servant to the emotion of love (the image of God) and an advisor to the imagination (the leader or queen of the mental train).<sup>102</sup> Wheatley conspicuously led the American Revolution to assert that the fount of human rights is emotion rather than the crown, a contention repeated in 1776 by Thomas Paine.<sup>103</sup>

Justice Holmes’ jurisprudence is also an object of wonder, but he agreed with Thomas Hobbes’s defense of absolute monarchy or, as Hannah Arendt labeled it, totalitarianism.<sup>104</sup> As atheistic as Hobbes’s *Leviathan* may

99. Jennifer Billingsley, *Works of Wonder, Wondering Eyes, and the Wondrous Poet: The Use of Wonder in Phillis Wheatley’s Marvelous Poetics* (2011), in *NEW ESSAYS ON PHILLIS WHEATLEY* 159, 170 (John C. Shields & Eric D. Lamore eds., 2011) (“The trial of Wheatley illustrated this issue. Even the attestation of such eminent men could not convince everyone of Wheatley’s literary achievement. Like Hume and Jefferson demonstrated, reason could not answer this question adequately, and further application of reason could not repair the inadequacies of reason. To avoid confronting established beliefs, reason became a vehicle of doubt. . . . In contrast, Wheatley successfully employs a strategy beyond the limitations of reason. For Wheatley wonder is that subjective faculty that can breach the gap between man and the world and help negotiate a new understanding of race and reality after reason fails.”); *id.* at 179 (“Whereas Hobbes defied the ability of men to realize the meaning of a work of wonder, Wheatley recognizes this very power in Ethiopians.”).

100. Phillis Wheatley, *On Imagination* [1773].

101. See Billingsley, *supra* note 99, at 170, 179.

102. *Id.*; Phillis Wheatley, *Thoughts on the Works of Providence* (1773) (explaining the relationship between reason and love, and discussing the role of human emotions generally as well). Cf. RUSSELL, *UNPOPULAR*, *supra* note 19, at 148 (supplementing previous forays into questions of natural human love with important observations).

103. Phillis Wheatley, *Thoughts on the Works of Providence* [1773]; Phillis Wheatley, *America* (1768) (speaking of Great Britain’s indolence and failure to love America). Wheatley’s exposition of human emotion in several of her poems was followed by the founders, who used emotion as “the touchstone of nature.” PAINE, *COMMON*, *supra* note 1, at 22–23; *Chisholm v. Georgia*, 2 U.S. 419, 458 (1793) (Wilson, J.) (explaining the Ciceronian idea of common sense, and its accepted role in American law as a replacement for “the English maxim, that the King or sovereign is the fountain of Justice;” Justice Wilson modified this maxim when he stated: “The sovereign, when traced to his source, must be found in the man”); Joseph Ladd, *The Prospects of America* [1785] (speaking of “the far-spread name / Of wondrous WHEATLY [sic], Afric’s heir to fame,” whose “glowing genius shines / . . . With magic power the grand descriptions roll / Thick on the mind, and agitate the soul.”).

104. Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 AM. BAR ASSOC. J. 569, 573 (1945) (“If totalitarianism comes to America . . . [i]t will come through dominance in the judiciary of men who have accepted a philosophy of law that has its roots in Hobbes and its fruition in implications from the philosophy of Holmes.”). See Nourse, *Buck*, *supra* note 44, at 101–02 (describing *Buck* as a representation of the banality of evil, which Arendt argued was a cause of the holocaust); RUSSELL,



be,<sup>105</sup> it is also a work of absolute religious prophesy or magic,<sup>106</sup> like the Witch Trials in Massachusetts.<sup>107</sup> For example, John Donne captured the puritanical oxymoron lifted from Hobbes by asking a benevolent “three person'd God” to batter and rape him into purity.<sup>108</sup>

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A HISTORY, *supra* note 22, at 737 (speaking of Hegel's monarchical views that inspired Holmes: “Democracy and aristocracy alike belong to the stage where some are free, despotism to that where one is free, and *monarchy* to that in which all are free. This is connected with the very odd sense in which Hegel uses the word ‘freedom.’”).

105. John Henry, *A Cambridge Platonist's Materialism: Henry More and the Concept of Soul*, 49 J. WARBURG & COURTAULD INSTS. 172, 175–76 (1986) (commenting on why Henry More specifically labeled Hobbes an atheist); Willis B. Glover, *God and Thomas Hobbes*, 29 CHURCH HIST. 275, 275–78 (1960) (noting the actual reasons “Hobbes was denounced as an atheist” including that, “The stark clarity with which Hobbes stated his views must have been particularly disconcerting to those who held very similar views but were accustomed to think of them in contexts and terminology that obscured implications Hobbes laid bare.”).

106. See HOBBS, *supra* note 18, at 119 (“This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in latine CIVITAS. This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence. For by this Authoritie, given him by every particular man in the Common-Wealth, he hath the use of so much Power and Strength conferred on him, that by terror thereof, he is enabled to forme the wills of them all, to Peace at home, and mutuall ayd against their enemies abroad.”); *id.* at 231 (appearing to declare support for the sea monster known as Leviathan in the book of Job, and arguing that humankind should strive to follow the commands of Leviathan as if it were God); *id.* at 329 (justifying absolute monarchies through religious argumentation: “By the Kingdome of Heaven, is meant the Kingdom of the King that dwelleth in Heaven; and his Kingdome was the people of Israel, . . . till in the days of Samuel they rebelled, and would have a mortall man for their King, after the manner of other Nations”); Glover, *supra* note 105, at 294 (quoting Nathaniel H. Henry, *Milton and Hobbes: Mortalism and the Intermediate State*, 48 STUDIES IN PHILOLOGY 234, 249 (1951)) (“Henry hardly goes too far when he says that theology was ‘practiced at its scholarly best by Milton and Hobbes.’”). But see PAINE, COMMON, *supra* note 1, at 12 (quoting *1 Samuel* 12:19) (adding the conclusion of the people of Israel who said to the prophet Samuel, “pray for thy servants unto the Lord thy God that we die not, for we have added unto our sins this evil, to ask for a king”); Benjamin Ramm, *Why You Should Re-Read Paradise Lost*, BBC: CULTURE (Apr. 19, 2017), <https://www.bbc.com/culture/article/20170419-why-paradise-lost-is-one-of-the-worlds-most-important-poems> [https://perma.cc/2FSC-PHKS] (noting that, like Hobbes, Milton was also counted among “the Devil’s party without knowing it” quoting from William Blake’s book *The Marriage of Heaven and Hell*).

107. Several sources note the commonality between Hobbes and Henry More’s Platonic Rationalism, and how they disagreed on smaller points rather than the big picture. See Henry, *supra* note 105, at 175–76; Glover, *supra* note 105, at 275–78. Henry More’s interest in witchcraft, in turn, gave the Massachusetts Bay Puritans a basis for their infamous Witch Trials. See generally JOSEPH GLANVILL & HENRY MORE, *SADUCISMUS TRIUMPHATUS* (1681); COTTON MATHER, *MEMORABLE PROVIDENCES, RELATING TO WITCHCRAFTS AND POSSESSIONS* [1693] (referencing “Mr. Glanvil, Dr. More, and several other Great Names” as an inspiration in the unnumbered introductory pages).

108. John Donne, *Holy Sonnet XIV* (1633) (“Batter my heart, three-person’d God . . . Take me to you, imprison me, for I, / Except you enthrall me, never shall be free, / Nor ever chaste, except you ravish me.”). The Puritans went further and mixed up their ideas of God with the power of the State, cycling through celebrations and reactions to state violence in the name of God. Compare HOBBS,

Following in the penumbral shades of Donne, Holmes developed two dichotomies in *Buck v. Bell*.<sup>109</sup> Justice Holmes pretended to discover a pro-eugenic dogma between fact and law, and procedure and substance.<sup>110</sup> The former dichotomy was already developed under plenary power doctrine to deny review of facts determined in immigration cases,<sup>111</sup> and the latter appeared to be invented by Justice Holmes.<sup>112</sup>

The point of the dichotomies was not judicial restraint,<sup>113</sup> nor was Justice Holmes befuddled by a large gray area between two clear poles.<sup>114</sup>

*supra* note 18, at 46–48, with John Milton, *Samson Agonistes* 532–40, 1639–68 [1671] (appearing to draw an eerie comparison between a mass suicide killing as a payment of sexual violence for sexual violence with a holy act like Christ’s sacrifice on the cross).

109. *Buck v. Bell*, 274 U.S. 200, 207–08 (1927). Cf. Eisenberg, *The Impact*, *supra* note 80, at 186 (noting how Holmes used a dichotomy that he established between substantive and procedural due process to decline reviewing Carrie Buck’s fundamental right to procreate). In *Buck*, the old Puritan version of due process balancing between private and public interests was applied. See, e.g., John Milton, *Samson Agonistes* 865–68 [1671] (“[T]hat grounded maxim / So rife and celebrated in the mouths / Of wisest men; that to the public good / Private respects must yield.”).

110. *Buck*, 274 U.S. at 207–08. Cf. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 788 (2009) [hereinafter Nourse, *A Tale*] (considering more subtle false dichotomies that arise once one attempts to defend an idea of “substantive” due process, which itself arose from the idea that substance can be safely separated from procedure; one of Holmes’ central, widely un-criticized premises).

111. See, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (explaining the dichotomy between fact and law in immigration cases like this was entirely invented by the courts to limit the “final determination of those facts . . . to executive officers,” while preserving the review of legal errors even in the case of non-citizens to Article III Courts), *superseded by law as stated in DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1977 (2020) (appearing to unsettle the old fact/law dichotomy in order to decide that Congress has the power to delegate the final decision on both law and fact to executive officers).

112. See *Buck*, 274 U.S. at 207–08; Nourse, *Buck*, *supra* note 44 at 111. Eisenberg’s thinking properly differs from the not-so-subtle attempts of Justice Powell to place the beginning of rational/intermediate/strict basis scrutiny in footnote four of *Carolene Products*, in order to extend and reaffirm a substantive/procedural dichotomy that Holmes deployed in *Buck* as the thing that saved America from *Lochner*. Compare Eisenberg, *The Impact*, *supra* note 80, at 196 n.98 (identifying an ulterior line of origin for rational basis scrutiny ostensibly beginning or at least exemplified in *Buck*), with *supra* note 52 and accompanying text.

113. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L. J. 449, 453 (1994) (“To the extent that the classical conception of judicial self-restraint relies on Holmes as one of its historical props, it is a weak conception.”). Compare *Buck*, 274 U.S. at 207–08 (adopting economic theories promulgated by eugenic propagandists to justify his holding), with O’Connor, *They Often*, *supra* note 79, at 385 (presenting the quip from Holmes’ *Lochner* dissent that “the Constitution ‘does not enact Mr. Hebert Spencer’s Social Statics’” as an expression of judicial restraint, when Holmes himself was not averse to adopting popular economic theories of his day as if they were original constitutional principles).

114. Holmes’ tone, while pulling new distinctions out of the ether, was one of smug triumph rather than humble caution. Holmes, *Law in Science*, *supra* note 28, at 456–57.

Rather, Holmes sought to befuddle others with his dichotomies, which were the basis of sheer fiat.<sup>115</sup> Holmes was the architect of the dichotomies he cited, predefining each pole he selected as favored and disfavored, but Holmes' favorites of procedure and law over substance and facts were completely arbitrary.<sup>116</sup>

According to Holmes, procedures and laws are favored to facts and substances so that human rights (which are always based in facts and substance)<sup>117</sup> can be ignored by judges.<sup>118</sup> However, procedure is not necessarily the opposite of substance and due process need not ignore substantial or substantive rights.<sup>119</sup> Nevertheless, Bernaysian judge endorsed procedures like those observed in *Buck*, successfully neutralized substantial rights for an era.<sup>120</sup>

Holmes never defended, justified, or substantiated why substituting a judge-made procedure for substantial rights made rational sense.<sup>121</sup> According to Holmes, it was merely a failure of one's manliness to consider a party's rights.<sup>122</sup> Holmes' idea of the common law was a reiteration of puritanical legal positivism,<sup>123</sup> which confounded the feudal, canon, and

115. Holmes, *Law in Science*, *supra* note 28 at 457 (characterizing those who call in the jury to decide hard questions as weaklings).

116. *See Buck*, 274 U.S. at 207–08 (citing to *no law or precedent* for why determining legal procedures and laws rather than substantive rights and facts were preferable in federal practice); *cf. Crowell v. Benson*, 285 U.S. 22, 57 (1932) (doubting Holmes' dichotomies, saying “fundamental rights depend, . . . upon the facts, and finality as to facts becomes in effect finality in law”); John Milton, *Samson Agonistes* 865–68 [1671] (preferring public rights over private rights to justify injustice).

117. *See Crowell*, 285 U.S. at 57 (discussing the courts should be the finders of facts).

118. *Buck*, 274 U.S. at 207–08; *Stump v. Sparkman*, 435 U.S. 349, 364 (1978).

119. Miccio, *supra* note 65, at 296. *See Crowell*, 285 U.S. at 57.

120. *Buck*, 274 U.S. at 207–08, *extended in Stone v. Powell*, 428 U.S. 465, 488–89 (1976), *and Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

121. *Buck*, 274 U.S. at 207–08; Holmes, *Law in Science*, *supra* note 28, at 456–57.

122. Holmes, *Law in Science*, *supra* note 28, at 444–45 (“It is proper to . . . discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century.” Holmes hoped that the progression of common law would eventually dispense with the petit jury and finally transition potentially all trials “to the commercial and rational test of the judgment of a man trained to decide.”); *id.* at 455–56 (disdaining “intellectual indolence or weakness”); Holmes, *The Path*, *supra* note 27, at 477 (concluding that “the weak and foolish must be left to their folly”); Holmes, *Natural Law*, *supra* note 28, at 42 (noting that even the most “tender-hearted judge” could sentence men to death in order to preserve mere cargo).

123. Several scholars have identified Holmes' “thoroughgoing positivism.” Patrick J. Kelley, *The Life of Oliver Wendell Holmes, Jr.*, 68 WASH. U. L. Q. 429, 453 (1990) (book review). *Cf.* John Milton, *Samson Agonistes* 865–68 [1671]. Whether scholars focused on Bentham's influence over Holmes or the influence of Emerson and other Hegelians over Holmes, ultimately Holmes' legal positivism traced back to Oliver Cromwell and the Puritans. AUSTIN WOOLRYCH, COMMONWEALTH TO

common laws, in the same way, the Witch Judges of Salem infamously did two centuries earlier.<sup>124</sup>

In *Buck*, the puritanical idea of “due” process was applied by preferring procedure to substance stating: “The attack is not upon the procedure but upon the substantive law.”<sup>125</sup> The Court seized on a definition of “due” process as mere procedural adherence to formalities that do not require the Court to consider the substantive rights of the patient writing,

There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process at law.<sup>126</sup>

Therefore, patient consent was not required for doctors to snatch up individuals off the street to remove their body parts like Dr. Frankenstein.<sup>127</sup> Women were more likely than men to be snatched, and non-white people were more likely than white folk to be taken.<sup>128</sup> The Nazis later used this concept of “due” process to not only sterilize countless

PROTECTORATE 271–73, 300 (1982) (noting that the Massachusetts Bay Puritans invented legal positivism in its modern form); *see*, 11 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 14, 42, 81 (John Bowring ed., 1843) [hereinafter BENTHAM, THE WORKS] (demonstrating how Bentham often cited Cromwell and the Puritans as the inspiration of his works); EMERSON, FIRST SERIES, *supra* note 17, at 249 (quoting Henry More, *Psychodia Platonica* 21 [1642]) (Emerson also enjoyed quoting the Puritans for inspiration).

124. AUSTIN, *supra* note 123, at 271–73, 300; Bradley Chapin, *Written Rights: Puritan and Quaker Procedural Guarantees*, 114 PENN. MAG. HIST. & BIO. 323, 346–48 (1990) (noting the United States’ Founders’ rejection of their ancestors’ legal positivism by noting “the Salem witchcraft trials” and other “glaring examples of severity and injustice”).

125. *Buck*, 274 U.S. at 207. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 400 435–37 (2010) (considering the origins of due process in the Massachusetts Bay Body of Liberties and other legal positivist codes in the American colonies).

126. *Buck*, 274 U.S. at 207.

127. *Id.*

128. *Id.*; Alexandra M. Stern, *Forced sterilization policies in the US targeted minorities and those with disabilities—and lasted into the 21st century*, MICH. INST. HEALTHCARE POL’Y & INNOVATION (Sept. 23, 2020), <https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-lasting-21st> [https://perma.cc/FHN3-LSD4] (“[W]omen and people of color increasingly became the target, as eugenics amplified sexism and racism.”). *See also* Gregory N. Price et al., *Did North Carolina Economically Breed-Out Blacks During its Historical Eugenic Sterilization Campaign?*, 15 AM. REV. POL. ECONOMY 1, 10 (June 27, 2020) (discussing how North Carolina’s eugenic sterilization targeted people of color).

Jews and non-white people<sup>129</sup> but to further justify state-sanctioned experimentations including live dissections of innocent people for science.<sup>130</sup>

Professor Rodney A. Smolla once imagined Socrates saying to Holmes, “The Nazi’s simply carried your philosophy to its natural conclusions.”<sup>131</sup> But, unfortunately, questioning Holmes even in an imaginary setting, led directly to Holmes’ false defenses of democracy.<sup>132</sup> From Holmes’ time until around 2018,<sup>133</sup> the Court remained relatively un-criticized when preferring law-over-facts as a democratic norm in order to bow to whatever factual decision executive officials made as accurate and lawful,

The judgment finds the facts that have been recited and that Carrie Buck “is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,” and thereupon makes the order. In view of the general declaration of the Legislature and the specific findings of the Court obviously

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129. *Buck*, 274 U.S. at 207; VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 30–32, 172 (2008) (“When the German sterilization law was first proposed, the press emphasized the analogy to American laws.”); see also JAMES Q. WHITMAN, HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 78–80 (2017). But see Eisenberg, *The Impact*, *supra* note 80, at 189–90 (arguing that though the Nazis administered “mass sterilization under similarly worded law” as the Virginia law upheld in *Buck*, that this was not necessarily inspired by Justice Holmes’ substantive due process analysis).

130. See PAUL WEINDLING, VICTIMS AND SURVIVORS OF NAZI HUMAN EXPERIMENTS 81 (2015); cf. Keiligh Baker, *Eduard Pernkopf: The Nazi book of anatomy still used by surgeons*, BBC NEWS (Aug. 19, 2019), <https://www.bbc.com/news/health-49294861> [<https://perma.cc/W474-MJU2>].

131. Rodney A Smolla, *The Trial of Oliver Wendell Holmes*, 36 WM. & MARY L. REV. 173, 214 (1994).

132. *Id.* at 215 (“You cannot begin to understand my philosophy, Socrates, because you cannot begin to understand democracy . . . . If there’s a link to the Nazis in this trial, Socrates, it is you!”).

133. *Id.*; Holmes, *Natural Law*, *supra* note 28, at 42 (noting that all human rights are expendable “whenever the interest of society, that is, of the predominant power in the community, is thought to demand it”); Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523, 526 (2018) (grappling with the modern day emanations of Holmes’ excuse of democracy for affirming unjust laws). See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295, 296, 305 (2000) (quoting *Giles v. Harris*, 189 U.S. 475, 482 (1903)); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (naming the limitations a majority may assume when conducting biological experiments on the minority under *Buck*); cf. *The Slaughterhouse Cases*, 83 U.S. 36, 66 (1872) (using the excuse of democratic government to deny the judicial protection of human rights), extended by *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (denying women the right to practice law).

we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result.<sup>134</sup>

This decision was embarrassed by the fact that the eugenic pseudo-science applied by Carrie Buck’s physicians was all debunked.<sup>135</sup> The very foundations of the balancing of costs and benefits in *Buck* were unsettled, and yet the holding remains.<sup>136</sup> A test that may give different results on different days should not be touted as a legitimate test in any court, and yet the United States Supreme Court embraces it wholesale and regularly gives it credence in the 2020s.<sup>137</sup>

Sterilizing people to purify the American gene pool through miscegenation laws was a sheer cost to society with no proven benefits to any person.<sup>138</sup> Arguably, eugenics encouraged instances of genetic disease such as those suffered by European Royals and American Elites.<sup>139</sup> In order to avoid “death spirals” in healthcare law,<sup>140</sup> the court should

134. *Buck*, 274 U.S. at 207.

135. See Dr. Howard Markel, *Column: The false, racist theory of eugenics once ruled science. Let’s never let that happen again*, PBS NEW HOUR (Feb. 16, 2018, 7:15 PM), <https://www.pbs.org/newshour/nation/column-the-false-racist-theory-of-eugenics-once-ruled-science-lets-never-let-that-happen-again> [<https://perma.cc/DFS6-TQLA>] (emphasizing the lack of evidence to support the eugenics theory).

136. *Buck*, 274 U.S. at 207, *extending* *Jacobson v. Massachusetts*, 197 U.S. 11, 24 (1905) (requiring “the risk of such an injury . . . to be . . . weighed as against the benefits”). See Peter S. Canellos & Joel Lau, *The Surprisingly Strong Supreme Court Precedent Supporting Vaccine Mandates*, POLITICO (Sept. 8, 2021), <https://www.politico.com/news/magazine/2021/09/08/vaccine-mandate-strong-supreme-court-precedent-510280> [<https://perma.cc/5CKZ-TFY5>] (comparing the arguments made in *Jacobson* with arguments being made today); *cf.* Eisenberg, *The Impact*, *supra* note 80 at 185 (arguing “that Justice Holmes’ endorsement of eugenic sterilization is now merely dicta” in apparent hopes to preserve the holding as separate from the practice of eugenics).

137. Compare *Buck*, 274 U.S. at 207, with *Jacobson*, 197 U.S. at 24. See, e.g., *June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120–33 (2020) (plurality opinion); *NOURSE*, *supra* note 129, at 58 (noting how eugenics were sold to the American public as a simple calculation of costs and benefits).

138. MILLER, *supra* note 89, at 133 (“Variation in genes, and hence in behavior and physical traits [helps species survive the natural chaos of the world]. Homogeneity is a death sentence. To rid a species of its mutants and outliers is to make that species dangerously vulnerable to the elements.”); see DAREN BAKST, NORTH CAROLINA’S FORCED STERILIZATION PROGRAM: A CASE FOR COMPENSATING THE LIVING VICTIMS, JOHN LOCKE FOUNDATION: POLICY REPORT 16 (2011) (“There was no benefit from sterilizing these individuals . . .”).

139. See ADAM KUPER, INCEST, COUSIN MARRIAGE, AND THE ORIGIN OF THE HUMAN SCIENCES IN NINETEENTH-CENTURY ENGLAND, 174 PAST & PRESENT 158, 183 (2002) (“Both Darwin and Galton had accepted George Darwin’s reassuring findings on the effects of cousin marriage. The eugenicists accordingly avoided the issue.”); *cf.* Tim M. Berra et al., *Was the Darwin/Wedgewood Dynasty Adversely Affected by Consanguinity?*, 60 BIOSCIENCE 376, 382 (2010) (“Our answer . . . is yes.”).

140. *King v. Burwell*, 576 U.S. 473, 492 (2015).

affirmatively overrule the cost/benefit due process framework invented by eugenic propagandists like Harry Laughlin.<sup>141</sup>

Holmes' preference for law and procedure over facts and substance expressed in *Buck* provided the world with perhaps its first justification of a final solution that would eventually be administered in Germany to the horror of all.<sup>142</sup> Holmes no less than endorsed human sacrifice in *Buck* when he wrote,

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough.<sup>143</sup>

This passage usually causes such drastic feelings of horror in modern America that the bases of it are usually overlooked.<sup>144</sup> Americans prefer to believe that *Buck* was overruled or set aside by *Skinner v. Oklahoma ex rel. Williamson*,<sup>145</sup> and so we usually ignore the existence of *Madrigal v. Quilligan*.<sup>146</sup> Holmes' arbitrary preferences that conflicted with *Munn v.*

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141. *Id.* See LAUGHLIN, *supra* note 30, at 454 (beginning with an introductory cost/benefit balancing test); Tim M. Berra et al., *The Galton–Darwin–Wedgwood Pedigree of H. H. Laughlin*, 101 *BIO. J. LINNEAN SOC.* 228, 228–30 (2010).

142. See NOURSE, *supra* note 129, at 30–32, 172.

143. *Buck v. Bell*, 274 U.S. 200, 207 (1927). *Cf.* Holmes, *Natural Law*, *supra* note 28, at 42 (Holmes' rationale in *Buck* was earlier stated in his article that pilloried the natural law, with very similar words regarding the government's right to sacrifice the lives of its citizens "not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it").

144. See, e.g., Greene, *supra* note 35, at 462; Eisenberg, *The Impact*, *supra* note 80, at 221.

145. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."), *criticized in* NOURSE, *supra* note 129, at 172 (*criticizing Skinner for not affirmatively overruling Buck*).

146. *Madrigal v. Quilligan*, 1978 U.S. Dist. LEXIS 20423\* (C.D. Cal. 1978) ("The requested document is not available from the Court."). See MAYA MANIAN, *THE STORY OF MADRIGAL V. QUILLIGAN: COERCED STERILIZATION OF MEXICAN-AMERICAN WOMEN* 1, 2 (Univ. of San Francisco Law Research Paper No. 2018–04) ("The counter-movement against eugenic sterilization culminated in the U.S. Supreme Court's 1942 decision in *Skinner v. Oklahoma*. Although *Skinner* did

*Illinois*,<sup>147</sup> were extended, banally, in *Mathews v. Eldridge* that similarly ignored *Red Lion Broadcasting Company. v. FCC*.<sup>148</sup>

Hitler murdered millions of people and attempted to overrun the world with the eugenic, *Übermensch* ideology invented in America under Justice Holmes' watch.<sup>149</sup> The events of the World War II era were not enough for federal judges to officially close the door on eugenics.<sup>150</sup> Justice Powell

not explicitly overrule *Buck v. Bell*, it rejected eugenic sterilization as a valid state goal and recognized that procreation 'involves one of the basic civil rights of man.' Yet, *Skinner* did not lead to the end of forced sterilization in the United States.”).

147. *Buck*, 274 U.S. at 208 (disparaging equal protection claims raised alongside due process claims, by calling them “the usual last resort of constitutional arguments”); *Munn v. Illinois*, 94 U.S. 113, 130, 134–35 (1876) (requiring that public interest regulations ensure that the public have equal right to access public property and equal protection of the law therein under a common carrier rationale); cf. *Smith v. Board of Examiners of Feeble-Minded*, 85 N.J.L. 46, 54–55 (1913) (finding that “[t]he palpable inhumanity and immorality of such a scheme” made the question of whether the costs and benefits balanced in favor of the scheme “not deserving of serious consideration”).

148. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (“We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.”); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 398–99 (1969) (using the prevalence of “[c]omparative hearings between competing applicants for broadcast spectrum” to interpret common carrier common law extended under the Communications Act of 1934 to protect the equal rights to of listeners and viewers to an even debate of issues under the First Amendment).

149. NOURSE, *supra* note 129, at 30–32; *Oliver Wendell Holmes Jr.: Further Readings*, LAW LIBRARY - AMERICAN LAW AND LEGAL INFORMATION, <https://law.jrank.org/pages/7386/Holmes-Oliver-Wendell-Jr.html> [<https://perma.cc/H8KB-TTR2>] (writing immediately following a discussion about *Buck*: “Holmes’ jurisprudence also suggested that the law is what the government says it is. This approach, called [legal positivism], was called into question in the 1930s and 1940s with the rise of totalitarian regimes in Germany and Italy and the rule of Stalin the Soviet Union.”); Mathew Day, ‘Shocking’ Holocaust Study Claims Nazis Killed Up To 20 Million People, BUS. INSIDER (Mar. 4, 2013), <https://www.businessinsider.com/shocking-new-holocaust-study-claims-nazis-killed-up-to-20-million-people-2013-3> [<https://perma.cc/GT5J-AE9X>]. Eugenics seems to have been doubly invented in the United States, first through Emerson’s metaphysical ravings about the “over-soul,” which were repurposed by Nietzsche in his *Will to Power* as the “over-man” or *übermensch*. Soressi, *supra* note 81, at 365–67 (noting the connection of the *übermensch* drawn from the “over-soul” in Emerson’s writings with the ideologies of Hitler and Mussolini); EMERSON, FIRST SERIES, *supra* note 17, at 252–53 (speaking of “that Over-soul, within which every man’s particular being is contained and made one with all other; that common heart of which all sincere conversation is the worship, to which all right action is submission; that overpowering reality . . . . Meantime within man is the soul of the whole; the wise silence; the universal beauty, to which every part and particle is equally related; the eternal ONE.”); Hines, *supra* note 81, at 46–47 (noting Emerson’s metaphysical influence upon Oliver Wendell Holmes, Jr.). Second, in furtherance of America’s pursuit of the “over-soul” or “over-man,” the practice of eugenic pseudo-science itself was invented directly under Justice Oliver Wendell Holmes’ watch in America as well, inspiring Hitler. See WHITMAN, *supra* note 129, at 78–80; see also Vannatta & Mendenhall, *supra* note 73, at 194.

150. See *supra* notes 144–145 and accompanying text; see also BELLY OF THE BEAST 48:05 (Erika Cohn dir., 2020) (investigative reporter Corey Johnson stated: “At the point that Dr. Heinrich



endorsed the old ideas of Justice Holmes as if they had nothing to do with Hitler's parallel adoption of a *Will to Power* inspired by the American poet Ralph Waldo Emerson.<sup>151</sup>

Liberals still extoll the values of *Mathews* balancing tests as if the plurality opinion in *Hamdi v. Rumsfeld* did not end in a travesty.<sup>152</sup> Even with the writing on the wall, Americans are not ready to move out of the darkness and into the light.<sup>153</sup> Most of us lean into the shadows of *Mathews* balancing tests “precisely to avoid any knowledge of” injustice;<sup>154</sup> the phrase *que sera, sera* is upon our lips;<sup>155</sup> the false optimism James Baldwin warned against

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was hired sterilization procedures had been going on for years at multiple prisons. He strongly believed that there were women that were gaming the system and that needed to be stopped . . . . That attitude tracked precisely to the historical attitude of the California leaders of the eugenic movement. They had always used cost/benefit as the justifier for why they were doing what they were doing.”)

151. See *supra* notes 120, 141, 149 and accompanying text.

152. Compare Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGRATION L.J. 405, 446 (2020) (“It is time to apply the *Mathews* factors to the admissions and expanded expedited removal contexts.”), with *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion) (“*Mathews* dictates that the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process.”); and Lithwick, *Nevermind*, *supra* note 36 (explaining the travesty of *Hamdi* in clear and unambiguous terms).

153. See *supra* note 152. Compare Hannah Yasharoff, *Read Britney Spears’ full statement from her conservatorship hearing: ‘I am traumatized’*, USA TODAY (June 24, 2021, 11:16 AM), <https://www.usatoday.com/story/entertainment/celebrities/2021/06/24/britney-spears-full-statement-conservatorship-hearing/5333532001/> [<https://perma.cc/N82B-XDQ7>] (“I was told right now in the conservatorship, I am not able to get married or have a baby, I have a (IUD) inside of myself right now so I don’t get pregnant. I wanted to take the (IUD) out so I could start trying to have another baby. But this so-called team won’t let me go to the doctor to take it out because they don’t want me to have children—any more children.”), with Ramtin Arablouei et al., < *The Shadows of the Constitution*, NPR (Nov. 12, 2020, 12:01 AM), <https://www.npr.org/transcripts/933825483> [<https://perma.cc/56AK-KQHP>] (quoting WHAT THE CONSTITUTION MEANS TO ME (Amazon 2020)) (“And this is when William O. Douglas brought out his beautiful penumbra metaphor. This is when he said, one thing our Constitution surely guarantees is the right to privacy and that this allows a woman to put in an IUD.”).

154. BALDWIN, THE CROSS, *supra* note 4, at 60.

155. See Timothy Besley, *Comments on: In Quest of the Political: The Political Economy of Development Policy Making by Merilee S. Grindle*, LSE (Aug. 1999), at 3, <https://econ.lse.ac.uk/staff/tbesley/papers/grindle.pdf> [<https://perma.cc/TQ5B-C5CD>] (noting that cost-benefit balancing analyses can “simply take a *que sera* view of policy”). With the help of Baldwin, we can imagine Doris Day advocating for *Mathews* by singing *que sera, sera, whatever will be, will be*—which is not prudent for a judge to say when deciding the fate of actual legal cases. Compare Doris Day, *Que Sera, Sera* [1965], with BALDWIN, THE CROSS, *supra* note 4, at 60, 78 (explaining that Doris Day, like *Mathews*, is one “of the most grotesque appeals to innocence that the world has ever seen”). See Margulies, *supra* note 152, at 446. Cf. James F. Bullock, *Democratic Due Process: Administrative Procedure After Bishop v. Wood*, 1977 DUKE L.J. 453, 465 (attempting to equate natural law theory and penumbral rights theory); *id.* at 467 (at the time it was

still pervades America,<sup>156</sup> and we continue to chase perfect crimes over imperfect justice as Flannery O'Connor and Octavio Paz observed over sixty-five years ago.<sup>157</sup>

#### B. HOW PENUMBRAL RIGHTS THEORY CONFOUNDED FEUDAL, CANON, AND COMMON LAW

In its day *Buck v. Bell* was an exceptional decision, not ordinarily extended outside of health law.<sup>158</sup> This fact was demonstrated in the next year when the court ignored a state law that criminalized wiretapping in *Olmstead v. United States*, where *Buck* was cited in Brandeis' dissent in favor of enforcing the state law.<sup>159</sup> However, *Buck* gave credence to a specific subset of racist, elitist, and bigoted state laws that were reaffirmed decades later under Brandeis' theory of penumbral privacy rights.<sup>160</sup>

Long before his dissent in *Olmstead*, Brandeis made a name for himself in privacy law by coauthoring a *Harvard Law Review* article entitled *The Right to Privacy*.<sup>161</sup> Brandeis began his Harvard article with a *Millar v. Taylor* epigraph

decided *Mathews* symbolized “the Court’s current indecision about how best to analyze” due process claims).

156. Compare BALDWIN, *THE CROSS*, *supra* note 4, at 60, 78, with Margulies, *supra* note 152, at 446.

157. See Vikki Bell, *On the Critique of Secular Ethics: An Essay with Flannery O'Connor and Hannah Arendt*, 22 THEORY CULTURE SOC. 1, 8 (2005); OCTAVIO PAZ, *Labyrinth of Solitude* 59–60 (Lysander Kemp trans., 1961) (observing, from the Mexican perspective, that U.S. “laws, customs and public and private ethics all tend to preserve human life,” and yet: “This protection does not prevent the number of ingenious and refined murders, of perfect crimes and crime-waves, from increasing. The professional criminals who plot their murders with a precision impossible to a Mexican, the delight they take in describing their experiences and methods, the fascination with which the press and public follow their confessions, and the recognized inefficiency of the systems of prevention, show that the respect for life of which Western civilization is so proud is either incomplete or hypocritical.”); see also George Piggford, “A Dialogue Between Above and Below”: Flannery O'Connor, Martin Buber, and “Revelation” after the Holocaust, 13 FLANNERY O'CONNOR REV. 90, 92 (2015). Cf. *supra* notes 14–16, 58, 81–83.

158. O'Connor, *They Often*, *supra* note 79, at 390–91 (claiming that “[t]he Court has never cited *Buck v. Bell*, for instance, as support for any important proposition”); see also Greene, *supra* note 35, at 462; Eisenberg, *The Impact*, *supra* note 80, at 221. But see Nourse, *Buck*, *supra* note 44, at 110–11 (noting that prior to *Buck*, “sterilization laws had become a dead letter due to hostile state court constitutional rulings”).

159. *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (citing *Buck v. Bell*, 274 U.S. 200 (1927)) (*Buck* was cited in Brandeis' dissent as a pro-government decision, because the majority in *Olmstead* decided that state law could not stop the state police from breaking the law).

160. See O'Connor, *They Often*, *supra* note 79, at 390–91 (emphasizing the limited nature of *Buck*); *Madrigal v. Quilligan*, No. 75–2057, 1978 U.S. Dist. LEXIS 20423, at \*1 (9th Cir. 1978) (demonstrating the reemergence of eugenics at a later time); *Stump v. Sparkman*, 435 U.S. 349, 364 (1978) (“The Indiana law vested in Judge Stump the power to entertain and act upon the petition for sterilization.”).

161. Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193 (1890).

naming the court's power to create new common law causes of action.<sup>162</sup> The problem with Brandeis' citation of *Millar*, unaddressed in *The Right to Privacy*, was that the House of Lords overruled *Millar* shortly after it was decided.<sup>163</sup>

Judge Willes' opinion in *Millar*, which was featured at the top of *The Right to Privacy*, cited to a litany of Star Chamber decisions.<sup>164</sup> Willes explained the basis of his common law theory upon "prosecution in the Star Chamber," of which England retained no records because the Star Chamber was not a court of precedent or common law.<sup>165</sup> Judge Willes' dependence on the Star Chamber as a source of common law, and the absolute nature of the rights contended for in *Millar*, led to the *Millar* decision's demise in 1774 in *Donaldson v. Beckett*.<sup>166</sup>

Justice Brandeis was right that there was a statute after William the Bastard conquered England that allowed a cause of action *vi et armis*.<sup>167</sup> He was also correct that the common law developed strategies to expand the rights granted by England's Norman conqueror.<sup>168</sup> But the common law

162. *Id.* at 193 (quoting *Millar v. Taylor* [1769] 4 Burr. 2303, 2312 (Eng.)).

163. *Id.* at 193–94; *Millar v. Taylor* [1769] 4 Burr. 2303, 2312 (Eng.), *overruled by* *Donaldson v. Becket* [1774] 4 Burr. 2408 (Eng.).

164. *Millar v. Taylor* [1769] 4 Burr. 2303, 2312–14 (Eng.) (beginning his opinion with a "decree of the Star-Chamber, 23 June 1585" and continuing on to "the year 1640," when the Star Chamber was abolished by statute, and stating "the Star-Chamber in 1637 expressly supposes a copy-right to exist otherwise than by patent, order, or entry in the register of the Stationers Company: which could only be by Common law").

165. *Millar v. Taylor* [1769] 4 Burr. 2303, 2313 (Eng.) ("Most of the judicial proceedings of the Star-Chamber are lost or destroyed.").

166. *Id.* at 2373 (Yates, J., dissenting) (The Star Chamber is "a Court the very name whereof is sufficient to blast all precedents brought from it."); Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, in 17 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 992 (1813) [hereinafter THE PARLIAMENTARY] (labeling Judge Willes' Star Chamber precedents a product "of the grossest tyranny and usurpation" and stating that the Star Chamber is one of "the very last places in which I should have dreamt of finding the least trace of the common law").

167. Compare Warren & Brandeis, *supra* note 161, at 193 ("[I]n very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*."), with Rattlesdene v. Grunestone [1317] YB 10 Edw II (54 SS) 140 (Eng.), in J.H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 341 (2013) (using a statute *vi et armis* to vindicate a right to wholesome food and drink, i.e., in the year 1317, English judges were already using the common law to expand upon the limitations of their statutes).

168. See Warren & Brandeis, *supra* note 161, at 193–95 (noting the gradual expansion of common law forms but failing to name the source of that gradual development in actions of trespass on the case); see also BAKER & MILSOM, *supra* note 167, at 341 (demonstrating that English jurists were developing the common law long before trespass on the case as well).

never used the Star Chamber to make common law; rather, it expanded upon the positive laws by adopting new forms of action through trespass on the case.<sup>169</sup>

The common law did not take as long as Justice Brandeis presented to modernize the law.<sup>170</sup> For example, the common law first invented the warranty of merchantability under the statute *vi et armis* to protect the English people from poisonous food and drink.<sup>171</sup> This happened in the 1300s and supports the legend that the common law survived the Norman Conquest and maintained the English people's preexisting human rights despite feudal usurpation.<sup>172</sup>

Rather than present this legend, Brandeis chose to define the common law with the Star Chamber, and he chose to cite a case that arose after the Star Chamber was abolished.<sup>173</sup> Thirty-eight years after Brandeis published his article, he adopted Lord Camden's opinion in *Entick v. Carrington*, contradicting his law review article.<sup>174</sup> With this reversion in Camden's

169. See H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 61–64, 67, 83 (4th ed., 2002) (explaining trespass on the case and providing case examples). Indeed, *Millar* was, itself, an action for trespass on the case. See *Millar*, 4 Burr. at 2305 (recognizing this case was “a plea of *trespass upon the case*,” which was a request that the Court recognize a new common law form).

170. See Warren & Brandeis, *supra* note 161, at 193–96, 210–12 (emphasizing “modern enterprise and invention” perpetually requires judges to reevaluate and modify old laws to ensure they properly address present day concerns). The implied warranty of merchantability, for example, was already being developed by English jurists in the year 1317. See *supra* notes 167–169.

171. BAKER & MILSOM, *supra* note 167, at 341.

172. See Sir Henry Vane [the Younger], *A Healing Question* 4–5 [1656] (noting that the root of the tree of liberty in England preceded “the evil of that Government which rose in and with the Norman conquest”); BAKER, *supra* note 169, at 12 (describing the Norman Conquest as “a catastrophe that determined the whole future of English law”). It appears that King Alfred, known as the Elfin King, stated a nascent form of the Fourteenth Amendment's Equal Protection Clause, which lies at the heart of the American ideal of “equal justice under law” that emblazons the entrance to the U.S. Supreme Court. U.S. CONST. amend. XIV, § 1; *The Laws of King Alfred: Alfred's Dooms*, in 1 ANCIENT LAWS AND INSTITUTES OF ENGLAND 55 (1840) (“Judge thou very evenly: judge thou not one doom to the rich, another to the poor; nor one to thy friend, another to thy foe, judge thou.”); Joshua J. Schroeder, *America's Written Constitution: Remembering the Judicial Duty to Say What the Law Is*, 43 CAPITAL U. L. REV. 833, 860 (2015) [hereinafter Schroeder, *America's*]; JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 88 (C. Bradley Thompson ed., 2000) [hereinafter ADAMS, THE REVOLUTIONARY] (referring to the laws of pre-Norman Conquest England and Alfred's “Dome Book”).

173. Warren & Brandeis, *supra* note 161, at 193 (quoting *Millar*, 4 Burr. at 2312).

174. Compare *Millar*, 4 Burr. at 2312, with *Olmstead v. United States*, 277 U.S. 438, 474–75 (1928) (Brandeis, J., dissenting) (citing *Entick v. Carrington* (1765) 19 How. St. Tr. 1029 (Eng.)). This is contradictory, because Lord Camden is the chief reason *Millar v. Taylor* was overruled in *Donaldson v. Becket*. See *supra* note 166 (referring to Lord Camden's disparaging statements regarding Judge Willes' opinion in *Millar*).

favor, Brandeis seemed to abandon Justice Story's opinion in *Folsom v. Marsh*.<sup>175</sup>

*Folsom* disagreed with Camden's attack on common law copyright in *Donaldson* in favor of American common law rights.<sup>176</sup> While drafting the United States Constitution, James Madison and James Wilson joined forces to defend common law patent and copyright with Lord Coke's precedents.<sup>177</sup> But Justice Brandeis did not search out the root of our common law of author-owned copyright, which is the primary basis of the privacy rights he sought to defend.<sup>178</sup>

Justice Brandeis failed to comprehend the primary enemy of privacy was not the press or newspapers, but rather the English Star Chamber.<sup>179</sup> He did not put together the history of patents and copyrights in England to

175. Compare *supra* note 174, with Warren & Brandeis, *supra* note 161, at 211 n.1 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901)).

176. Compare *Folsom*, 9 F. Cas. at 345 (affirming George Washington's descendible, common law copyright in the letters he wrote), followed by *Bartlett v. Crittenden*, 2 F. Cas. 967, 971 (C.C.D. Ohio 1849) (No. 1,076), with 17 THE PARLIAMENTARY, *supra* note 166, at 999–1000 (“If there be such a right at common law, the crown is an usurper; but there is no such right at common law, which declares it a monopoly; no such action lies; resort must be had to the crown in all such cases. . . . It was not for gain, that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy [of] such men to traffic with a dirty bookseller for such much a sheet of a letter press. When the bookseller offered Milton five pound for his *Paradise Lost*, he did not reject it, and commit his poem to the flames, nor did he accept the miserable pittance as the reward for his labour; he knew that the real price of his work was immortality, and that posterity would pay it.”). But Milton *did* claim that the crown was a usurper for profiting upon his works without permission. See JOHN MILTON, EIKONOKLASTES 13 (2d ed. 1650) (referring to the monarch's stealing of the property of “every author” as an illegitimate taxation saying “any King heretofore that made a levy upon their wit, and seized it as his own legitimate” is an illegitimate taxation that was “a trespass also more than usual against human right”).

177. U.S. CONST. art. I, § 8, cl. 8. See THE FEDERALIST NO. 43 (James Madison) (“The copy right of authors has been solemnly adjudged in Great Britain, to be a right at common law.”); 2 JAMES WILSON, in COLLECTED WORKS OF JAMES WILSON 1080 (Kermit L. Hall & Mark David Hall eds., 2007) (“[T]he common law abhors all monopolies.”); see also *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 552 (2013) (noting Madison's successful defense of common law copyright against Thomas Jefferson's fervent attacks).

178. See Warren & Brandeis, *supra* note 161, at 200, 205 n.1 (observing that authors own copyrights but not explaining *why*).

179. See *id.* at 196 (“The press is overstepping in every direction the obvious bounds of propriety and decency.”); see also 1 JOHN LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 335–36 (1849) (noting how “illegal proclamations were issued, to be enforced in the Star Chamber” without the permission of Parliament for taxes on royal enemies like Lord Coke, according to which Lord Coke's residence was ordered to be “search[ed] for seditious papers, and, if any were found, to arrest the author”—when the police arrived they found Lord Coke on his death-bed and nevertheless searched his house took several important papers that were hidden from the public and censored by the crown).

show Americans how they were used to dominate the printing presses prior to the rise of common law.<sup>180</sup> Brandeis did not show us how the American Revolutionaries followed Coke's lead to vindicate author-owned copyrights at common law.<sup>181</sup>

Prior to the American Revolution, copyright was not owned by authors as commemorated in both *Donaldson* and *Millar*.<sup>182</sup> The Founders discovered, to their dismay, that Lord Coke's opinions were despised and limited in England.<sup>183</sup> In the time of *The Case of Monopolies*, copyrights were patents, i.e., there was a royal patent for the use of printing presses bestowed upon the Stationer's Company to censor English speech—the first “copy-right.”<sup>184</sup>

While Lord Coke's right of life—valiantly declared in *The Case of Monopolies*—might have naturally been extended in England to author-

180. Warren & Brandeis, *supra* note 161, at 196; see CHARLES ROBERT RIVINGTON, THE RECORDS OF THE WORSHIPFUL COMPANY OF STATIONERS 25–26 (1883) (explaining that English copyright and patent was first developed as a royal strategy to police speech—especially religious speech).

181. See Warren & Brandeis, *supra* note 161, at 193 (citing to *Millar* and several other English decisions, but not mentioning Lord Coke, despite his chief role in the development of patent and copyright common law in England and America); 3 EDWARD COKE, INSTITUTES \*181–83 (vindicating the Case and Statute of Monopolies, which began the shift to inventor owned patents, and by later extension author owned copyrights); 1 CAMPBELL, *supra* note 179, at 335–36.

182. See *Millar v. Taylor* (1769) 4 Burr. 2303, 2312–14 (Eng.) (identifying this case might have created a common law, author owned copyright for the first time), *overruled by* Proceedings in the Lords on the Question of Literary Property [in *Donaldson v. Becket*], Feb. 4–22, 1774, in 17 THE PARLIAMENTARY, *supra* note 166, at 992. The Americans disagreed about this vital issue, though in a very subtle way. *Folsom v. Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901), *followed by* *Bartlett v. Crittenden*, 2 F. Cas. 967, 971 (C.C.D. Ohio 1849) (No. 1,076).

183. Compare 3 EDWARD COKE, INSTITUTES \*181–83 (arguing that the Statute of Monopolies (1623) secured the common law by precluding non-common law tribunals like the Star Chamber from issuing patents to non-inventors for potentially unlimited times), with 17 THE PARLIAMENTARY, *supra* note 166, at 994 (“The two sole titles by which a man secured his right was the royal patent and the licence of the Stationers’ Company; I challenge any man alive to shew me any other right or title. Where is it to be fund? some of the learned judges say the words ‘or otherwise’ in the statute of queen Anne relate to a prior common law right? To what common law right could these words refer?”) Lord Camden went further, willfully ignoring Lord Coke's checks upon the king that led to the English Civil War, stating that “the corrupt judges of the times submitted to the arbitrary law of prerogative”). *Cf.* *Case of Proclamations* (1610) 12 Co. Rep. 74, 76 (Eng.) (Lord Coke firmly stated that “the law of England is divided into three parts: common law, statute law, and custom; but the King's proclamation is none of them”).

184. RIVINGTON, *supra* note 180, at 2–3. See 17 THE PARLIAMENTARY, *supra* note 166, at 993–94 (“The manner in which the copy-right was held was a kind of copyhold tenure, in which the owner has a title by custom only, at the will and pleasure of the lord. The two sole titles by which a man secured his right was the royal patent and the licence of the Stationers’ Company. . . .”); 3 EDWARD COKE, INSTITUTES \*181–83.

owned copyrights as they originally emanated from patents, they were emphatically not.<sup>185</sup> The Star Chamber staunchly defended the royal power to censor religious texts under canon law.<sup>186</sup> The alleged necessity of canon law to protect England from heresy supported feudal claims of copyright that would later shape the English Court.<sup>187</sup>

Copyrights developed as a separate entity for the specific purpose of denying the author's common law rights of life once declared by Lord Coke on behalf of inventors.<sup>188</sup> Thus, John Milton died a poor man with close to nothing to pass on to his daughters as an inheritance.<sup>189</sup> Milton characterized his proprietors' violation of common law copyright to profit from the works of his hands as a taxation without representation,<sup>190</sup> a phrase adopted by James Otis a century later.<sup>191</sup>

Yesteryear's literary agents, known as proprietors, were granted copyrights from the crown as feudal titles are granted to lands.<sup>192</sup> The proprietors, not the authors, sued in *Millar* and *Donaldson* to defend their feudal titles as if they were derived from the common law.<sup>193</sup> Though common law precedent can be heard in the opinions of *Millar* and *Donaldson*, they were constrained by the fact that the authors were not a party to those decisions.<sup>194</sup>

185. The Case of Monopolies [1602] 11 Co. Rep. 84b (Eng.); Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.). See *supra* note 183.

186. RIVINGTON, *supra* note 180, at 2–3; 17 THE PARLIAMENTARY, *supra* note 166, at 993–94.

187. See 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON, 1554–1640 A.D., at 52 (Edward Arber ed., 1875) (providing an example of a royal proclamation censoring books and writings that may be imported or printed in England). From the old English proclamations arose a presumption in English law that survived Lord Coke's countermovement and became the basis of a wide array of state actions, including the censorship of *North Briton No. 45* through actions of seditious libel. See also *Leach v. Money* (1763) 19 How. St. Trials 981, 1026 (Eng.); cf. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1204–07 (2016).

188. See 17 THE PARLIAMENTARY, *supra* note 166, at 993–94 (“The manner in which the copyright was held was a kind of copyhold tenure.”); MILTON, *supra* note 176, at 13.

189. SAMUEL JOHNSON, LIVES OF THE POETS 100 (1826); 17 THE PARLIAMENTARY, *supra* note 166, at 1000.

190. MILTON, *supra* note 176, at 13.

191. PARKER P. SIMMONS, JAMES OTIS'S SPEECH ON THE WRITS OF ASSISTANCE. 1761., at 23 (Albert Bushnell Hart & Edward Channing eds., 1906).

192. 17 THE PARLIAMENTARY, *supra* note 166, at 993–94.

193. *Id.* at 992, 933–94.

194. See *id.* at 1000 (noting that “the present proprietors pretend to derive that copy from them, for which the author himself never received a farthing”—arguably distinguishing *Donaldson* from any future case in which an actual author claimed his copyright at common law); *id.* at 978 (naming a common law right of authorial attribution as the basis of common law copyright); *id.* at 997 (“[A]n

In the years between *Millar* and *Donaldson*, the common law of author-owned copyrights was litigated in America alongside the separation of powers in the trial of Phillis Wheatley.<sup>195</sup> In pre-revolutionary Massachusetts Bay, Governor and Chief Justice Thomas Hutchinson managed to accumulate ultimate power over all three branches of government.<sup>196</sup> When the first bill for an author-owned copyright in the entire Western World was passed in the legislature of Massachusetts Bay, Hutchinson used his accumulated powers to preempt the law.<sup>197</sup>

Due to this unjust result of Hutchinson's accumulation of ultimate legislative, executive, and judicial powers in Massachusetts Bay, the entire government of the colony was put in an uproar and prorogued to debate the governor's power and the legal rights of authors.<sup>198</sup> This short era was a silent court period where Chief Justice Hutchinson presided over a great debate at Harvard College.<sup>199</sup> After Hutchinson sided with the crown to abridge American rights, Benjamin Franklin and Samuel Adams became whistleblowers of Hutchinson's secret plans, and the American Revolution commenced.<sup>200</sup>

However, there is more to the story, had Justice Brandeis cared to look closer.<sup>201</sup> Prior to the silent court period, William Billings' artistic colleague, a young black slave girl named Phillis Wheatley gained worldwide renown

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action [at common law], I allow, will lie for ink and paper."); *Millar v. Taylor* [1769] 4 Burr. 2303, 2316 (Eng.) (naming the author's contract with their proprietor/agent a common law basis of copyright). *See also* *Bartlett v. Crittenden*, 2 F. Cas. 967, 968 (C.C.D. Ohio 1849) (No. 1,076) ("We have to say whether the writer has a right of property in his own manuscripts. That he has such a property in his own literary labor, until he shall relinquish it by contract or by some unequivocal act, would seem to be clear.").

195. Schroeder, *Leviathan*, *supra* note 3, at 160–64 n.914.

196. *See* SIMMONS, *supra* note 191, at 9 ("In the interval, Chief Justice Sewall died, and Lieutenant Governor Hutchinson was made his successor, thereby uniting in his person, the office of Lieutenant Governor with the emoluments of the commander of the castle, a member of the Council, Judge of Probate and Chief Justice of the Supreme Court!").

197. Schroeder, *Leviathan*, *supra* note 3, at 160–61.

198. *Id.* at 160–64.

199. *Id.* at 161–64 n.914; JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 134–35, 137 (1980).

200. *See* THE LETTERS OF GOVERNOR HUTCHINSON AND LIEUT. GOVERNOR OLIVER, & C. PRINTED AT BOSTON 92, 110 (2d ed., 1776) (noting that Franklin was key to sending the letters to Samuel Adams in America); *id.* at 16, 59, 64 (demonstrating the Americans took most umbrage against Hutchinson's statement "*there must be an abridgment of what are called English Liberties*" which, in America, had come to include the natural rights of humankind).

201. Schroeder, *Leviathan*, *supra* note 3, at 161.



for writing an elegy for Reverend Whitefield.<sup>202</sup> Then in 1772, during the silent court period, a dispute over whether Wheatley was the actual author of her poems electrified the Colony of Massachusetts Bay.<sup>203</sup>

While the entire colony was prorogued to debate the separation of powers, Phillis Wheatley was tried by a Court of Chief Justice Hutchinson regarding her attribution rights.<sup>204</sup> The Court was split almost evenly between revolutionaries and royalists, and unanimously decided in Wheatley's favor.<sup>205</sup> This was the first common law precedent in the Western World in favor of a common law copyright originally owned by authors, and it was, if one searches even further, the first example of actual Lockean property rights to exist in the West.<sup>206</sup>

Phillis Wheatley received an attestation from the unanimous court to be published in her book of poems as the basis of her copyright.<sup>207</sup> She took this attestation and her poetry to England and placed her book in the Stationer's Company's ledger one year prior to *Donaldson's* overruling of *Millar*.<sup>208</sup> Then she imported her books, according to her common law rights, into America on the famous ship of tea that was offloaded into the Boston Harbor.<sup>209</sup>

Nobody in the English-speaking world had yet accomplished this feat prior to Phillis Wheatley, and all afterward took for granted her success.<sup>210</sup> She was so forgotten that Justice Brandeis managed to cite *Millar* and *Star*

202. Phillis Wheatley, *An Elegiac Poem, on the Death of that Celebrated Divine, and Eminent Servant of Jesus Christ, the Late Reverend, and Pious George Whitefield* [1770].

203. Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] in PHILLIS WHEATLEY, POEMS ON VARIOUS SUBJECTS, RELIGIOUS AND MORAL 7 (1773). Cf. Matilda, *On Reading the Poems of Phillis Wheatley, the African Poetess*, NEW YORK MAGAZINE, Oct. 1796.

204. See Schroeder, *Leviathan*, *supra* note 3, at 161 ("Loyalist and revolutionary miraculously united to secure Phillis Wheatley a right of attribution to the works of her hands.").

205. *Id.*

206. *Id.* at 183.

207. *Id.* at 161; Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] in WHEATLEY, *supra* note 203, at 7.

208. Schroeder, *Leviathan*, *supra* note 3, at 166–67.

209. *Id.* at 175. Cf. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013) (vindicating the common law right to import and export copyrighted goods for a profit, stating that "[W]hen a statute covers an issue previously governed by the common law, it is presumed that 'Congress intended to retain the substance of the common law.'" (quoting *Samantar v. Yousuf*, 560 U.S. 305, 320, n.13 (2010))).

210. Schroeder, *Leviathan*, *supra* note 3, at 21, 151. Cf. *Kirtsaeng*, 568 U.S. at 552 (considering Jefferson and Madison regarding the scope and contours of copyright, without considering the founding poetess Phillis Wheatley, who was arguably the most important figure on the topic of founding copyright law).

Chamber precedent for his rights of privacy.<sup>211</sup> Had he only looked a little closer Brandeis might have found the *Afric Muse*, to whom we owe our common law copyrights, extended by Justice Story in *Folsom* as a privacy right in mail.<sup>212</sup>

Today we have the benefit of even more hindsight: we now know that the United States regulation of telecommunications is to respect the general public's First Amendment rights, including privacy rights.<sup>213</sup> Brandeis' analogy of telephones-as-mail in *Olmstead* became real when the Communications Act of 1934 was passed, as it was inspired by the sinking of the Titanic, a mail delivery ship that might not have sunk if public interest emergency regulations were established at that time.<sup>214</sup>

Brandeis did not have the benefit of knowing that updates to this telecommunications law would later oversee development of radio, television, the internet, and emails under the public interest standard and common carrier common law.<sup>215</sup> Therefore, some grace may be given to Brandeis for failing to celebrate the trial of Phillis Wheatley, whose common law copyrights were exported to England and imported back into America under common carrier common law.<sup>216</sup> However, no grace should extend

211. Schroeder, *Leviathan*, *supra* note 3, at 151 (“a curtain of forgetfulness is drawn over the ‘magic power’ of Phillis Wheatley’s verse.”); Warren & Brandeis, *supra* note 161, at 193.

212. Compare Schroeder, *Leviathan*, *supra* note 3, at 169–70, 210 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 347 (C.C.D. Mass. 841) (No. 4,901)), with Warren & Brandeis, *supra* note 161, at 211 n.1 (citing *Folsom*, 9 F. Cas. at 346).

213. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969) (interpreting the Communications Act of 1934 to encompass First Amendment rights of people viewing and listening to content distributed through telecommunications networks).

214. Radio Act of 1912, Pub. L. No. 264, 37 Stat. 302 (repealed 1927); Communications Act of 1934, ch. 652, 48 Stat. 1064; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. See Smithsonian: National Postal Museum, *Fire & Ice: Hindenburg and Titanic: Titanic’s Mail Clerks*, <https://postalmuseum.si.edu/exhibition/fire-ice-hindenburg-and-titanic-exhibition-ice-the-titanic-disaster/titanic%E2%80%99s-mail-clerks> [<https://perma.cc/94Y6-E8LJ>] (“*Titanic* had five sea post clerks aboard: three Americans and two British.”); Mathew Lasar, *How the Titanic Disaster Pushed Uncle Sam to Rule the Air*, ARSTECHNICA (July 7, 2011, 7:00 AM), <https://arstechnica.com/tech-policy/2011/07/did-the-titanic-disaster-let-uncle-sam-take-over-the-airwaves/> [<https://perma.cc/E28W-VGD5>] Interestingly, Justice Holmes decided *The Titanic*, where he upheld the anti-common law American deregulation of the high seas, apparently according to an implied repeal of common law choice of laws principles that disfavored applying British law to the detriment of the American claimants. *Oceanic Steam Navigation Co. v. Mellor (The Titanic)*, 233 U.S. 718, 734 (1914).

215. Compare Warren & Brandeis, *supra* note 161, at 211, with *National Broadcasting Co. v. United States*, 319 U.S. 190, 238 (1943) (Murphy, J., dissenting) (quoting to express common carrier provisions in the telecommunications law).

216. Cf. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538, 541–42 (2013). How far this grace should extend is debatable, especially since Brandeis had the legal/historical evidence completely

to Brandeis for his ironic endorsement of Justice Holmes' opinion in *Buck v. Bell*, a horrendous stain on Brandeis' jurisprudence.<sup>217</sup>

The amount of contradictory logic deployed in *Buck* and *Olmstead* is overwhelming.<sup>218</sup> In *Olmstead*, Justice Brandeis departed from his idea, earlier published in the *Harvard Law Review* in 1890, of an inherent, human right of privacy.<sup>219</sup> Especially in the light of *Buck*, Brandeis' privacy rights did not protect imbeciles, homosexuals, women, or non-white people, which strained the conception of *human* rights to the point of nonexistence.<sup>220</sup>

Brandeis nevertheless appeared to invent a protection for substantive constitutional rights in his *Olmstead* dissent, something Holmes labeled penumbral.<sup>221</sup> Brandeis cited *Buck v. Bell* in support of his dissent in *Olmstead v. United States*, because in *Olmstead* federal officers were tapping phone lines in violation of state criminal law.<sup>222</sup> Justice Holmes agreed with Brandeis' use of *Buck*, but broke away from Justice Brandeis by disclaiming Brandeis' idea that the Fourth and Fifth Amendments embraced human rights,

I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant . . . . But I think, as MR. JUSTICE BRANDEIS says, that apart from the Constitution the

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available to him. Compare Warren & Brandeis, *supra* note 161, at 212, with WHEATLEY, *supra* note 203, at 7, and Henry Louis Gates, Jr., *Thomas Jefferson and The Trials of Phillis Wheatley*, C-SPAN (Mar. 22, 2002), <https://www.c-span.org/video/?169288-1/thomas-jefferson-trials-phillis-wheatley>.

217. *Buck v. Bell*, 274 U.S. 200 (1927), *cited in* *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

218. Compare *Buck*, 274 U.S. at 207–08 (upholding a state statute as to the individual), with *Olmstead*, 277 U.S. at 468–69 (Brandeis, J., dissenting) (disregarding a state statute as to the police).

219. *Olmstead*, 277 U.S. at 474–75 (Brandeis, J., dissenting).

220. *Id.* at 472 (Brandeis, J., dissenting) (oxymoronically citing *Buck v. Bell*, a horrendous violation of any idea of privacy by the government, in support of privacy rights granted by state statute); *see also id.* at 478 (Brandeis, J., dissenting) (noting that the right of privacy as is “the right most valued by civilized men”).

221. Compare *id.* at 478 (Brandeis, J., dissenting) (“The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”), with *id.* at 469 (Holmes, J., dissenting) (“I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant . . .”).

222. *Id.* at 472, 475–76 (Brandeis, J., dissenting) (“The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails.”).

Government ought not to use evidence obtained and only obtainable by a criminal act.<sup>223</sup>

Holmes argued that the Government should not “play an ignoble part” by committing crimes, but also that the Bill of Rights should be irrelevant to that conclusion.<sup>224</sup> What mattered to Justice Holmes was only what the state law said, but he agreed with the majority that the United States Constitution did not protect the defendants.<sup>225</sup> Decades later, not even Justice Scalia agreed with Holmes’ *Olmstead* dissent, as Scalia demonstrated in *Kyllo v. United States*.<sup>226</sup>

A long line of cases led to Scalia’s admirable common law decision in *Kyllo*.<sup>227</sup> First, the Court eventually restored the exclusionary rule in *Mapp v. Ohio*, quoting a passage from Brandeis’ *Olmstead* dissent,<sup>228</sup> and then it overruled *Olmstead* in *Katz* citing to Brandeis’ common law ideas published at Harvard rather than his *Olmstead* dissent.<sup>229</sup> This line of cases seemed to reach its pinnacle in *Terry v. Ohio*, which shifted focus from the question of merely whether Fourth Amendment rights exist to the scope of those rights saying,

We have recently held that ‘the Fourth Amendment protects people, not places,’ and wherever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.<sup>230</sup>

The Court also pressed forward into the penumbra in *Griswold v. Connecticut* citing to Brandeis’ *Olmstead* dissent;<sup>231</sup> in *Roe v. Wade* also citing Brandeis’

223. *Id.* at 469–70 (Holmes, J., dissenting).

224. *Id.* at 470 (Holmes, J. dissenting).

225. *Id.* at 469–70 (Holmes, J. dissenting).

226. Compare *id.* at 470 (Holmes, J. dissenting) (endorsing a right of privacy, but only in so far as it was enacted by state law), with *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (creating a common law rule far broader than the one established in *Boyd*, which originally overruled a state law as unconstitutional as a plain trespass under the Fourth Amendment).

227. See *Kyllo*, 533 U.S. at 31–32 (referencing this line, stemming from *Boyd*).

228. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

229. *Katz v. United States*, 389 U.S. 347, 350 n.6 (1967) (citing Warren & Brandeis, *supra* note 161, at 193).

230. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Katz*, 389 U.S. at 351, 361).

231. *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

*Olmstead* dissent;<sup>232</sup> and again in *Lawrence v. Texas* overruling *Bowers v. Hardwick*, which again cited to Brandeis' *Olmstead* dissent.<sup>233</sup> All these cases paved the way to *Obergefell v. Hodges*, which again cited to Brandeis' *Olmstead* dissent.<sup>234</sup> However, the Court retained ulterior reasons for overruling the Defense of Marriage Act (DOMA) in *Windsor v. United States* as a violation of equal rights rather than a violation of penumbral privacy rights.<sup>235</sup>

All this to say, Holmes' view about the penumbra being off limits was repeatedly reversed in favor of Brandeis' penumbral approaches.<sup>236</sup> However, the Court never addressed how both Brandeis and Holmes' views were furthered by *Buck v. Bell*'s vindication of state police powers.<sup>237</sup> It also never addressed whether *Katz*'s cite to Brandeis' *Harvard Law Review* article, *The Right to Privacy*, was substantially different from relying on Brandeis' endorsement of *Buck* in *Olmstead*.<sup>238</sup>

Brandeis' legacy seemed to be subsumed by Holmes' obsession with the penumbra, *abgrund*, or abyss—a quasi-religious legal strategy Brandeis never fully adopted.<sup>239</sup> Holmes' arbitrary preferences for law and procedure were

232. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

233. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”), extending *Bowers v. Hardwick*, 478 U.S. 186, 207 (1986) (Stevens, J., dissenting) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

234. *Obergefell v. Hodges*, 576 U.S. 644, 666–67 (2015) (quoting *Griswold*, 381 U.S. at 486).

235. *United States v. Windsor*, 570 U.S. 744, 769–70 (2013); cf. *Smith v. Board of Examiners of Feeble-Minded*, 85 N.J.L. 46, 54–55 (1913) (extending the federal Equal Protection Clause to outlaw eugenic sterilization in New Jersey).

236. See *supra* notes 226–234 and accompanying text.

237. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting) (citing *Buck v. Bell*, 274 U.S. 200 (1927)). The closest the Court got was: *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (“There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes.”).

238. See *supra* note 229 and accompanying text. Compare Warren & Brandeis, *supra* note 161, at 193 (describing the changing scope of fundamental rights over time), with *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (describing the Framers’ prospective expectations for Fourth Amendment privacy rights).

239. See, e.g., Erwin Chemerinsky, *Rediscovering Brandeis’ Right to Privacy*, 45 BRANDEIS L.J. 643, 644 n.3, 648 (2007) (accepting the sleight of hand accomplished by *Griswold* as if Brandeis thought of human rights as penumbral, when he may not have). See *supra* notes 40, 94–96; Holmes, *Law in Science*, *supra* note 28, at 457 (stating Holmes’ penumbral theory that appears to be strongly influenced by Hegelian magical thinking). Cf. JOHN DURHAM PETERS, *COURTING THE ABYSS* 9–11, 67, 146–49, 153, 205–06 (2010) (devoting several passages to Oliver Wendell Holmes, Jr., and again seeming to extend Holmes’ penumbra over Brandeis’ views).

rehashed in *DeShaney v. Winnebago County Department of Social Services*,<sup>240</sup> and *Castle Rock v. Gonzales*.<sup>241</sup> A Hegelian negative versus positive rights distinction was recently asserted to blame the constitution for these miscarriages of justice, rather than the flawed character of the judges themselves.<sup>242</sup>

With the false dichotomies of Hegel in mind, Eric Voegelin wrote that “[o]nce you have entered the magic circle the sorcerer has drawn around

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240. Compare *DeShaney v. Winnebago Cnty. Dept. Soc. Servs.*, 489 U.S. 189, 197 (1989) (rejecting expansion of substantive due process to include positive duties), with *Buck v. Bell*, 274 U.S. 200, 207 (1927) (appearing to invent the concept of substantive due process in an attempt to preclude it), and Holmes, *Law in Science*, *supra* note 27, at 457 (reflecting on the gradation of penumbral legal theories). Holmes is often seen as a critic of substantive due process, but it appears he was the originator of the concept of substantive due process in order to cancel judicial review of most due process. *Adkins v. Children’s Hosp. D.C.*, 261 U.S. 525, 544 (1923) (when exercising what would later be labeled substantive due process, Justice Sutherland noted that there was no such distinction at the time: “This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists.”); *id.* at 568–69 (Holmes, J., dissenting) (comparing Court’s expansion of substantive due process rights to untenable Court decisions protecting right to contract). See also *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting) (attempting to demonstrate that the Due Process Clause “was [not] intended to give us *carte blanche* to” apply what was later referred to as substantive due process); *Olmstead*, 277 U.S. at 469–70 (Holmes, J., dissenting) (explaining the sole reason Holmes distinguished himself from Brandeis was because Brandeis expounded substantive due process ideas in an attempt to uphold a state law in this case—it didn’t matter if it upheld or overruled a law, Holmes would not endorse the concept of what would later be called substantive due process); *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (equating written laws of a state or of Congress with the “dominant opinion” of the American people in order to hold that due process is “perverted” whenever it is used to overrule a law—thus, it appears that Holmes created a distinction between procedural due process and substantive due process in order to obstruct or even put an end to substantive due process).

241. Compare *Castle Rock v. Gonzales*, 545 U.S. 748, 755–56 (2005) (distinguishing substantive and procedural due process), with *Buck*, 274 U.S. at 207 (delineating substantive due process), and Holmes, *Law in Science*, *supra* note 28, at 457 (espousing precursor to penumbral due process legal theory).

242. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 241–44, 311, 323–25 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (discussing his dichotomy of positive versus negative rights); Miccio, *supra* note 65, at 296 (noting that “the negative/positive rights debate” has “[e]verything” to do with the miscarriage of justice in *Castle Rock*, which is completely accurate, Professor Miccio also diagnosed the problem to be that the Justices on the Court “adhere[] to a negative rights standard” in their constitutional interpretation, *not* that the U.S. Constitution is actually a negative-rights-only constitution—this means that if the U.S. Constitution is flawed, its flaws lie in the structure of the U.S. Supreme Court, which allowed it to fall victim to false Hegelian dichotomies, rather than in the structure of the Bill of Rights *per se*); cf. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

himself, you are lost.”<sup>243</sup> Hegelianism, a derivative of Hobbesian philosophy, defined terms in a way that made desired conclusions inescapable.<sup>244</sup> Once these false dichotomies were accepted by opponents, like Hobbes’ Puritans who embraced pride and dejection as if they were virtues, the tyrannical conclusions they were designed to wreak must follow.<sup>245</sup>

Thus, Brandeis’ dissent in *Olmstead*, which accepted Holmes’ presuppositions in *Buck v. Bell* for support, obviously cannot overcome *Buck v. Bell*.<sup>246</sup> One can, as the Court appeared to do in *Katz*, attempt to distinguish Brandeis’ common law arguments from his *Olmstead* dissent to create ulterior common law grounds, but this too lands the Court no further than the Star Chamber.<sup>247</sup> Brandeis’ good intentioned ideas may be unworkable, at least wherever they accepted Hobbesian or Hegelian premises.<sup>248</sup>

The most memorable quote from Brandeis’ richly written dissent in *Olmstead* was probably that the right of privacy is “the most comprehensive of rights and the right most valued by civilized men.”<sup>249</sup> Unwitting or not,

243. ERIC VOEGELIN, *On Hegel: A Study in Sorcery*, in 12 THE COLLECTED WORKS OF ERIC VOEGELIN 228 (1990).

244. See *supra* notes 21, 93–94 and accompanying text; RUSSELL, A HISTORY, *supra* note 22, at 733–35 (discussing several of Hegel’s dichotomies, between subjective vs. objective and *Gegenstand* vs. *Objekt*, from which Hegel claimed to derive the Absolute Idea); *id.* at 738–40 (noting Hegel’s celebration of violence and war, and his ideology’s vestiges in Hobbesian state-worship); RUSSELL, UNPOPULAR, *supra* note 19, at 22–23 (discussing Hegel’s “dialectic”); *id.* at 122–23 (noting that if Hobbes “had been alive in 1940, he would have found ample confirmation of his contention [that people should reverence the government however unworthy it might be] in the devotion of German youth to the Nazis”); cf. JEAN-JACQUES ROUSSEAU, EMILE 57 (Eleanor Worthington trans., D.C. Heath & Co. ed., 1889) (giving the French despot Robespierre a philosophy to follow when he said, “Forgive my paradoxes, . . . I prefer paradoxes to prejudices”).

245. See RUSSELL, A HISTORY, *supra* note 22, at xxii (noting that the doctrines of “Hobbes, Rousseau, and Hegel . . . are embodied practically in Cromwell, Napoleon, and modern Germany,” i.e., Hitler). Compare HOBBS, *supra* note 18, at 46–48 (maintaining pride is a form of madness), with *Instrument of Government* (Dec. 16, 1653), in 2 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642–60, at 813–22 (C.H. Firth & R.S. Rait eds., 1911) (discussing England’s first written constitution, installing Oliver Cromwell as Lord Protector with supreme legislative and executive powers), with John Milton, *Samson Agonistes* 144, 865–68, 1639–68 [1671] (adopting a Hobbesian public/private dichotomy to justify mass killings as a way of castrating a people and a mass terrorist suicide death for the same purpose of completing an act of sexual violence against women).

246. See *supra* note 237 and accompanying text.

247. See *supra* notes 229, 238, and accompanying text.

248. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (citing *Buck v. Bell*, 274 U.S. 200 (1927)). Cf. Holmes, *Law in Science*, *supra* note 28, at 457.

249. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

Brandeis' opinions became a mere right to privacy emanating from the penumbra that protected only "civilized men," i.e., rich white men.<sup>250</sup> The rights Brandeis described were not for women, non-white people, and were especially not for imbeciles or mentally disturbed individuals, including homosexuals and other nonconforming individuals, who were all considered, in Brandeis' day, to be uncivilized.<sup>251</sup>

Brandeis was the first and only Jew on the U.S. Supreme Court in his day, but in a time when even Helen Keller supported eugenics it is hard to place too much significance on Brandeis's Jewishness.<sup>252</sup> As James Baldwin attested in a fiery piece that ran in the New York Times *Negroes are Anti-Semitic Because They're Anti-White*, while Jews eventually became the target of eugenic persecution, in America they were seen as white people and like Brandeis they largely enjoyed the spoils of racial injustice and did not perceive that they *could* be the target of a genocide.<sup>253</sup> In the more recent

250. Compare *id.* (protecting a man's right to privacy), *with* *Buck*, 274 U.S. at 207, and *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (deciding, essentially, that women's liberty of contract may be violated by the states, where men's liberty of contract may not).

251. Compare *Buck*, 274 U.S. at 207 (refusing to extend substantive due process protection to mentally ill woman), *with* *Muller*, 208 U.S. at 423 (refusing to extend the right to contract to women the same as to men), and *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 395 (1937) (unflatteringly stating such things like, "referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a 'fictitious equality'" (quoting *Quong Wing v. Kirkendall*, 223 U.S. 59, 63 (1912), wherein Justice Holmes wrote the opinion, in which he also hinted that the Equal Protections Clause may properly be ignored when considering the claims of Chinese Americans)). Cf. *NOURSE*, *supra* note 129, at 68 ("*Buck v. Bell* was a progressive decision, in line with a variety of others in which Holmes and Brandeis would lead the charge by urging deference to popular majorities").

252. *Revisiting The Tenure Of Supreme Court Justice Louis Brandeis, The 'Jewish Jefferson'*, NPR: FRESH AIR (June 7, 2016, 1:22 PM), <https://www.npr.org/2016/06/07/481076322/revisiting-the-tenure-of-supreme-court-justice-louis-brandeis-the-jewish-jeffers> [<https://perma.cc/9WT5-JNKV>]; *The Helen Keller Exorcism*, THE EXPERIMENT PODCAST (Mar. 24, 2022), <https://www.wnycstudios.org/podcasts/experiment/episodes/helen-keller-tiktok-conspiracy-fraud> [<https://perma.cc/GM9H-WV3Y>] (presenting a debate regarding whether Hellen Keller actually withdrew her support for eugenics, but those debating the topic admitted that at least for a time "Helen supported eugenics").

253. See James Baldwin, *Negroes Are Anti-Semitic Because They're Anti-White*, N.Y. TIMES (Apr. 9, 1967), [https://archive.nytimes.com/www.nytimes.com/books/98/03/29/specials/baldwin-antisem.html?\\_r=2](https://archive.nytimes.com/www.nytimes.com/books/98/03/29/specials/baldwin-antisem.html?_r=2) [<https://perma.cc/53GM-MQY3>] ("[M]any Jews despise Negroes, even as their Aryan brothers do. (There are also Jews who despise other Jews, even as their Aryan brothers do.) It is true that many Jews use, shamelessly, the slaughter of the 6,000,000 by the Third Reich as proof that they cannot be bigots—or in the hope of not being held responsible for their bigotry. It is galling to be told by a Jew whom you know to be exploiting you that he cannot possibly be doing what you know he is doing because he is a Jew."); cf. BLACKKKLANSMAN (Focus Features 2018) (telling the amazing true story of a black man Ron Stallworth whose Jewish colleague Phillip Zimmerman helped him infiltrate the KKK at great risk to his own life, by using his white skin color to pose as a white



words of Emma Green for *The Atlantic*, “From the earliest days of the American republic, Jews were technically considered white, at least in a legal sense. Under the Naturalization Act of 1790, they were considered among the ‘free white persons’ who could become citizens.”<sup>254</sup>

### C. HOW THE RECONSTRUCTION COURT INSPIRED JUSTICE POWELL TO RESURRECT *BUCK V. BELL*

After the Civil War, almost the entire membership of the Taney Court filtered out by death or retirement and a Court shaped by the North presided over Reconstruction.<sup>255</sup> This first crop of postbellum jurists did not describe why *Dred Scott* and its progeny were not a legitimate or “due” constitutional framework.<sup>256</sup> Instead, they made a horcrux for *Dred Scott* in *The Slaughterhouse Cases* by endorsing *Dred Scott*'s false version of the United States' social compact.<sup>257</sup>

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supremacist—where Zimmerman was *not* clocked as a person of color or a Jew). Another important episode that demonstrated that American Jews did not generally perceive the danger of Nietzsche and the *Übermensch* ideology to the Jewish diaspora was the Loeb & Leopold murder trial. *See supra* notes 82–83 and accompanying text.

254. Emma Green, *Are Jews White?*, THE ATLANTIC (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/are-jews-white/509453/> [<https://perma.cc/P5MF-FPCJ>].

255. Together, Abraham Lincoln and Ulysses S. Grant appointed nine United States Supreme Court Justices, reconfiguring the Court from around 1862 to 1874. *Justices 1789 to Present*, U.S. SUP. CT, [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/4PGM-A5GV>]; *see* Calvin Schermerhorn, *Packing the Court: Amid National Crises, Lincoln and His Republicans Remade the Supreme Court to Fit Their Agenda*, THE CONVERSATION (Oct. 12, 2020, 11:23 AM), <https://theconversation.com/packing-the-court-amid-national-crises-lincoln-and-his-republicans-remade-the-supreme-court-to-fit-their-agenda-147139> [<https://perma.cc/W5DM-5PAK>] (discussing Lincoln and Grant's Supreme Court appointments).

256. Schermerhorn, *supra* note 255 (citing *United States v. Cruikshank* and *The Civil Rights Cases*, Professor Schermerhorn wisely wrote, “careful what you wish for”). Perhaps the Reconstruction Court's most salient contribution, after the miscarriage of justice in the illegitimate military trial of Mary Surratt, was *Ex parte Milligan*, 71 U.S. 2 (1866), brought about by Lincoln's changes to the judiciary. *See* THE CONSPIRATOR (American Film Company, 2010).

257. *See* *The Slaughterhouse Cases*, 83 U.S. 36, 73 (1872) (referring to “the celebrated *Dred Scott* case” favorably and, while acknowledging that the Fourteenth Amendment “overturns the *Dred Scott* decision,” the *Slaughterhouse* Court reaffirmed Chief Justice Taney's false presupposition in *Dred Scott* that only rich white men were intended to be included in the original compact of 1776, in order to demolish the rights of poor white men and arguably all men); *id.* at 105, 116–117 (Field, J., dissenting) (arguing rights in the Declaration of Independence were limited to freedom of trade and contract). The Court's failure to affirmatively overrule *Dred Scott*'s presuppositions about the United States' social compact, that *caused* the Civil War, resulted in further miscarriages of justice. *See, e.g.*, *Minor v. Happersett*, 88 U.S. 162, 178 (1874) (excluding women from suffrage and deciding along the lines of *Dred Scott*'s narrow reading of the United States social compact “that the Constitution of the United States does not confer the right of suffrage upon *anyone*”) (emphasis added). *But see* LUCY STONE,

The term “horcrux” is taken from the Harry Potter series.<sup>258</sup> It refers to dark magic that aims at granting its user immortality by fragmenting a dark wizard’s soul and placing it in otherwise innocent objects, such as a diary or locket, so that the dark wizard may be resurrected from death.<sup>259</sup> The facial innocence of the horcrux can ensnare otherwise unwilling participants into completing the dark wizard’s plans, especially if the dark wizard is believed to be dead.<sup>260</sup>

In the analogy of *Slaughterhouse*-as-horcrux, the proverbial dark wizard was *Dred Scott*’s exclusion of African Americans from the founding compact.<sup>261</sup> The innocent object used by *Slaughterhouse* to help *Dred Scott* live on, was the idea of due process.<sup>262</sup> *Slaughterhouse* adopted the very rationale stated in

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WOMAN SUFFRAGE IN NEW JERSEY 1–12 (1867) (proving that the “consent of the governed” mandated by THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) meant giving the vote to all citizens by observing: “In New Jersey, women and negroes voted from 1776 to 1807, a period of thirty-one years.”). Stone faithfully described from the Constitution down to the law, that “all inhabitants” of New Jersey were conferred “suffrage and ability to hold the highest office in the State.” *Id.* (quoting N.J. CONST. OF 1776, § 4).

258. Sarah E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1655 (2018).

259. *Id.* at 1656–57 n.29.

260. *Id.* at 1659 (for example, Lord Voldemort chose “a diary, a ring, a locket, a cup, and a diadem”). Since Professor Light was advocating for the creation of “regulatory” horcruxes, she seemed to shy away from describing the essential, deceptive nature of horcruxes. See *Ginevra Weasley*, HARRY POTTER WIKI, [https://harrypotter.fandom.com/wiki/Ginevra\\_Weasley](https://harrypotter.fandom.com/wiki/Ginevra_Weasley) [<https://perma.cc/VSF6-U7LM>] (“Ginny . . . discovered Tom Riddle’s diary in amongst her school things and unaware of the diary’s true nature, began writing in it. To her amazement, the diary wrote back, and she started to confide in Tom Riddle’s memory . . .”).

261. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856) (“[T]he language used in the Declaration of Independence, show[s] that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument”).

262. *Id.* at 450; see also *Slaughterhouse*, 83 U.S. at 80–82 (stating that the Fourteenth Amendment Due Process Clause “has been in the Constitution since the adoption of the fifth amendment,” and as such it “has practically been the same as it now is during the existence of the government” and stating: “We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.” Essentially, this holds that *Dred Scott* was right about black people not being included in the idea of all men being equal in the Declaration of Independence by giving the Fourteenth Amendment the *sole* purpose of including black men rather than finding that the Fourteenth Amendment stands as a testament to *Dred Scott*’s error for depriving non-white people of all stripes from their rights, which contradicts the original intentions of the Declaration of Independence); cf. Pauli Murray, *An American Credo*, 5 COMMON GROUND 22, 24 (1945) (“When my brothers try to draw a circle to exclude me, I shall draw a larger circle to include them. Where they speak out for the privileges of a puny group, I shall shout for the rights of all mankind . . . . With humility but with pride I shall offer one small life, whether in foxhole or in wheatfield, for whatever it is worth, to fulfill the prophecy that all men are created equal.”).

*Dred Scott* while simultaneously maintaining that *Dred Scott* was dead, making *Slaughterhouse Dred Scott's* horcrux.<sup>263</sup>

Prior to *Crowell v. Benson's* due process framework based in common law de novo review,<sup>264</sup> the Court was stuck in old slavery ideas extended by *The Slaughterhouse Cases*.<sup>265</sup> Accordingly, *Buck v. Bell* extended *no* due process prior to allowing doctors to perform horrific, unwanted surgeries in furtherance of eugenics.<sup>266</sup> Under *Buck* and *Olmstead*,<sup>267</sup> United States citizens were arguably given *fewer* rights than immigrants under *Chae Chan Ping*.<sup>268</sup>

To explain how this may be so, it is important to remember that prior to the Immigration Act of 1924 America had no general visa system such that there was still an open door to most immigrants,<sup>269</sup> and as such, in its time, *Chae Chan Ping* dealt with a subset of immigrants that were targeted by Congress for unjust exclusion.<sup>270</sup> The *Chae Chan Ping* Court unjustly upheld Chinese exclusion, but preserved a due process right to challenge legal errors including to show that an individual immigrant was not a member of the

263. *Supra* notes 260–262.

264. *Crowell v. Benson*, 285 U.S. 22, 58–59 (1932).

265. *Slaughterhouse*, 83 U.S. at 105, 77–82 (disregarding the Civil Rights Act of 1870 against state laws that allegedly recreated a system of involuntary servitude through monopolies), *extended in* *Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897) (developing the idea of “liberty of contract” from *Slaughterhouse's* disregard for the right of United States citizens not to be enslaved). *See* *Lochner v. New York*, 198 U.S. 45, 53 (1905) (following *Allgeyer*, and by transitive horcrux through *Slaughterhouse*, *Dred Scott*, by completely disregarding the fundamental right of workers to make a living wage in a safe work environment, which was *the* original right of life exclaimed by the *Case of Monopolies* that *Slaughterhouse* scandalously rejected); *cf.* Schroeder, *Leviathan*, *supra* note 3, at 274–76 (explaining the original conception of “the rights of ordinary working people as a right of life”).

266. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

267. *See id.* (upholding and affirming state laws under the constitution that violate the fundamental right of privacy); *Olmstead v. United States*, 277 U.S. 438, 464–65 (1928) (allowing police to violate state laws to invade the privacy of citizens with illegal wiretapping).

268. *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889). As horrible as this case and its progeny were, the Court did carve out an exception to immigration laws that preserved the judicial power to “pass upon the validity of laws,” by construing Congress’s delegation of the power to make determinations of final determinations narrowly. *Id.* *See* *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (limiting, in an immigration case, the finality of decisionmaking by which Congress can delegate to administrative tribunals to the facts and preserving the Court’s power to determine the law), *superseded by statute as stated in* *Dep’t Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1978–79, 1983 (2020) (“[T]he Due Process Clause . . . does not require review of [the immigration] determination or how it was made.”).

269. *See* *Closing the Door on Immigration*, NAT’L PARK SERV. (Jan. 18, 2017), <https://www.nps.gov/articles/closing-the-door-on-immigration.htm> [<https://perma.cc/5JZY-DA2F>] (citing Immigration Act of 1924, 43 Stat. 153).

270. *Compare id.*, with *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889).

class of Chinese people the law targeted for exclusion,<sup>271</sup> while *Buck* and *Olmstead* denied due process rights generally to all U.S. citizens preserving *no* right to privacy in order to prove, for example, that one is not feebleminded or insane.<sup>272</sup> By struggling against the unjust, eugenic immigration system, naturalized U.S. citizens managed to vindicate their right to prove their citizenship in U.S. court to avoid deportation, which was eventually extended in *Crowell* to vindicate a general U.S. citizen's right to *de novo* review in cases involving fundamental rights including the right to privacy.<sup>273</sup>

*Crowell* can be read as a correction of *Buck* and *Olmstead*,<sup>274</sup> in line with *Moore v. Dempsey*'s correction of *Frank v. Mangum*,<sup>275</sup> requiring common law *de novo* review.<sup>276</sup> The *Crowell* Court cited *de novo* review in federal matters.<sup>277</sup> Prior to the eugenic era, Justice Brandeis observed that statutes routinely underwent this review as in *Boyd v. United States*, “a case that will be remembered as long as civil liberty lives in the United States.”<sup>278</sup>

Nevertheless, Justice Brandeis ironically defended the eugenic era's version of due process in his *Crowell* dissent.<sup>279</sup> Justice Powell, the author of *Mathews*, fashioned his definition of due process after the feigned judicial restraint of Justices Holmes and Brandeis, as extended by Justice Stone in *United States v. Carolene Products*.<sup>280</sup> Footnote 4 of *Carolene Products*

271. See, e.g., *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact.”); cf. *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889).

272. See *supra* note 267.

273. *Crowell v. Benson*, 285 U.S. 22, 46, 60–61 (1932), quoting and extending *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922).

274. *Crowell v.*, 285 U.S. at 60–61.

275. See *Wright v. West*, 505 U.S. 277, 299–303 (1992) (O'Connor, J., concurring) (addressing and adding to a list started by Justice Thomas, giving several decisions that applied *de novo* review in habeas corpus cases, beginning with *Moore v. Dempsey*, 261 U.S. 86 (1923), and *Frank v. Mangum*, 237 U.S. 309 (1915)); *Cone v. Bell*, 556 U.S. 449, 472 (2009) (stating “the claim is reviewed *de novo*.”); see also O'Connor, *They Often*, *supra* note 79, at 394–96 (describing the significance of *Moore* and *Frank*).

276. *Supra* notes 274–275.

277. *Crowell*, 285 U.S. at 58–59.

278. *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (discussing *Boyd v. United States*, 116 U.S. 616 (1886)) Interestingly, Brandeis also wrote the opinion in *Ng Fung Ho* that *Crowell* extended to U.S. citizens. See *supra* note 273.

279. See *Crowell*, 285 U.S. at 80–81 (Brandeis, J., dissenting) (arguing against *de novo* review).

280. Powell, Jr., *supra* note 53, at 1089 (“When the Court invalidated legislation, Stone frequently joined the Court's aging giants, Holmes and Brandeis, in dissent.”). Justice Powell chose to cite two cases from 1927, where Stone dissented with Holmes and Brandeis against the destruction of state laws, but Powell deemphasized *Buck v. Bell*, as if Stone did not join Justice Holmes' *Buck* opinion, when he did. *Id.* at 1089 n.8, 1090 n.10 (quoting *Buck v. Bell*, 274 U.S. 200, 208 (1927)).

theoretically replaced *Lochner v. New York*'s "substantive due process" review with equal protection claims.<sup>281</sup>

The idea that *Carolene Products*' footnoted dicta indicating future cases may decide to use the Constitution to protect "discrete insular minorities" somehow displaced *Lochner* substantive due process is absurd.<sup>282</sup> It is simply not anywhere in *Carolene Products* that equal protection should, or even could, *replace* due process.<sup>283</sup> Rather, Powell used his public relations training to preserve both *Buck v. Bell* and *Lochner*, while making it appear as though they passed away.<sup>284</sup>

In almost the same breath, Powell distanced himself from the very theory he presented.<sup>285</sup> Powell admitted that footnote 4 "is not a developed theory in itself. Nor is there reason to think that Stone intended it to be."<sup>286</sup> In this way, Powell put his theory for how to work around *Lochner* and *Buck* in Justice Stone's mouth, presented it, and then retracted any obligation on Powell's part to avoid the results of either *Lochner* or *Buck*.<sup>287</sup>

281. *Id.* at 1089–90 ("Stone lived to see—and indeed helped to preside over—the passing of the *Lochner* era. The well-known turning point came in 1937, when the Court upheld the constitutionality of a state minimum wage law for women. *Carolene Products* was an otherwise unremarkable decision in the same line. But Footnote 4 [of *Carolene Products*], as interpreted by many commentators, represented a radical departure of its own. Far from initiating a jurisprudence of judicial deference to political judgments by the legislature, Footnote 4—on this view—undertook to substitute one activist judicial mission for another. . . . Where the Court before had used the substantive due process clause to protect property rights, now it should use the equal protection clause . . . as a sword with which to promote the liberty interests of groups disadvantaged by political decisions.").

282. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *see* Miccio, *supra* note 65, at 296 (explaining the use of the word "substantive" in relation to due process is itself "artificial").

283. *Carolene Prods. Co.*, 304 U.S. at 151 (explicitly rejecting equal protection claims under federal statutes: "The Fifth Amendment has no equal protection clause, and even that of the Fourteenth, applicable only to the states, does not compel their Legislatures to prohibit all like evils, or none."); *id.* at 152 n.4 (not mentioning equal protection specifically).

284. *See* Powell, Jr., *supra* note 53, at 1089 (making the somewhat outlandish claim that Justice Stone transcended his own opinions during the *Lochner* era to fashion a way of replacing substantive due process associated with *Lochner* with equal protection ideology that was explicitly rejected by Justice Stone in *Carolene Products*); *id.* at 1087 n.4 (quoting Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979)) ("Professor Fiss, for example, has termed Footnote 4 of *Carolene Products* 'the great and modern charter for ordering the relations between judges and other agencies of government.'"—this conclusion was, to be sure, shaped by Justice Powell's resurrection of footnote 4 of *Carolene Products* in *Bakke*).

285. *Id.* at 1090 ("Occasionally I think that Stone should be defended, not from his detractors, but from his admirers.").

286. *Id.*

287. *Id.* at 1092 (Footnote 4 of *Carolene Products* is "perhaps the most farsighted dictum in our modern judicial heritage. But, after all, it is *dictum* and was intended to be no more."). Ergo, Powell's

Justice Powell relied on the *Carolene Products* footnote 4 theory in three decisions authored by him: *Regents of the University of California v. Bakke*,<sup>288</sup> *First National Bank of Boston v. Bellotti*,<sup>289</sup> and *Mathews v. Eldridge*.<sup>290</sup> In each of these decisions, Justice Powell interpreted individual rights in a way that *Crowell v. Benson* prohibited.<sup>291</sup> Powell attempted to supplant *Crowell* by ironically creating several *Lochner* horcruxes, feigning *Crowell*'s nonexistence.<sup>292</sup>

Powell's role of inventing shadow lines of case law to counter *Crowell sub silentio* is extremely unsurprising given his authorship of the Powell Memorandum.<sup>293</sup> Among the Bernaysian strategies Powell pursued was

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statements about “the passing of the *Lochner* era” and Justice Holmes' infamous rejection of equal protection claims in *Buck v. Bell* were premised on an extravagant dictum rather than actual law. *Id.* at 1089–90 nn.9–10.

288. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 288, 290 n.28, 291–92 (1978).

289. *Compare* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786–87 (1978) (applying an “exacting scrutiny” standard), *with* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (considering the future adoption of a “more exacting judicial scrutiny”).

290. *Compare* *Mathews v. Eldridge*, 424 U.S. 319, 330–32 (1976) (rejecting *Eldridge*'s substantive due process claims and only considering procedural due process), *with* Powell, Jr., *supra* note 53, at 1089–90 (describing how the era of substantive due process, i.e., the *Lochner* era, passed away, in part, because *Carolene Products* theoretically supplanted it), *and* *Buck v. Bell*, 274 U.S. 200, 207 (1927) (reviewing only for procedural due process and deciding “there is no doubt that in that respect the plaintiff in error has had due process at law”).

291. *Compare supra* notes 289–91, *with* *Crowell v. Benson*, 285 U.S. 22, 57 (1932) (refusing “to sap the judicial power as it exists under the Federal Constitution”).

292. *Compare* Powell, Jr., *supra* note 53, at 1087 n.4 (quoting Fiss, *supra* note 284, at 6) (supplanting *Crowell sub silentio* by citing footnote 4 of *Carolene Products* as “[t]he great and modern charter for ordering the relation between judges and other agencies of government”), *with* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 659–62, n.62 (2004) (noting “the significance of *Crowell* to the modern administrative state,” consisted in “the widespread reliance on *Crowell* in crafting rules to govern the judicial review of agency action”), *and* *Crowell*, 285 U.S. at 60–61 (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284–85 (1922) in turn citing *Liu Hop Fong v. United States*, 209 U.S. 453, 461 (1908) (“[T]he law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is ordered to be deported.”))).

293. Powell's secret memorandum can be seen as his secret audition to be lifted onto the bench by President Richard Nixon so he could resurrect a *Lochner 2.0* upon the first *Lochner*'s grave. Powell Memo, *supra* note 47. Powell was nominated by President Nixon. President Richard Nixon, Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States (Oct. 21, 1971), <https://www.presidency.ucsb.edu/documents/address-the-nation-announcing-intention-nominate-lewis-f-powell-jr-and-william-h-rehnquist> [<https://perma.cc/6ETG-QDEC>].

the engineering of consent,<sup>294</sup> premised on Hobbesian force and fraud.<sup>295</sup> The primary purpose of Powell's decisions in *Bakke*, *Bellotti*, and *Mathews*, were not to distinguish *Lochner*, but to reanimate *Lochner* with Bernays-inspired horcruxes.<sup>296</sup>

Justice Powell claimed *Lochner* was dead without overruling it,<sup>297</sup> and then remade *Lochner* just as *Slaughterhouse* remade *Dred Scott*.<sup>298</sup> Powell claimed that the era of substantive due process was over, but no United States Supreme Court ever overruled *Lochner* on that basis.<sup>299</sup> Rather, Powell remade the *Lochner* era by referring to substantive due process only

294. Powell Memo, *supra* note 47, at 15–24 (Powell's solutions listed under the title "What Can Be Done About the Campus" and "What Can Be Done About the Public?" are candidly Bernaysian); Edward Bernays, *The Engineering of Consent* (1947), in 250 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 113, 113–14 (1947) (claiming the constitutional right of public relations counsels to manipulate the American public, as if our constitutional system was indestructible).

295. Compare Powell Memo, *supra* note 47, at 15–24, and Bernays, *supra* note 294, at 113–14, with JAMES OTIS, COLLECTED POLITICAL WRITINGS OF JAMES OTIS 241 (Richard Samuelson ed., 2015) (disputing "Hobbesian maxims" including "[t]hat dominion is rightfully founded on force and fraud"), and THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (requiring legitimate governments to secure the consent of the governed).

296. See *supra* notes 288–290 and accompanying text. Especially *Bakke*, which secured admission to medical school for a white man who was not a member of a discrete insular minority, seemingly aligning with Bernays's focus on Hawaii in order to advocate white supremacy. Compare Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978), with Edward Bernays, *Public Relations as Aid to Ethnic Harmony: Hawaii—The Almost Perfect State* [1950], reprinted in BERNAYS, PUBLIC, *supra* note 48, at 308 ("Hawaii is . . . the melting pot of the Pacific, assimilating people of Oriental ancestry, . . . It is of further significance to the continental United States because it is setting a successful pattern for the working out of maladjustments between people of diverse ethnic backgrounds."). Cf. The Martin Luther King, Jr. Center for Nonviolent Social Change, *MLK: Proud To Be Maladjusted*, YOUTUBE (Aug. 31, 2015), <https://www.youtube.com/watch?v=hhCtkfImxuE> [<https://perma.cc/K79Q-XP9A>] ("I never intend to adjust myself to racial segregation and discrimination").

297. Powell, Jr., *supra* note 53, at 1089.

298. Compare *Bakke*, 438 U.S. at 293 (quoting *Slaughterhouse Cases*, 83 U.S. 36, 71 (1872)) (extending the *Slaughterhouse* holding which concluded the Fourteenth Amendment was intended primarily to bridge "the vast distance between members of the Negro race and the white 'majority,'" which was a subtle reiteration of *Dred Scott's* holding that only rich white men were intended to be included in the phrase "all men are created equal" written in the Declaration of Independence), with *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856) ("[T]he language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable instrument.").

299. Powell, Jr., *supra* note 53, at 1089.

when he wanted to deny rights,<sup>300</sup> as the Court did in cases like *Slaughterhouse*, *Muller v. Oregon*, and *Buck v. Bell*.<sup>301</sup>

Whether unwitting or not, Justice Powell liberally used *Slaughterhouse* as a horcrux to resurrect the evils of the American past.<sup>302</sup> His references to *Lochner* as the definitive case of its time was itself a deception.<sup>303</sup> *Lochner* was a bad decision, but it existed alongside numerous bad decisions that *denied* substantive rights to people regardless of whether the laws required the protection of those rights or not.<sup>304</sup>

A closer look at *Lochner*, a case that overruled a state law enacted for the protection of workers' health and safety, reveals that *Lochner*

300. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 330–31 (1976) (naming the distinction between procedural and substantive due process in order to deny due process). Cf. Miccio, *supra* note 65, at 296 (arguing against continuing the distinction between procedural and substantive due process for the reason stated above).

301. See *Slaughterhouse*, 83 U.S. at 65–66 (denying substantive rights by referring to the “due” processes Louisiana used to issue monopolies as if they “ha[ve] never been questioned or denied”); *Muller v. Oregon*, 208 U.S. 412, 420–23 (1908) (“[W]ithout questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution . . . .”); *Buck v. Bell*, 274 U.S. 200, 207 (1927); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the *substantive evils that Congress has a right to prevent.*” (emphasis added)), *extended in Debs v. United States*, 249 U.S. 211, 215 (1919).

302. *Bakke*, 438 U.S. at 369 (quoting *Slaughterhouse*, 83 U.S. at 71).

303. Powell, Jr., *supra* note 53, at 1089 (examining “the *Lochner* era, or the era of substantive due process” without considering whether *Buck v. Bell* or *Muller v. Oregon*’s racist, misogynist, and ableist denials of substantive due process might have characterized the era more honestly). Cf. *Debs*, 249 U.S. at 216–17 (showing how Eugene Debs was destroyed by the government’s disregard for his substantive rights, and the Court’s refusal to step in to defend Debs’ free speech rights was probably more momentous of a decision than *Lochner* was); *Schenck*, 249 U.S. at 52 (showing that substantive First Amendment rights were not used to overrule the Espionage Act, while Holmes cited Congress’s substantive right to punish speech instead).

304. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (disregarding substantive workers’ rights that were intended to be secured by statute); *Muller*, 208 U.S. at 423 (denying liberty of contract to women without disturbing *Lochner*), *extended by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 394–95 (1937); *Debs*, 249 U.S. at 216–17; *Schenck*, 249 U.S. at 52; *Buck*, 274 U.S. at 207 (denying rights of privacy and autonomy to women, homosexuals, non-white people, and imbeciles); *Olmstead v. United States*, 277 U.S. 438, 463–65 (1928) (disregarding a state law designed to protect the privacy of individuals); cf. *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (extending *Slaughterhouse* to deny women the right to practice law); *Plessy v. Ferguson*, 163 U.S. 537, 542–44 (1896) (extending *Slaughterhouse* to affirm state power to enforce Jim Crow laws); *Downes v. Bidwell*, 182 U.S. 244, 271–72, 274–76 (1901) (quoting *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1856)). There are several other examples that may be named.



misapprehended workers' substantive rights.<sup>305</sup> The *Lochner* Court failed to properly interpret state laws in light of all of the rights of workers.<sup>306</sup> The problem with *Lochner*, made clear when Justice Holmes' dissent in *Lochner* became the law in *Buck v. Bell*, was its failure to find human rights both relevant and controlling.<sup>307</sup>

*Lochner's* misapprehension of human rights was first established in *Slaughterhouse*, a decision that denied workers' rights to avoid involuntary servitude.<sup>308</sup> The *Slaughterhouse* horcrux was later remade and strengthened in Justice Powell's three most salient contributions to federal jurisprudence.<sup>309</sup> Justice Powell made his inspirations so obvious that it would be surprising if he did not simply lift all his central ideas directly from *Slaughterhouse*.<sup>310</sup>

First, in *Bakke* Justice Powell successfully convinced a bare majority to limit Title VI of the Civil Rights Act of 1964 to the words of the United States Constitution.<sup>311</sup> Powell used the United States Constitution to limit, rather than expand, the breadth of rights that Congress could protect.<sup>312</sup> Powell's statutory construction was a remake of *Slaughterhouse*, which was a

305. *Lochner*, 198 U.S. at 58 (disregarding the rights of workers secured by statute when overruling state law), *distinguishing* *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905) (disregarding the rights of patients to refuse consent to receiving vaccines while affirming state law), *extended by* *Buck*, 274 U.S. at 207 (denying the right of innocent patients to refuse consent to being imprisoned and sterilized).

306. *Compare* *Lochner*, 198 U.S. at 56–58 (disregarding the rights of workers), *with* *Slaughterhouse*, 83 U.S. at 65–66 (disregarding the rights of workers).

307. *Buck*, 274 U.S. at 207, *extending* *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (arguing that *Jacobson* should have been extended to affirm broad state powers).

308. *Supra* note 306.

309. *See supra* notes 288–290 and accompanying text.

310. *Supra* note 302.

311. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (Opinion of Powell, J.) (“[T]he voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution.”); *id.* at 328 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies . . .”).

312. *Id.* at 284; *cf.* *Slaughterhouse*, 83 U.S. 36, 78 (1872) (limiting the Civil Rights Act of 1870 to the text of the constitution and refusing to become “a perpetual censor upon all legislation of the States, on the civil rights of their own citizens”), *extended by* *Civil Rights Cases*, 109 U.S. 3, 18 (1883) (using the constitution to limit the Civil Rights Act stating, “the law in question cannot be sustained by any grant of legislative power made to Congress by the [F]ourteenth [A]mendment”); *Civil Rights Cases*, 109 U.S. at 51 (Harlan, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (granting extremely broad latitude to Congress in its “choice of means”).

remake of *Dred Scott*, to overrule rights enacted in positive laws “short of an amendment to the Constitution.”<sup>313</sup>

This oxymoronic rule of construction alone is why the Civil Rights Act during the time of *Slaughterhouse* did not protect workers under *The Case of Monopolies* that formerly inspired the express adoption of the right of life in the U.S. Constitution.<sup>314</sup> The *Slaughterhouse* Court arbitrarily decided that post-Fourteenth Amendment rights were *less* than those protected by the Bill of Rights.<sup>315</sup> This is how *Slaughterhouse* adopted the legal presuppositions of *Dred Scott* to destroy human rights.<sup>316</sup>

Statutory construction that denies a statute’s existence apart from the U.S. Constitution is imprudent judicial activism.<sup>317</sup> The only question of a statute’s existence should be whether the broad powers of Congress according to *McCulloch v. Maryland* and *Wickard v. Filburn* justify the enactment.<sup>318</sup> If it does, Congress may create new legal rights through the enactment of laws according to the Ninth Amendment and under constitutional avoidance doctrine.<sup>319</sup>

Constitutional avoidance requires that, if it is practically possible, the Court should construe statutes in such a way that they do not violate the U.S. Constitution.<sup>320</sup> The Ninth Amendment of the U.S. Constitution

313. *Slaughterhouse*, 83 U.S. at 73; see *supra* notes 298, 311 and accompanying text.

314. *Slaughterhouse*, 83 U.S. at 65, 73; see *supra* note 265.

315. *Slaughterhouse*, 83 U.S. at 69 (using the Fourteenth Amendment to narrowly construe the Civil Rights Act so that it may only be used to “to forbid all shades and conditions of African slavery”); cf. *supra* note 311.

316. Compare *Slaughterhouse*, 83 U.S. at 69, and *id.* at 105 (Field, J., dissenting) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)), with *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856) (deciding that the Declaration of Independence was not intended to include black people, in order to use the Fifth Amendment to limit any statutes that might include them).

317. Compare *Slaughterhouses*, 83 U.S. at 73 (using the Fourteenth Amendment to narrowly construe the Civil Rights Act so that it may only be used to “forbid all shades and conditions of African slavery”), with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 328 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies . . .”).

318. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *Wickard v. Filburn*, 317 U.S. 111, 127 (1942).

319. *McCulloch*, 17 U.S. at 421, extended by *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 654 (2012); *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (citing U.S. CONST. amend. IX); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

320. See *supra* note 319.

reserves all rights not enumerated in the U.S. Constitution to the people.<sup>321</sup> Therefore, construing statutes such that they protect rights *not* enumerated in the U.S. Constitution *is* constitutional.<sup>322</sup>

Unfortunately, rather than avoid a tough constitutional question, Justice Powell created another horcrux in *Bellotti* for feudal law.<sup>323</sup> In *Bellotti*, Justice Powell appeared to invent the existence of corporate free speech in the United States out of whole cloth by overruling a Massachusetts law that restricted corporate political “speech” designed to influence the vote on a referendum.<sup>324</sup> However, Justice Powell’s decision was not as original as it might seem.<sup>325</sup>

*Bellotti* appears to reiterate the pre-revolutionary English feudal absolute and qualified immunity case known as *The Bankers Case*.<sup>326</sup> Even as states begin abolishing qualified immunity for police officers after George Floyd’s death, judges may turn to *Bellotti* to continue the practice.<sup>327</sup> It is unlikely that any United States judge will remember how the *Chisholm* Court already limited corporate rights by the contours of natural human rights when it decided:

321. *Id.*

322. *Id.*

323. Compare *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (stating that corporate free speech “is at the heart of the First Amendment’s protection”), with *Chisholm v. Georgia*, 2 U.S. 419, 455–56 (1793) (Wilson, J.) (“In all our contemplations, however, concerning this feigned and artificial person [i.e., corporations], we should never forget, that, in truth and nature, those who think and speak and act are men.”), *distinguishing and delegitimizing* *The Bankers Case*, (1696) 14 How. St. Tr. 1, 32 (Eng.) (establishing sovereign and qualified immunity doctrine based upon the corporate and feudal rights of the crown).

324. *Bellotti*, 435 U.S. at 768–770, 768 n.2, 776, *overruling* Massachusetts Gen. Laws Ann., ch. 55, § 8 (West Supp. 1977).

325. Compare *Bellotti*, 435 U.S. at 776–78 (overruling a state law under the First Amendment as incorporated by the Fourteenth), with *Lochner v. New York*, 198 U.S. 45, 56–58 (1905) (overruling a state law under a liberty interest incorporated by the Fourteenth Amendment).

326. See *supra* note 323 and accompanying text.

327. *Id.*; Jacob Knutson, *New Mexico eliminates qualified immunity*, AXIOS (Apr. 7, 2021), <https://www.axios.com/new-mexico-qualified-immunity-police-repeal-e11fec38-94db-4419-bf67-9ac93eb5348.html> [<https://perma.cc/28EM-LXDW>]; Cary Aspinwall & Simone Weichselbaum, *Colorado Tries New Way To Punish Rogue Cops*, THE MARSHALL PROJECT (Dec. 18, 2020, 4:00 PM), <https://www.themarshallproject.org/2020/12/18/colorado-tries-new-way-to-punish-rogue-cops> [<https://perma.cc/B8DA-DGBX>]; cf. *Chisholm*, 2 U.S. at 437–44 (Iredell, J., dissenting) (expounding and defending state powers through corporate/feudal law given in *The Bankers Case*, 14 How. St. Tr. at 32 (establishing the feudal maxim that the king can do no wrong)); *Nixon v. Fitzgerald*, 457 U.S. 731, 766 (1982) (White, J., dissenting) (“Attaching absolute immunity to the Office of the President . . . is a reversion to the old notion that the King can do no wrong.”).

[A corporation] is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members: It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those who think and speak and act are men.<sup>328</sup>

The opposite idea was defended by a single dissenter, Justice Iredell, who stoutly expounded the feudal case known as *The Bankers Case*, which invented sovereign and qualified immunity upon the idea that the corporation of the crown can do no wrong.<sup>329</sup> Justice Powell's defense of the First Amendment rights of corporations was a rebirth of *The Bankers Case* immunity for corporations including public government corporations to issue all kinds of Bernaysian propaganda to manipulate the people and to engineer their consent.<sup>330</sup>

Bernaysian strategies for securing business interests were operationalized by Justice Powell himself in the Powell Memo, which suggested a hands-off approach for corporations to, for example, use think tanks and grass roots movements to shuttle in their agendas as if they were one in group of agendas naturally arising from the people.<sup>331</sup> In pursuit of the Powell Memo's political objectives, *Bellotti* was eventually extended in *Citizens United*.<sup>332</sup> Ever since, billionaires like the Koch brothers took Powell's advice, fostering mass public delusion through corporate propaganda that they positioned as grass roots movements.<sup>333</sup>

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328. Chisholm, 2 U.S. at 455–56 (Wilson, J.).

329. *Id.* at 455–56; *id.* at 437–44 (Iredell, J., dissenting); *The Bankers Case*, 14 How. St. Tr. at 32.

330. *Bellotti*, 435 U.S. at 776–78; Chisholm, 2 U.S. at 455–56 (noting that the crown, like the states in America, are structured as public corporations).

331. *Supra* notes 293–295 and accompanying text; cf. Nicholas Freudenberg, *McDomination: How Corporations Conquered America and Ruined our Health*, SALON (Feb. 23, 2014, 2:00 PM), [https://www.salon.com/2014/02/23/mcdomination\\_how\\_corporations\\_conquered\\_america\\_and\\_ruined\\_our\\_health/](https://www.salon.com/2014/02/23/mcdomination_how_corporations_conquered_america_and_ruined_our_health/) [https://perma.cc/F8UM-AEEY] (“Powell’s memo serves as a useful starting point for understanding how the transformation of the corporate system that began in the 1970s set the stage for today’s global health problems.”).

332. *Bellotti*, 435 U.S. at 776–78, extended by *Citizens United v. FEC*, 558 U.S. 310, 342 (2010).

333. Jeff Nesbit, *The Secret Origins of the Tea Party*, TIME (last visited on Apr. 2, 2022), <https://time.com/secret-origins-of-the-tea-party/> [https://perma.cc/Y9RP-96KW]; Nahal Toosi, *Koch showers millions on think tanks to push a restrained foreign policy*, POLITICO (Feb. 13, 2020, 1:44 PM), <https://www.politico.com/news/2020/02/13/charles-koch-grants-foreign-policy-think-tanks-114898> [https://perma.cc/HM5M-W3FW]; see CITIZEN KOCH (Elsewhere Films 2013) (using the

America was eventually softened up by big money, so much so that longshot pro-Kremlin efforts led by shady characters like Carter Page, Maria Butina, and others actually worked.<sup>334</sup> *Bellotti* and *Citizens United* opened the door for rich Americans, like Rex Tillerson and Donald Trump, to facilitate the influence of foreign money in U.S. politics.<sup>335</sup> With greedy men at the helm, America no longer seemed to heed George Washington's clear warning "[a]gainst the insidious wiles of foreign influence."<sup>336</sup>

As bad as this is, Justice Powell's most concerning horcrux was his majority opinion in *Mathews v. Eldridge*.<sup>337</sup> The *Mathews* cost/benefit framework traced back through *Buck v. Bell* and *Slaughterhouse* to Jeremy

Koch brothers as a case study to expound several ways rich people use corporate citizenship to corrupt the United States, including by bankrolling the "tea party"); cf. MILLER, *supra* note 88, at 97–106 (explaining why people fall for delusions that are sometimes of their own making).

334. RACHEL MADDOW, BLOWOUT 207 (2019) (discussing how Carter Page was a fellow at the Center for National Policy, a conservative nonprofit think tank, where he wrote an opinion piece supporting links between Russia and Exxon, while criticizing "the Obama administration for imposing 'excessive restrictions on Russian officials as see in last year's Magnitsky Act which was reminiscent of the blacklists of the McCarthy era'"); Valerie Hopkins, *After 15 Months in U.S. Prisons, She Now Sits in Russia's Parliament*, N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/11/19/world/europe/aria-butina-russia-duma.html> [<https://perma.cc/46QF-6GMD>] ("Ms. Butina, who worked before joining the Duma for RT, a government-backed television channel, frequently comments on systemic racism in America, as pro-Kremlin figures have done for decades."); Erik Larson & Bloomberg, *Why the Infamous Trump Tower Meeting Didn't Take Down Trump*, FORTUNE (Apr. 20, 2019, 5:28 AM), <https://fortune.com/2019/04/20/trump-tower-meeting-mueller/> [<https://perma.cc/G9LE-ZFS3>].

335. Brendan Fischer, *How Citizens United Led Directly to Trump's Impeachment*, SLATE (Jan. 21, 2020, 3:13 PM), <https://slate.com/news-and-politics/2020/01/citizens-united-john-roberts-trump-impeachment.html> [<https://perma.cc/225L-2M6T>]; Michael Sozan, *Ending Foreign-Influenced Corporate Spending in U.S. Elections*, AMERICAN PROGRESS (Nov. 21, 2019), <https://www.americanprogress.org/article/ending-foreign-influenced-corporate-spending-u-s-elections/> [<https://perma.cc/H59M-KC7R>] ("*Citizens United* . . . unleashed a torrent of spending directed at super PACs and shadowy nonprofit organizations."); MADDOW, *supra* note 334, at 358, 362.

336. GEORGE WASHINGTON, WASHINGTON'S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES 21 (1913) [1796]; MADDOW, *supra* note 334, at 358, 362; cf. Jon Schwarz, *The Best Hot Take on the Mueller Report is from 1796*, THE INTERCEPT (Apr. 20, 2019, 6:00 AM), <https://theintercept.com/2019/04/20/mueller-report-george-washington-farewell-address/> [<https://perma.cc/RDK2-KMVW>]; Larson & Bloomberg, *supra* note 332 ("The 20-minute gathering in Manhattan seemed to have everything: Donald Trump Jr. meeting with a Kremlin-linked lawyer. The supposed promise of dirt on Hillary Clinton. The president personally dictating parts of a statement that smacked of cover-up. Collusion with Russia, obstruction of justice—Robert Mueller's twin targets—all seemingly taking place right inside Trump's signature landmark, just a few months before the election. In Mueller's final report, however, the Trump Tower meeting is little more than a blip, just one of a host of incidents that drew his attention.")

337. *Mathews v. Eldridge*, 424 U.S. 319, 333–34 (1976).

Bentham and the Witch Judges of Massachusetts.<sup>338</sup> In *Mathews*, Justice Powell created a horcrux for puritanical legal positivism that arbitrarily mixed feudal, canon, and common laws to horrific effect as exemplified by Dalila's justification for Samson's figurative castration and death in Milton's

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338. Compare *id.*, with John Milton, *Samson Agonistes* 865–68 [1671] (containing the cost/benefit balancing ideology the Puritans used to justify their austere systems of law: “[I]hat grounded maxim / So rife and celebrated in the mouths / Of wisest men; that to the public good / Private respects must yield.”). In their rush to vindicate quarantine and vaccine mandates in 2020, some researchers failed to connect the dots completely, regarding the Puritans. See, e.g., Adam Klein & Benjamin Wittes, *The Long History of Coercive Health Responses in American Law*, LAWFARE (Apr. 13, 2020, 2:56 PM), <https://www.lawfareblog.com/long-history-coercive-health-responses-american-law> [https://perma.cc/S49H-5PRS] (noting “[t]he first formal quarantine law enacted by one of the American colonies followed in 1647, in Massachusetts,” but failing to realize that Margaret Jones, who was blamed for this epidemic in 1647–48, was the *first* of the so-called witches hanged by the Puritans, because they believed she caused the epidemic through magic); THOMAS HUTCHINSON, *THE HISTORY OF THE COLONY OF MASSACHUSETTS BAY* 150 (2d ed., 1765) (noting Margaret Jones was the first “witch” to be hanged for having the malignant touch and that she was blamed for the epidemic of 1647–48 that the Lawfare Blog cited above); 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 237 (Nathaniel B. Shurtleff ed., 1853) (containing the first official American quarantine law enacted in what appears to be March of 1648, though several sources say it was enacted in 1647); Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People under Guardianship*, 62 OHIO ST. L.J. 481, 494–95 (2001) (examining the puritanical roots of health laws in the Puritan laws of Massachusetts Bay Colony characterized by a “covenant” in which the interests of the individual were weighed and balanced against the interests of the state, but as God’s will was usually in favor of the state over the individual, “[t]he private interests of individuals were insignificant by comparison and hardly merited attention”); EVE LAPLANTE, *AMERICAN JEZEBEL* 149–51 (2010) [hereinafter LAPLANTE, AMERICAN] (referring to a quarantine that occurred between 1630 and 1631 to combat the bubonic plague). It is very easy to connect the dots of the thought process the Puritans started to Jeremy Bentham and Justice Holmes to *Buck v. Bell*, *Mathews*, and beyond. Compare *Mathews*, 424 U.S. at 333–34, with *Buck v. Bell*, 274 U.S. 200, 207–08 (1927) (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)) (the only case *Buck* cited was *Jacobson*, which extended Massachusetts’ cost/benefit balancing justification from pages 24–25 of *Jacobson*), John R. Schmidhauser, *Jeremy Bentham, the Contract Clause and Justice John Archibald Campbell*, 11 VANDERBILT L. REV. 801, 819–20 (1958) (conceptually connecting *Slaughterhouse* with Bentham and Holmes), CHRISTOPHER HILL, *GOD’S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION* 171, 273 (1970) (“Jeremy Bentham five years later regretted that the English Revolution had produced no Code Cromwell, and highly praised Oliver’s interest in law reform.”), PHILIP SCHOFIELD, *UTILITY & DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* 241 (2006) (noting that the purpose of Bentham’s legal positivism was the maximization of utility through cost/benefit balancing tests), WOOLRYCH, *supra* note 123, at 271–73, 300 (noting that Cromwell and the English Puritans’ embrace of legal positivism, which arguably destroyed their country, originated in Massachusetts Bay), and SIMMONS, *supra* note 191, at 22 (highlighting John Adams and James Otis’ argument that the most likely figure to pollute England with notions of legal positivism after Cromwell used it to ruin their country was the notorious American Puritan George Downing, who sponsored and achieved the passage the English Navigation Acts to oppress his own countrymen in America).

*Samson Agonistes*.<sup>339</sup> This opened a door to the establishment of Star Chambers in America for the literal castration of unwilling Americans like Kelli Dillon, who uncovered a eugenic system in California in the 2000s and who will be address in more depth in Parts II & III to follow.<sup>340</sup>

*Mathews* disrupted due process, which is the most crucial element of the law, as it is a master switch that affects potentially every law and right in relation to government power.<sup>341</sup> Perhaps the most striking indication of Powell's success is that for decades liberals broadly endorsed *Mathews* when it is directly antithetical to their interests.<sup>342</sup> The *Mathews* horcrux, being the most successful of Powell's three horcruxes, will receive special focus in Part II to follow.<sup>343</sup>

339. John Milton, *Samson Agonistes* 865–68 [1671] (“[T]hat grounded maxim / So rife and celebrated in the mouths / Of wisest men; that to the public good / Private respects must yield.”). Compare *Mathews*, 424 U.S. at 333–34 (“Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.”), extended by *Kaley v. United States*, 571 U.S. 320, 340 (2014) (“So experience, as far as anyone has discerned it, cuts against the Kaleys: It confirms that even under *Mathews*, they have no right to revisit the grand jury’s finding.”), with *Schriner & Ochs*, *supra* note 322, at 495 (describing Puritanical legal positivism’s role in facilitating colonial determinations that state interests “had to be above the self-interested pursuits of individuals” such that the cost/benefit balance always seemed to tip in favor of strong state action), and *Woolrych*, *supra* note 123, at 271–73, 300. Cf. *Holmes, Jr.*, *supra* note 27, at 1, 312 (expounding the version of “experience” that Justice Kagan applied in a *Mathews* framework to decide *Kaley*: “The distinctions of the law are founded on experience, not on logic.”); Catharine Pierce Wells, *Oliver Wendell Holmes: A Willing Servant to an Unknown God* 83–90 (2020) (Holmes “was deeply embedded in a Puritan culture”).

340. BELLY OF THE BEAST 48:05 (Erika Cohn dir., 2020) (explaining how cost/benefit balancing tests were used to castrate women in California prisons in the 2000s).

341. See *Miccio*, *supra* note 65, at 296–97 (defending a proposed collapse of “both the distinction between substantive and procedural, and the categories under a rubric of ‘natural’ rights”).

342. See Joshua J. Schroeder, *Conservative Progressivism in Immigrant Habeas Court: Why Boumediene v. Bush is the Baseline Constitutional Minimum*, 45 THE HARBINGER 46, 51–52 n.13 (2021) (explaining how cost/benefit balancing tests are used by conservative judges to “bypass liberal criticism”); *id.* at 56. Compare *Kaley*, 571 U.S. at 340, and *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)) (applying a *Mathews* balancing test), with *Margulies*, *supra* note 152, at 446.

343. There are several sources that celebrate and expound the particular significance of *Mathews* in the due process decisions of the present era. See, e.g., Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 881, 885 (2015).

CONCLUSION OF *THE DARK SIDE OF DUE PROCESS: PART I*

*The Dark Side of Due Process: Part I* covered Justice Holmes' problematic interpretation of due process and his strategy of using opposites to draw bright-line rules. It also explained how Justices Holmes and Brandeis established the origins of penumbral rights and cost/benefit balancing tests in *Buck* and *Olmstead*. Finally, it explained how Justice Powell used Holmes' strategies to extend Holmes and Brandeis' penumbral rights and cost/benefit balancing tests into the present era of legal jurisprudence.

In *The Dark Side of Due Process: Part II*, this series will take several steps deeper into the dark chasms of Justices Holmes and Brandeis' due process ideology, by discussing the quandaries caused by their positions in present-day court including the recent use of the shadow docket to nullify *Roe v. Wade*.