St. Mary's Law Journal

Volume 53 | Number 4 Article 2

12-9-2022

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ARTICLE

THE DARK SIDE OF DUE PROCESS: PART III HOW TO USE IRREVERENT DOUBLE-TALK TO SPEAK BACK TO BAD MEN

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This is Part III of a three-part series known as "The Dark Side of Due Process" published in The St. Mary's Law Journal. Parts I and II precede this Article in consecutive issues of this volume at 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.

INTRODUCTION: THE PROBLEM OF DUPLICITY IN LEGAL THOUGHT AND SPEECH

Justice Oliver Wendell Holmes, Jr. and Ralph Waldo Emerson proved that Thomas Hobbes's factions of American Hegelians were as sanguine as French *Terroristes* were about rationalizing human cruelty.[1] We have several theories of dual consciousness that owe their existence to these Hegelians.[2] Pro-cruelty, dual-consciousness rationalisms persisted as an explanation, but

1. *Compare* BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 738–41 (1945) [hereinafter RUSSELL, A HISTORY] (explaining Hegel's celebration of Hobbesian violence and cruelty), *with* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) [hereinafter Holmes, *Natural Law*] (presenting preexisting natural rights as a mere struggle for survival stating: "A dog will fight for his bone."), Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 449 (1899) [hereinafter Holmes, *Law in Science*] (presenting judicial lawmaking as a violent "struggle for life among competing ideas, and of the ultimate victory and survival of the strongest"), *and* RALPH WALDO EMERSON, ESSAYS: SECOND SERIES 175 (1845) (imagining the ideal Christmas gift, Emerson wrote: "Rings and other jewels are not gifts, but apologies for gifts. The only gift is a portion of thyself. *Thou must bleed for me.*") (emphasis added); *cf.* James A. Good, *A "World-Historical Idea": The St. Louis Hegelians and the Civil War*, 34 J. AM. STUDIES 447, 451–53 (2000) (noting that the violence that occurred in Missouri during the Civil War "led the St. Louis Hegelians to conclude that they had witnessed a necessary moment in Hegel's 'slaughter-bench' of history.").

2. Joel Porte, *Emerson, Thoreau, and the Double Consciousness*, 41 NEW ENGLAND Q. 40, 42 (1968); Sheldon M. Novick, *Justice Holmes' 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), *explaining* W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 8–9 (Brent Hayes Edwards ed., 2007) (putting forth a well-known theory of "double-consciousness" from the African American perspective, and desiring Hegelian *aufebung* and sublation here: "The history of the American Negro is the history of strife,—this longing to attain self-conscious manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the older selves to be lost."), *also examined in* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 28–30 (2019), *and in* REGINALD A. WILBURN, PREACHING THE GOSPEL OF BLACK REVOLT 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*); *see* THOMAS HOBBES, LEVIATHAN 46–48 (A. R. Waller ed., 1904) (asserting inherent human insanity because of the duality of human pride and dejection), *exemplified in* John Milton, *Samson Agonistes* 532–40 [1671]; *see also* Christopher N. Warren, *When Self-Preservation Bids: Approaching Milton, Hobbes, and Dissent*, 37 ENG. LIT. RENAISSANCE 118, 119–20, 130, 139 (2007); *cf.* Good, *supra* note 1, at 448 (noting Emerson's strong interest in Hegelianism); BERTRAND RUSSELL, UNPOPULAR ESSAYS 20 (1995) [hereinafter RUSSELL, UNPOPULAR].

not an excuse, when Donald Trump's irreverence was embraced by the evangelicals in 2016.[3]

Hobbesian cognitive dissonance exemplified by the paradoxical experience of the human emotions of pride and dejection,[4] in line with the poetry of John Donne,[5] is as real as it is alarming.[6] Hobbes's bastardized version of virtue ethics descended from the philosophies of Saint Thomas Aquinas and Aristotle.[7] However, Hobbes was the first to idealize vices as perfect and thus correct, while dismissing virtues as imperfect, disappointing, and thus incorrect and improper.[8]

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3. Eddle Harmon-Jones, *Dissonance and the President: How Supporters of the Current President Continue to Support Him.*, PSYCH. TODAY (Aug. 27, 2020), https://www.psychologytoday.com/us/blog/the-social-emotional-brain/202008/dissonance-and-the-president [https://perma.cc/R98Z-YSZA] (explaining how Christian supporters of Trump continue to do so through "cognitive dissonance"). *Compare* RUSSELL, A HISTORY, *supra* note 1, at 733–40 (explaining the Hegelian way of double-thinking and Hegel's celebration of violence and cruelty as a necessary component of statecraft, and clarifying that Hegel's vision of the ideal "free" society was a monarchy where several people are enslaved, impoverished, and abused), RUSSELL, UNPOPULAR, *supra* note 2, at 122–23, HOBBES, *supra* note 2, at 46–48, *exemplified in* John Milton, *Samson Agonistes* 1639–68 [1671] (defining suicide-as-self-sacrifice, i.e., as an expression of selfishness-made-virtue, based in Christianity, that suffers the ironies of being Hobbesian, materialist, and potentially, anti-Christ); *and* WILBURN, *supra* note 2, at 20 (examining Milton's influence over calls to violence in America), *with The Family: Wolf King* 27:18 (Netflix 2019) (presenting a way of religious thinking that Evangelicals use to support Trump as a form of virtuous self-sacrifice for the greater good, while knowing Trump is a bad man that is certainly in the service of their enemies).

4. HOBBES, *supra* note 2, at 46–48.

5. John Donne, *Holy Sonnet XIV* [1633] (arguing that religious purity can be gained through violence and abuse); *cf.* WIT (Avenue Pictures 2001) (explaining Donne's contributions to the English literature, especially his use of the literary device known as a conceit).

6. *The Family: Wolf King* 27:18 (Netflix 2019).

7. *See* HOBBES, *supra* note 2, at 46–48 (describing how the human vices of pride and dejection worked to drive humanity so insane that they would disregard their preexisting rights and lift absolute kings into power); *id.* at 109 (criticizing "the Writers of Morall Philosophie" including Aristotle and Aquinas for presuming that their virtues are apparent with uniformity to all people through natural reason by which "private Appetite is the measure of Good, and Evill" that causes "Disputes, Controversies, and at last War," which Hobbes defines as "the condition of meer nature"); ST. THOMAS AQUINAS, SUMMA OF THE SUMMA 16 (Peter Kreeft ed., 1990); Aristotle, *Nicomachean Ethics* 43–49; *cf.* Robert Arp, *The* Quinque Viae *of Thomas Hobbes*, 16 HIST. PHIL. Q. 367, 368 (1999) (quoting THOMAS HOBBES & JOHN BRAMHALL, QUESTIONS CONCERNING LIBERTY, NECESSITY, AND CHANCE 48 (1656)) ("Aquinas himself is mentioned in Hobbes's works. It is noted by Hobbes that Luther mentions Aquinas as the one who 'set up the kingdom of Aristotle, the destroyer of Godly doctrine' . . . ." (citation omitted)).

8. *See, e.g.*, HOBBES, *supra* note 2, at 21, 46–48 (stating that the language of virtues and vices is relative and "therefore . . . can never be true grounds of any ratiocination"); *id.* at 62 (positing his theory that felicity consists in prospering, not in having prospered as a replacement for virtue theory). Hobbesian vice-as-ideal could be seen as an attempt by Hobbes to besmirch Aristotle's virtue known as "magnanimity," which is sometimes translated as "pride." Aristotle, *Nicomachean Ethics* 66–67;

Hobbes's novel theory that the perfection of government through vice is preferable to an imperfect, virtue driven government was premised on the theory that the virtue of humility is futile.[9] The best exemplar of this overlooked virtue in America was the marvelous revolutionary poet, Phillis Wheatley.[10] As a leader of American revolutionary forces, Wheatley countenanced Christianity's anticipation of Hobbes's abuse of the duality in human nature by writing a glowing review of the sermons of the English Reverend Thomas Amory,

> When God's eternal ways you set in sight,
> And Virtue shines in all her native light,
> In vain would Vice her works in night conceal,
> For Wisdom's eye pervades the sable veil.[11]

Here, Wheatley presented a central theme of her poetry: a comparison of light and darkness that anticipated the Emersonian and Holmesian appeals to the Hegelian "*Abgrund*" or "*Ungrund*" void or abyss whence Nietzsche later drew his *Will to Power*.[12] Wheatley knew that darkness was the biblical

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AQUINAS, *supra* note 7, at 389, 470–72. However, with Hobbes scholars may distinguish pride from magnanimity because Hobbes did so in his definitions. *Compare* HOBBES, *supra* note 2, at 32, *with id.*, at 46 (differentiating the now accepted usage in the English language). *Cf.* RUSSELL, A HISTORY, *supra* note 1, at 550 (noting that in Hobbes's "state of nature, there is no property, no justice or injustice; there is only war, and 'force and fraud are, in war, the two cardinal virtues'").

9. HOBBES, *supra* note 2, at 46–48, 108 (declaring men inherently pervaded by pride and dejection, which in turn lifts *Leviathan* into power, and explaining how "he that should be modest, and tractable, and performe all he promises, in such time, and place, where no man else should do so, should but make himselfe a prey to others, and procure his own certain ruine"). *But see* Cicero, *De Officiis* 1.15.47 ("no duty is more imperative than that of proving one's gratitude").

10. *See* Phillis Wheatley, *An Hymn to Humanity* [1773] ("For when thy pitying eye did see / The languid muse in low degree, / Then, then at thy desire / Descended the celestial nine; / O'er me methought they deign'd to shine / And deign'd to string my lyre."). *See, e.g.*, HENRI GRÉGOIRE, AN ENQUIRY CONCERNING THE INTELLECTUAL AND MORAL FACULTIES, AND LITERATURE OF NEGROS 103 (Graham Russell Hodges ed., 1997) (presaging the romantic era in literature that Wheatley inspired, the supportive, French clergyman Grégoire read of her works and noted: "The sentimental Phillis . . . died of a broken heart.").

11. Phillis Wheatley, *To the Rev. Dr. Thomas Amory on Reading His Sermons on Daily Devotion, in which that Duty is Recommended and Assisted* [1773]; *cf.* Cicero, *De Officiis* 1.15.47 (noting that gratitude is the greatest duty).

12. *Compare* Phillis Wheatley, *To the Rev. Dr. Thomas Amory on Reading His Sermons on Daily Devotion, in which that Duty is Recommended and Assisted* [1773], *with* RALPH WALDO EMERSON, ESSAYS, FIRST SERIES 247 (1850) ("[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, *Europe in Emerson and Emerson in Europe*, *in* MR. EMERSON'S REVOLUTION 325, 326, 365–67 (Jean McClure Mudge ed., 2015) ("Unfortunately in Germany, Nietzsche misused central

womb of creation, as well as the tomb to which we are destined to return.[13] Wheatley showed us how the human imagination mimics a place of creation and rest, dark and warm, appearing as if dead but not dead, so that human beings can invent new works of art, unchained from the dogmas of inherent madness established by Hobbesian ideology.[14]

Professor Karla V. Zelaya's research into Wheatley's counter-slavery strategies found that through mimicry, Phillis Wheatley spoke "double-voiced and double-languaged."[15] Zelaya noted how Wheatley "spoke out of both sides of her mouth,"[16] and by doing so she was "able to speak back" to white power in the revolutionary era.[17] Zelaya was the first to locate the origin of Wheatley's resistance in "irreverent double-talk," in large part inspiring this series.[18]

As Zelaya described, Phillis Wheatley smiled upon her enemies with skin teeth, but her forgiveness was designed as a witness to the evils of slavery.[19] The very burden of being forced to speak in double-entendres, because of rampant cognitive dissonance in the white population, is a sign of surviving

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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. SUP. CT. HIST. 39, 42, 46–47 (2019) (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897) [hereinafter Holmes, Jr., *The Path*]) ("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.").

13. *Genesis* 1:2; *cf.* Valarie Kaur, *Speech at the National Moral Revival Watch Night Service*, YOUTUBE (Feb. 8, 2017), https://www.youtube.com/watch?v=qQ7QlKG70LE, *printed in* VALARIE KAUR, SEE NO STRANGER: A MEMOIR AND MANIFESTO OF REVOLUTIONARY LOVE vii–xv (2021).

14. *See* Matilda, *On Reading the Poems of Phillis Wheatley, the African Poetess* [1796] (confirming the inspiration Wheatley gave to the Americans); Phillis Wheatley, *On Imagination* [1773].

15. Karla V. Zelaya, *Sweat the Technique: Visible-izing Praxis Through Mimicry in Phillis Wheatley's "On Being Brought from Africa to America"* 4 (Sep. 2015) (Ph.D. dissertation, University of Massachusetts Amherst) (on file with ScholarWorks@UMass Amherst).

16. *Id.* at 67.

17. *Id.* at 84.

18. *Id.* at 92.

19. *See id.* at 11–12 ("Whether in a dining room or on the page, Wheatley may have bowed to tradition but 'only the better / to rise and strike / again'" (quoting Grace Nichols, *Skin Teeth* [1983])); *see also* Phillis Wheatley, *To the Right Honorable William, Earl of Dartmouth* [1773] ("Should you, my lord, while you peruse my song, / Wonder from whence my love of Freedom sprung, / Whence flow these wishes for the common good, / By feeling hearts alone best understood, / I, young in life, by seeming cruel fate / Was snatch'd from Afric's fancy'd happy seat: / . . . Steel'd was that soul and by no misery mov'd / That from a father seiz'd his babe belov'd: / Such, such my case. And can I then but pray / Others may never feel tyrannic sway?").

abuse.[20] Wheatley demonstrated how the humble may yet dispute Hobbesian plays of freedom against slavery that keep both through Hegelian "dialectical sublation" (*Aufhebung*).[21]

Hobbes convinced the Puritans to abandon imperfect republican virtues for the perfect vices of the Lord Protector Oliver Cromwell.[22] Phillis Wheatley thoughtfully countered the Cromwellian madness Hobbes stoked by using double-speak in her funeral elegies to minister to her enemies as well as her friends.[23] Americans may yet follow her example, to minister to those still stuck in a paradoxical state of madness as exemplified by Hobbes, Hegel, and Holmes.[24]

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20. Zelaya, *supra* note 15, at 4; *see* Letter from Phillis Wheatley to Samson Occom (Mar. 11, 1774) (speaking of slaveholders: "This I desire not for their Hurt, but to convince them of the strange Absurdity of their Conduct whose Words and Actions are so diametrically, opposite. How well the Cry for Liberty, and the reverse Disposition for the exercise of oppressive Power over others agree,—I humbly think it does not require the Penetration of a Philosopher to determine[.]"); *cf.* RUSSELL, A HISTORY, *supra* note 1, at 730–35.

21. *Compare* Zelaya, *supra* note 15, at 4, *with* Guyora Binder, *Master, Slavery, and Emancipation*, 10 CARDOZO L. REV. 1435, 1477 (1989) (explaining Hegel's dialectic treatment of slavery versus freedom: the idea of "'*Aufhebung*'—a negation that also preserves"); *cf.* RUSSELL, A HISTORY, *supra* note 1, at 733–34.

22. HOBBES, *supra* note 2, at 46–48; *id.* at 268 (perhaps imagining Cromwell when he hoped "that one time or other, this writing of mine, may fall into the hands of a Soveraign, who will consider it himselfe, (for it is short, and I think clear,) without the help of any interessed, or envious Interpreter; and by the exercise of entire Soveraignty, in protecting the Publique teaching of it, convert this Truth of Speculation, into the Utility of Practice"); *see* James J. Hamilton, *Hobbes the Royalist, Hobbes the Republican*, 30 HIST. POL. THOUGHT 411, 450 (2009).

23. Letter from Phillis Wheatley to Samson Occom (Feb. 11, 1774) (responding directly to Hobbesian double-speak in America: "How well the Cry for Liberty, and the reverse Disposition for the exercise of oppressive Power over others agree,—I humbly think it does not require the Penetration of a Philosopher to determine."). *See* Phillis Wheatley, *To His Honor the Lieutenant Governor on the Death of His Lady March 24th, 1773* [1773] (expressing deep seated compassion for her enemies, here the loyalist Andrew Oliver, by helping them face death and offering them a song of hope: "All conquering Death! By thy resistless power, / Hope's tow'ring plumage falls to rise no more!"); *cf.* 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, 97–99 (2021) [Schroeder, *We Will*] (focusing on Wheatley's longest poem *Niobe in Distress* as an example of how an artist can love her enemies as one of her own); 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, 159–60 n.898 (2021) [hereinafter Schroeder, *Leviathan*] ("Wheatley focused directly upon the Puritan funeral elegy and redeemed it in the present moment to support the revolution with a unique song of hope for the world to come."); *id.* at 141 (quoting Phillis Wheatley's consideration of the Puritan experiment: "Indeed, ever since the Puritan Revolution sank England into 'the great depth . . . hell's profound domain,' the English Crown came to embody the political realism espoused by Cromwell."); Kesha, *Shadow* [2020].

24. *See* Harmon-Jones, *supra* note 3 (discussing the dissonance between Trump supporters and their morals and beliefs); Zelaya, *supra* note 15, at 84.

In pursuit of Wheatley's ministry, Part III examines pre-existing human rights in the light of the *Free Kesha* movement.[25] Then it will explain the American distinction between rights and powers, and especially how this distinction separated America from British Monarchy.[26] Finally, Part III will demonstrate how John Adams used his memory and imagination, rather than an innate capacity for reasoning to safeguard the common law in America.[27]

A. HOW TO USE THE *FREE KESHA* MOVEMENT AS A FRAMEWORK FOR PRE-EXISTING RIGHTS

In his *Lochner v. New York* dissent, Justice Holmes stated his belief that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[28] As already noted in Parts I & II of this series, Holmes did not follow his own advice.[29] Rather, Holmes revealed the irony in his *Lochner* statement against economic theories when he construed the First Amendment to embody John Stuart Mill's utilitarian economic theory of a "marketplace of ideas."[30]

Holmes always seemed to speak out of both sides of his mouth.[31] Thus, to express disagreement with Holmes is tricky, because silence regarding one of his contradictions could be taken as an implicit endorsement of the

25. *See* Maura Johnston, *Kesha and Dr. Luke: Everything You Need to Know to Understand the Case*, ROLLING STONE (Feb. 22, 2016, 10:34 PM), https://www.rollingstone.com/music/music-news/kesha-and-dr-luke-everything-you-need-to-know-to-understand-the-case-106731/ [https://perma.cc/HTV9-FGNQ].

26. *Cf.* JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 34 (C. Bradley Thompson ed., 2000) [hereinafter ADAMS, THE REVOLUTIONARY] (considering "matters of power and of right").

27. *Id.* at 145.

28. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

29. *Id.*

30. Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes' Free Speech Defenses*, 22 YALE J. L. & HUMAN. 35, 38–39 (2010); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 19 (2004); Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in* Buck v. Bell, 43 CATHOLIC LAWYER 125, 131–32 (2004) (noting on a more serious note that Holmes also applied Mill's utilitarian economics in support of eugenics).

31. Rodney A. Smolla, *The Trial of Oliver Wendell Holmes*, 36 WM. & MARY L. REV. 173, 217 (1994) (noting how Holmes actually believed he was being consistent in *Debs v. United States* and did not change his mind in *Abrams v. United States* but applied the same way of thinking as he always had done).

opposite.[32] As demonstrated here, Kesha's style of irreverent double-talk,[33] if it may be fairly compared to Wheatley's original strategies,[34] provides a useful framework to contend with the cognitive dissonance in Justice Holmes.[35]

Justice Holmes' dissent in *Abrams v. United States* had a profound effect upon the Court's later First Amendment decisions.[36] Due to Justice Holmes' induction of a utilitarian economic theory of free speech into constitutional law,[37] the court opened the door to Hobbesian force and fraud in America.[38] QAnon grew up under Holmes' marketplace of ideas ideology until it attempted to end American democracy on January 6, 2021, where QAnon followers equated a violent, Trumpian *coup d'état* with First Amendment freedoms of speech and assembly.[39]

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32. *Compare Lochner*, 198 U.S. at 75 (counseling against the constitutionalization of economic theories that Holmes disliked), *with* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (constitutionalizing utilitarian economic theory); *cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (encouraging the states' "right to experiment" with "things social and economic" and giving the now popular idea of the states as "laborator[ies]"—this view seems to both embrace and reject Holmes' contradictions in *Lochner* and *Abrams*, and it, of course, turned a blind eye toward *Buck v. Bell*). One of many examples in Holmes' scholarship is found in *Natural Law* where he purported to expound the natural law, but at the same time disparaged pre-existing natural rights; this made mustering a response to Holmes difficult, because you would be in trouble either way; if you doubted the existence of natural law *or* if you tried to vindicate the natural law's pre-existing rights, Holmes presumably both agreed and disagreed with you at the same time. Holmes, *Natural Law*, *supra* note 1, at 41–42.

33. Kesha, *Praying* [2017]; *see also* Kesha, *Hymn* [2017]; Kesha, *Shadow* [2020].

34. *Cf.* Zelaya, *supra* note 15.

35. *See, e.g.*, Smolla, *supra* note 31, at 217 (highlighting the difficulties in expressing disagreement with Holmes).

36. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458 (2011) (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)); Virginia v. Black, 538 U.S. 343, 358 (2003) (citing *Abrams*, 250 U.S. at 628 (Homles, J., dissenting)); *Johnson*, 491 U.S. at 418–19 (citing *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting)).

37. Ten Cate, *supra* note 30, at 61–62; Blasi, *supra* note 30, at 19; *cf.* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 955 (1919) (lauding Justice Holmes' transplantation of the philosophy of John Stuart Mill into First Amendment jurisprudence).

38. *See Snyder*, 562 U.S. at 458 (quoting *Johnson*, 491 U.S. at 414); *Black*, 538 U.S. at 358 (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); *cf.* Ten Cate, *supra* note 30, at 66–67 ("The notion of societal progress, which underlies Mill's free speech defense, seems utterly foreign to Holmes."); Holmes, *Law in Science*, *supra* note 1 at 449 (explaining progress as a much more brutal undertaking than Mill idealized, i.e., a "struggle for life among competing ideas, and of the ultimate victory and survival of the strongest").

39. Justin Hyland, *Conspiracy Speech: Reimagining the First Amendment in the Age of QAnon*, 44 HASTINGS COMM. & ENT. L.J. 1, 11 (2021) ("As it currently stands, the jurisprudence is skewed heavily toward speech-protection. This preference mirrors the presiding liberal First Amendment regime . . . . Inherent within the prevailing dogma is the concept of the 'marketplace of ideas' . . . [which] fundamentally resists government censorship, even censorship of dangerous or hateful expression.

Perhaps free speech inherently harbors dangerous ideologies.[40] Perhaps the First Amendment was predestined to be conflated with Mill's utilitarian economic theories.[41] Even if this were so, Holmes' embrace of the marketplace of ideas did not save Eugene Debs,[42] nor did it help members of Anonymous reveal the lies of Scientology,[43] nor did it help Heather Heyer overcome American Nazis in Charlottesville,[44] nor did it safeguard those who sang out *This Little Light of Mine* in the wake of Heyer's death from threats of Hobbesian force and fraud.[45]

Instead, speech regulation is left to the democratic masses."); *id.* at 18–19, 22, 40 (referring to January 6, 2021 as part of the "violent action" that is "linked directly to" the speech of QAnon conspiracy theorists); James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 18–19 (2008) ("Violent acts . . . may be intended to convey a message every bit as clearly as the best of theatre pieces, and the public is every bit as likely to understand the message."); Alec MacGillis, *Inside the Capitol Riot: What the Parler Videos Reveal*, PROPUBLICA (Jan. 17, 2021, 3:00 PM), https://www.propublica.org/article/inside-the-capitol-riot-what-the-parler-videos-reveal (quoting the speech of Capitol rioters: "'This is *our* house. This is not their house. Our tax money pays for their salaries, our tax money pays for everything. It pays for their freaking $40,000 furniture allotment for their offices while we have families starving in the street.' *Our house*. It is the most dominant phrase of any of the chants shouted by the mob as it presses into the Capitol. It is an expression of entitlement—white nativist entitlement, as many have noted: This is *our* house, *our* country."). To the minds of many QAnon supporters of the January 6 insurrection, the Capitol rioters were representatives of the people as a whole and simply destroyed their own house in protest of Trump's impending political loss under prevailing First Amendment jurisprudence that protects "symbolic speech." Texas v. Johnson, 491 U.S. 397, 406 (1989) (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)) ("Johnson's burning of the flag was conduct 'sufficiently imbued with elements of communication,' . . . to implicate the First Amendment."). *Compare* Ten Cate, *supra* note 30, at 67 (quoting Holmes, *Natural Law*, *supra* note 1, at 40) (noting that Holmes "defines truth as 'the majority vote of that nation that could lick all others'"), *with Q: Into the Storm, The Storm* (HBO 2021).

40. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43–44 (1977); *cf.* STEVEN D. SMITH, FOREORDAINED FAILURE 13–15 (1995).

41. Blasi, *supra* note 30, at 19.

42. Smolla, *supra* note 31, at 217.

43. Brian Knappenberger, *We Are Legion: The Story of the Hacktivists*, YOUTUBE (Nov. 25, 2005), https://www.youtube.com/watch?v=-zwDhoXpk90 [https://perma.cc/J2SV-6V76] (telling the story of how Anonymous took on Scientology, and how Scientology beat the hacktivists by using the United States courts).

44. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/ [https://perma.cc/8YUC-DYWC].

45. *Id.* ("At 9:30 a.m., about 30 clergy members clasped arms and began singing 'This Little Light of Mine.' Twenty feet away, the white nationalists roared back, 'Our blood, our soil!'"); Katherine Cusumano, *In Charlottesville, a Low-Key Vigil for Heather Heyer Turned Into a Ceremony of Thousands Singing By Candlelight*, W MAG. (Aug. 17, 2017), https://www.wmagazine.com/story/charlottesville-heather-heyer-vigil ("Heyer's mother, Susan Bro, took the podium during the ceremony: 'They tried to kill my child to shut her up. Well, guess what? You just magnified her,' she said . . . ."); Cheryl C. Boots, *"This Little Light of Mine" vs. "Jews Will Not Replace Us"*, CTR. INTERDISCIPLINARY TEACHING & LEARNING:

Holmes' sympathizers usually argue that he "changed his mind" about the First Amendment.[46] However, a wider look at his contradictory opinions seems to suggest he was actually subsumed by Hobbesian double-consciousness or cognitive dissonance, such that he unwittingly held several contradictory views at the same time.[47] Prior to Kahneman & Tversy's Nobel Prize-winning research that scientifically demonstrated the flaws of rationalistic thought,[48] Professor Rodney A. Smolla attempted to expose Holmes' contradictions.[49]

IMPACT (2018), https://sites.bu.edu/impact/previous-issues/impact-summer-2018/this-little-light-of-mine-vs-jews-will-not-replace-us/ ("Chanting may not have caused Heather Heyer's death, but it contributed to an environment of verbal and physical aggression that led to her murder."); *cf.* Virginia v. Black, 538 U.S. 343, 358 (2003); 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, 389 (1992) [hereinafter O'Connor, *They Often*] (presenting Holmes' disparagement of human rights, when he said that rights were "no more than a romantic ideal with no place in the rough and tumble world"—Holmes' free speech and human rights ideologies clearly resonated with those of the Charlottesville protesters).

46. *See* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 243 (2013); David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 141 (1982). *But see* Smolla, *supra* note 31, at 217 (noting Holmes likely *did not* change his mind); Chafee, Jr., *supra* note 37, at 944, 967–69 (demonstrating that despite this article is usually given credit for convincing Justice Holmes to author his dissent in *Abrams*, it did not appear to contend that *Schenck* or *Debs* was wrongly decided).

47. *Compare* Holmes, *Law in Science*, *supra* note 1, at 457 (exemplifying his strategy of pulling bright line rules from between the contradictions in law or society), *with* HOBBES, *supra* note 2, at 46–48 (explaining how a totalitarian government can be derived from the contradictory emotional state of pride and dejection), *and* RUSSELL, A HISTORY, *supra* note 1, at 730–35 (explaining the Hegelian version of Hobbesian ideology popular in the WWII era).

48. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 377–78, 381 (2011) (noting that the "tyranny of the remembering self" stops human beings from accurately measuring their past experiences of pain or pleasure, such that they are not inherently capable of knowing what actions can be taken in the present to maximize their pain or pleasure in the future, i.e., Benthamite prophesies of future pain or pleasure are unreliable and utilitarianism is unreliable); *see* Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting) (constitutionalizing utilitarian economic theory); Holmes, Jr., *The Path*, *supra* note 12, at 457–58 (setting forth a theory "of dogma or systematized prediction which we call the law," and hoping that by studying the law as he defined it men would be enabled "to prophesy in their turn," i.e., Holmes' idea of the law itself turned upon the idea that human beings are inherently capable of determining right action from past experience, something that can no longer be presumed possible under Kahneman's research—Holmes' statements such as "[t]he primary rights and duties with which jurisprudence busies itself again are nothing but prophecies," means that Holmes only believed in laws and rights that manifested in actual practice, not merely those that have been legislated or constitutionally ratified on paper, such that Holmes is at once both the absolute idealist and the absolute skeptic); *id.* at 475 ("to be a master of [the law] means to look straight through all the dramatic incidents and to discern the true basis for prophecy").

49. Smolla, *supra* note 31, at 217; *cf.* RUSSELL, A HISTORY, *supra* note 1, at 673 (noting a "growth of unreason throughout the nineteenth century and what has passed of the twentieth").

Holmes' contradictory ideas regarding free speech and the marketplace of ideas took center stage in copyright law.[50] On one hand, like Mill's marketplace of ideas, Justice Holmes disagreed with the Court's expansion of common law copyright to create a new form of property in *International News Service v. Associated Press*.[51] On the other hand, Holmes seemed to say the exact opposite in *Bleistein v. Donaldson Lithographing Company*.[52]

If one reads only *International News Service*, one may think Holmes opposed overly expansive property rights out of prudential restraint.[53] However, when reading *International News Service* in the light of *Bleistein*, it appears that Holmes only rejected copyright-as-property because if he acknowledged a judge-made property right the scope of the property right could be restrained by judges and juries rather than legislatures and statutes.[54] Holmes preferred property rights granted by Congress to those maintained by judges,[55] which can sound like judicial restraint and perhaps in a sense it is, but it also appeared to bring about Hohfeldian judicial activism,[56]

50. *Compare* Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Opinion per Holmes, J.), *with* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

51. *Int'l News Serv.*, 248 U.S. at 246 (Opinion per Holmes, J.).

52. *Bleistein*, 188 U.S. at 252. Congress relied on Holmes' opinion in *Bleistein* to extend copyright to potentially any original work capable of being authored and fixed in a tangible medium. *See* Lydia Pallas Loren, *Law, Money, and Visual Art*, 22 LEWIS & CLARK L. REV. 1331, 1348 (2019).

53. *Int'l News Serv.*, 248 U.S. at 246 (Opinion per Holmes, J.).

54. *Compare id.*, *with Bleistein*, 188 U.S. at 252. The real travesty of Holmes' opinion in *International News Service* is that he wanted to enjoin the International News Service in order to force it to acknowledge the real source of the news it reported, which was the Associated Press. *Int'l News Serv.*, 248 U.S. at 246 (Opinion per Holmes, J.). Yet, by extension of his original thought, he denied any property could exist in the Associated Press's labor to produce the news, which would have been a much sounder basis for his opinion that an injunction should issue; the right he wanted to protect, while failing to allow its existence in words, appeared to be the original moral right of attribution, which was affirmed in *Folsom v. Marsh* and vindicated in the American Revolution by Phillis Wheatley. *See* Schroeder, *We Will*, *supra* note 23, at 52 n.450.

55. *Compare Bleistein*, 188 U.S. at 252 (presenting the legal positivist idea that anything that carries value can be property), *with* HOBBES, *supra* note 2, at 21 ("For one man calleth Wisdome, what another calleth feare; and one cruelty, what another justice; one prodigality, what another magnanimity; and one gravity, what another stupidicy, &c. And therefore such names can never be true grounds of any ratiocination.").

56. *See* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 711 n.4, 759–63 (1917) (using Justice Holmes' nihilistic, Hobbesian relativism as a foundation for a monetary-value-based view of property, premised on relationships rather than things, which in turn, proliferated potentially all conceivable property rights known as the bundle of sticks analogy); *cf.* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 330, 335, 360 (1980) (using Hohfeld as a rubric, American jurists transformed the concept of property until it "was no longer solely rights over things, but rights to any

namely, the dephysicalization of property and the invention of the bundle of sticks way of thinking about property rights, neither of which can be categorized as judicial prudence.[57]

Holmes' contradiction can be observed in a side-by-side comparison of quotations in both cases.[58] In *International News Service* Holmes wrote, "Property, a creation of law, does not arise from value, although exchangeable—a matter of fact."[59] In *Bleistein*, Holmes wrote for the Court that if creative works "command the interest of any public, they have a commercial value," and therefore "have rights entitled to the protection of the law."[60]

First, Holmes stated, "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations."[61] Then, Holmes argued that the Court cannot grant property rights to something just because it has value.[62] In *International News Service* Holmes participated in the very "dangerous undertaking" that he warned against in *Bleistein*,[63] all the while defending an injunction to secure the foundation of common law copyright, which is a form of common law property, in the attribution rights of authors.[64]

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valuable interest"); Joshua J. Schroeder, *Bringing America Back to the Future: Reclaiming a Principle of Honesty in Property and IP Law*, 35 HAMLINE J. PUB. L. & POL'Y 1, 4 (2014) [hereinafter Schroeder, *Bringing*].

57. Vandevelde, *supra* note 56, at 360; *cf.* Loren *supra* note 52, at 1342 (explaining in practical terms how establishing monetary value for art tends to have the effect of legitimizing the artwork). Professor Loren's observation about the role of monetary value in establishing the theoretical existence of an artist's property rights under statute took an extremely uncomfortable role in case of Vivien Meyer, a photographer who never sought to monetize her photographs, and whose legacy is only known to the public because a random person found her film roles and began to internalize the value of her photographs, treating them as if he were their author in order to avail himself of Visual Artist Rights Act (VARA) rights by signing the backs of the photos. VARA, 17 U.S.C. § 106A(a); 17 U.S.C. § 101 (defining a protectable "work of visual art" as "a still photographic image produced for exhibition purposes only . . . in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author" as a "work of visual art," which may claim protections under VARA); *Documentary Film: Finding Vivian Maier*, http://www.vivianmaier.com/film-finding-vivian-maier/ [https://perma.cc/398D-V2E3] (last visited on Apr. 24, 2022) (a webpage owned by the "Maloof Collection, Ltd.").

58. *Compare Int'l News Serv.*, 248 U.S. at 246 (Opinion per Holmes, J.), *with Bleistein*, 188 U.S. at 251–52.

59. *Int'l News Serv.*, 248 U.S. at 246 (Opinion per Holmes, J.).

60. *Bleistein*, 188 U.S. at 252.

61. *Id.* at 251.

62. *Int'l News Serv.*, 248 U.S. at 246 (Opinion per Holmes, J.).

63. *Compare id.*, *with Bleistein*, 188 U.S. at 251–52.

64. *Int'l News Serv.*, 248 U.S. at 248 (Opinion per Holmes, J.) ("I think that . . . the defendant should be enjoined from publishing news obtained from the Associated Press for hours after publication by the plaintiff unless it gives express credit to the Associated Press, the number of hours

Both Holmes in *International News Service* and Holmes in *Bleistein* arguably applied the marketplace of ideas framework.[65] The marketplace of ideas prefers that judges abstain from enforcing the First Amendment objects of the encouragement of peace and the discovery of truth,[66] for fear that it would have a chilling effect.[67] Paradoxically, naming forums for speech a "marketplace" presumes a measure of enforceable good faith and fair dealing to avoid force or fraud, which are the actual elements in relation to speech that should be feared for their chilling effects.[68]

A similar irony pervaded the *Lochner* idea of *laissez faire* freedom of contract.[69] This theory was the conceptual descendent of the English antebellum case *Le Louis*, which advocated the absolute irony of a free trade in human flesh.[70] The freedom of contract ideology was later translated into the postbellum era in America by *The Slaughterhouse Cases*,[71] as presented

and the form of acknowledgment to be settled by the district court."). Justice Holmes missed a golden opportunity to vindicate the copyright ideals upheld in *Folsom v. Marsh* that were ultimately founded upon the copyright of Phillis Wheatley in 1772. *Id.*; Schroeder, *Leviathan*, *supra* note 23, at 210.

65. *Compare Int'l News Serv.*, 248 U.S. at 246 (Opinion per Holmes, J.), *with Bleistein*, 188 U.S. at 251–52; *cf.* Smolla, *supra* note 31, at 217 (maintaining the likelihood that despite his contradiction that Holmes did not intend to change his mind).

66. ROGER WILLIAMS, THE BLOODY TENENT 1, 11–13 (1644) [hereinafter WILLIAMS I] (naming the two purposes of free speech throughout: truth and peace); *cf.* Isaac Backus, *An Appeal to the Public for Religious Liberty* 25–26 [1773] (quoting ROGER WILLIAMS, THE BLOODY TENENT MADE YET MORE BLOODY 192 (1652) [hereinafter WILLIAMS II]).

67. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977) (per curiam); *cf.* Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). *Compare Abrams*, 250 U.S. at 630 (Holmes, J., dissenting), *with Int'l News Serv.*, 248 U.S. at 246 (Opinion per Holmes, J.), *and Bleistein*, 188 U.S. at 251–52.

68. *Compare Abrams*, 250 U.S. at 630 (Holmes, J., dissenting), *with* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 319, 323–25, 332, 381 (1881) (giving examples of how contracts and property acquisitions with a basis of force or fraud are voidable, and that it is incumbent upon the courts to enforce such limitations on contracts so as to make marketplaces free from force or fraud).

69. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

70. Le Louis [1817] 2 Dodson 210, 264 (Eng.).

71. Allgeyer v. Louisiana, 165 U.S. 578, 589–90 (1897), *citing* Butcher's Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring), *decided according to* Slaughterhouse Cases, 83 U.S. 36, 71–76 (1873) (preserving and extending *Dred Scott's* interpretation of the United States social compact to ensure workers' rights continued to be unprotected despite African slavery being abolished). Some scholars point to Justice Field's *Slaughterhouse* dissent as the origin of the freedom of contract ideology, but this would be to take the *laissez faire* doctrine seriously when in fact its purpose was to justify derogations of workers' rights like the majority of *Slaughterhouse* did, without an actual, logical basis. *Slaughterhouse*, 83 U.S. at 106 (Field, J., dissenting); *cf.* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citing to the majority opinion in *Slaughterhouse* as lead support for "the right of the individual to contract").

in *The Dark Side of Due Process: Part I*,[72] and was most recently reinvigorated in *Integrity Staffing Solutions, Inc. v. Busk*.[73]

In *Busk*, the Court decided that the presupposition of all work being paid work is only triggered if one enters into a written contract with their employer.[74] Without written contract terms explicitly stating that all work is to be paid work, some work may be unpaid, i.e., under *Busk* what is basically slave labor can now be implicitly required *without* a written contract as a condition of being hired for other paid work.[75] *Busk* may be interpreted by future courts to mean that all implied contracts for work are contracts for indentured servitude unless a written provision in a contract state otherwise.[76]

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72. This topic is discussed at note 265 of *The Dark Side of Due Process: Part I* and accompanying text, which cites to these sources: *Slaughterhouse*, 83 U.S. at 77–82, 105 (disregarding the Civil Rights Act of 1870 in the context of 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 23, at 274–76 (explaining the original conception of "the rights of ordinary working people as a right of life").

73. Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. 27, 36–37 (2014) (dismissing the workers' claim for unpaid work under federal law for lack of a written contract naming their specific activities as payable: "These arguments are properly presented to the employer at the bargaining table, see 29 U.S.C. § 254(b)(1), not to a court in an FLSA [Fair Labor Standards Act of 1938, as amended by the Portal to Portal Act of 1947] claim.").

74. *Id.*

75. *Id.* The question of the enforcement of contracts for personal services, like the employment contracts litigated in *Busk*, was traditionally linked to a legal discussion about how employment law must preclude the condition of slavery and Judge Kornreich specifically noted that the court was treading this near this line in Kesha's lawsuit as well. Gottwald v. Sebert, 2016 N.Y. Mic. LEXIS 5202, at *32 (N.Y. Sup. Ct. 2016) (citing Am. Broadcasting Cos. V. Wolf, 52 N.Y.2d 394, 401–02 (N.Y. App. Div. 1981)) ("Courts generally will not enforce a contract for personal services because slavery has been outlawed since the 19th century."); *see* Lea S. VanderVelde, *The Gendered Origins of the* Lumley *Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 779, 794–95 (1992) (explaining the role of slavery as a foil in the ebb and flow of American employment law that is too often forgotten especially in the discussion of entertainment contracts involving women: "When *Lumley* first appeared in the United States, the cultural repulsion to anything that even hinted of slavery led to its unequivocal rejection. But later in the century, the cultural aversion to mastery had lessened and no longer seemed to apply to men's domination of women in particular."). *Busk's* apparent lack of concern about whether slavery could occur due to its interpretation of the employment law bucks the employment law tradition observed by Professor VanderVelde of using slavery as a foil to ensure justice in the context of not only the employment of women, but of the entire working class. *Id.*; *Busk*, 574 U.S. at 36–37.

76. *See Busk*, 574 U.S. at 36–37 (deciding workers have the right and power to make their work compensable by negotiating for it and securing it in a written contract, and giving this freedom of

Justice Holmes believed that workers had no relevant preexisting rights to health or safety on the job,[77] and he did not believe in Lockean property creation,[78] or even the right to an education.[79] Nevertheless, he did believe that Congress and state legislatures could expand workers' legal rights,[80] secure rights to compensation for labor,[81] and the citizen's right to privacy.[82] These contradictions in the law, as exemplified by Holmes, explains how Kesha's preexisting property rights were essentially maximized by Congress,[83] while her most essential employment rights were denied existence by the court in *Gottwald v. Sebert* (*Kesha v. Dr. Luke*).[84] Congress can maximize Kesha's earning power for Sony,[85] but cannot protect her from violence that is inflicted at work directly under Sony's watch.[86]

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contract rationale as the reason why federal law does not make Amazon's requirement that warehouse workers go through unpaid security checks compensable under federal law), *applied by* Balestrieri v. Menlo Park Fire Prot. Dist., 800 F.3d 1094, 1100–01 (9th Cir. 2015), *and* Dinkel v. Medstar Health Inc., 99 F. Supp. 3d 37, 40 (D.C. Cir. 2015); *cf.* Lumley v. Wagner [1852] 42 Eng. Rep. 687 (Eng.); VanderVelde, *supra* note 75, at 795, 806 (citing Ford v. Jermon, 6 Phila. 6 (Dist. Ct. 1865); Daly v. Smith, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874)) (explaining the employment contracts disputed in American courts adjudicated after *Lumley* was decided around the time the Thirteenth Amendment was ratified, and noting cases that expanded (i.e., *Ford v. Jermon*) and narrowed (i.e., *Daly v. Smith*) workers' rights involving *Lumley*, especially their right to quit their jobs).

77. *See* Quong Wing v. Kirkendall, 223 U.S. 59, 63–64 (1912) (commenting upon the differentness of Chinese people, Justice Holmes infamously wrote that "the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference"—this sentiment directed at Chinese women, implying their work was inferior, informed his opinions in favor of states regulating women's employment generally symbolized by *Muller v. Oregon*); *cf.* Holmes, *Natural Law*, *supra* note 1, at 41–42 (describing his general opposition to the idea of pre-existing rights).

78. Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Opinion per Holmes, J.).

79. Meyer v. Nebraska, 262 U.S. 390, 403, 412–13 (1923) (Holmes, J., dissenting) (noting the *Meyer* dissent was appended after the next case *Bartels v. Iowa*, which was decided according to *Meyer*, in order to allow languages other than English to be taught in public schools).

80. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 567–68 (1923) (Holmes, J., dissenting).

81. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903) (explaining *not* calling the copyrights secured by Congress "property" but securing these rights all the same); *Adkins*, 261 U.S. at 567–68 (Holmes, J., dissenting).

82. Olmstead v. United States, 277 U.S. 438, 469–71 (1928) (Holmes, J., dissenting).

83. *Bleistein*, 188 U.S. at 252; Eldred v. Ashcroft, 537 U.S. 186, 221–22 (2003) (affirming the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998).

84. Gottwald v. Sebert, 193 A.D.3d 573, 582 (N.Y. App. Div. 2021).

85. *Bleistein*, 188 U.S. at 252; *Eldred*, 537 U.S. at 221–22 (expanding copyright protections to what many consider an extreme, despite the "limited times" requirement of U.S. CONST. art. I, § 8, cl. 8); *see* Loren *supra* note 52, at 1342 (noting that "money changes things").

86. *Gottwald*, 193 A.D.3d at 582; *see* Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. 27, 36–37 (2014); *cf.* VanderVelde, *supra* note 75, at 806 (discussing how struggles with employment law, like Kesha's struggle to reclaim her right to quit working for Dr. Luke, seem to come straight out of *Daly v. Smith*, without consideration of *Ford v. Jermon*).

After allegedly surviving abuse and rape at the hands of Lukasz Sebastian Gottwald, known as "Dr. Luke," Kesha requested that a California court release her from her contract with him.[87] Dr. Luke sued Kesha for defamation and breach of contract in New York State.[88] Kesha dropped her suit in California to focus on the lawsuit in New York countersuing Dr. Luke in New York state court.[89]

All of Kesha's countersuits were dismissed by Judge Shirley Werner Kornreich,[90] who failed to properly recuse herself.[91] In a decision *The Atlantic* labeled "mind-bending,"[92] Kornreich dismissed Kesha's tort suits refusing to consider "Gottwald's California conduct" with the unfortunate choice of words: "Every rape is not a gender-motivated hate crime."[93] In another decision, Kornreich decided that Kesha's rape under contract was

87. Dee Lockett et al., *The Complete History of Kesha's Legal Fight Against Dr. Luke*, VULTURE (Apr. 23, 2021), https://www.vulture.com/article/timeline-keshas-legal-fight-against-dr-luke.html [https://perma.cc/KUE5-UX4U].

88. *Id.*

89. *Id.*

90. Gottwald v. Sebert, 2016 WL 1365969, at *10 (N.Y. Sup. Ct. 2016).

91. *See* Chris Spargo & Patrick Lion, *Sleeping With the Enemy? Judge Who Tossed Out Kesha's Case Against Sony Married to Partner at Law Firm that Represents the Music Company*, DAILYMAIL (Aug. 25, 2016, 11:26 AM), https://www.dailymail.co.uk/news/article-3758317/The-judge-threw-Kesha-s-case-against-Sony-married-lawyer-firm-works-record-label.html [https://perma.cc/78A4-TA9R] (indicating Judge Kornreich had a conflict of interest in Kesha's case); *see also* VanderVelde, *supra* note 75, at 804 (noting that New York case law on the topic of controlling female singers arose from *Hayes v. Willio* where Judge Daly failed to recuse himself, because his business interests as well as his brother's benefited from the ruling); James V. Grimaldi et al., *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J. (Sept. 28, 2021, 9:07 AM), https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421 [https://perma.cc/CJD2-ED7Y] (counting at least 685 federal court cases where judges failed to recuse themselves since 2010, violating the law).

92. Spencer Kornhaber, *Kesha's Legal Paradox*, THE ATLANTIC (Apr. 7, 2016), https://www.theatlantic.com/entertainment/archive/2016/04/kesha-dismissal-statute-of-limitations-dr-luke/477261/ [https://perma.cc/X392-W728] [hereinafter Kornhaber, *Kesha's Legal*]:

> Perhaps the most mind-bending aspect of Wednesday's decision involves location. Kesha initially filed her claims against Gottwald in a California court and said all along that the abuse happened in California. But Gottwald's side successfully requested that the case be moved to New York, citing a provision in Kesha's record contract about selecting the venue where legal disputes related to that contract are heard. Once there, though, Luke's side argued for dismissal of Kesha's claims on the ground that they happened in California and therefore did not violate New York law. Kornreich agreed with this argument, which would seem to raise the question of how Kesha's allegations could ever get full consideration in civil court if the defense can move the case away from where the abuse actually happened.

93. *Gottwald*, 2016 WL 1365969, at *1, *9.

"foreseeable,"[94] and paradoxically dismissed her reasons to be released from her contracts as too "speculative."[95]

Then, despite Kornreich's refusal to consider the alleged crimes Dr. Luke committed in California, the Honorable Jennifer G. Schecter decided that Kesha's filing of a lawsuit in California could be a legitimate basis of Dr. Luke's suit.[96] In another decision, Judge Schecter held that Kesha defamed Dr. Luke *per se* for privately texting Lady Gaga to warn her about Dr. Luke and perhaps to get advice from a fellow female artist about the situation.[97] This decision was affirmed on appeal, where, in yet another mind-bending twist, the court decided that Dr. Luke, who is famous in his own right, is a private figure.[98]

Kornreich and Schecter turned a blind eye to the research of Professor Lea S. VanderVelde into the sexist bases of New York entertainment law.[99] They became willing agents of the retrenchment of New York cases like *Daly v. Smith* to virtually shackle female artists to their male overseers.[100] It is almost unbearable to witness modern judges

94. Gottwald v. Sebert, 2017 WL 1062924, at *5 (N.Y. Sup. Ct. 2017), *aff'd*, 161 A.D.3d 679 (N.Y. App. Div. 2018) ("Gottwald's allegedly abusive behavior was foreseeable.").

95. *Id.* ("It is speculative, not justiciable, whether Sony's contract is ending and whether it will be able to assist after this month.").

96. *See* Kornhaber, *Kesha's Legal*, *supra* note 92 (detailing Kornreich's ruling). *Compare Gottwald*, 2016 WL 1365969, at *9, *with* Gottwald v. Sebert, No. 653118/2014, 2018 WL 4181723, at *4 n.9 (N.Y. Sup. Ct. 2018) (creating an exception to Civil Rights Law § 74, which usually precludes court filings from being a basis for a SLAPP suit, stating "a trier of fact could possibly conclude that the California complaint was a sham maliciously filed solely to defame plaintiffs as part of Kesha's alleged campaign to destroy Gottwald as leverage to renegotiate her contracts").

97. Gottwald v. Sebert, No. 653118/2014, 2020 WL 587348, at *10 (N.Y. Sup. Ct. 2020), *aff'd*, 193 A.D.3d 573 (N.Y. App. Div. 2021).

98. Gottwald v. Sebert, 193 A.D.3d 573, 582–83 (N.Y. App. Div. 2021).

99. *See supra* notes 90–98 and accompanying text; VanderVelde, *supra* note 75, at 778.

100. *Compare supra* notes 90–96 and accompanying text, *with* Daly v. Smith, 49 How. Pr. (n.s.) 150 (N.Y. Super. Ct. 1874). *See* VanderVelde, *supra* note 75, at 800–12 (presenting several significant characteristics of Judges Daly and Freedman's rulings that are strikingly similar to Judges Kornreich and Schecter's, including Kornreich's failure to recuse herself for financial interest in the outcome, as well as Kesha's similarities with actress Fanny Morant Smith who brought suit to get out of her contract, even posting "$20,000 surety bond against any damages for breach of contract" because she no longer wanted to associated with the Dalys, whom she believed were purposely tanking her career).

retrench *Daly*-esque ideologies,[101] when *Ford v. Jermon* was already vindicated in the *Yale Law Journal*.[102]

Kornreich's dismissal of Kesha's countersuits did nothing to support the court's grounds to affirm the legitimacy of Sony's contracts if they were based in the crimes Kesha alleged.[103] The basis of Kesha's contracts themselves, i.e., the basis of the bargain, are reviewable as long as the contracts are in force.[104] If there were significant crimes that go to the heart of Kesha's contracts with Sony and Dr. Luke, then the contracts are voidable in Kesha's favor.[105]

The cacophony of contradictions uttered by New York state judges to blind themselves from reviewing contracts with an alleged basis in serious

101. *See supra* notes 90–96, 98. The nearly unbearable irony of the decisions women judges made in *Gottwald v. Sebert* is emphasized by the fact that Kesha's song *Here Comes the Change* was featured in Justice Ginsburg's biopic *On the Basis of Sex*, to encourage women to take roles in power including judgeships. *See* ON THE BASIS OF SEX (Focus Features 2018) (featuring Kesha, *Here Comes the Change* [2018]).

102. VanderVelde, *supra* note 75, at 799 (citing Ford v. Jermon, 6 Phila. 6 (Dist. Ct. 1865)); *cf.* Beverly Glen Music, Inc. v. Warner Commc'ns, Inc., 178 Cal. App. 3d 1142, 1145 (Cal. Ct. App. 1986) (releasing famed singer Anita Baker from her former record deal).

103. *Compare* Gottwald v. Sebert, 2016 WL1365969, at *9 (N.Y. Sup. Ct. 2016) (dismissing Kesha's lawsuit against Dr. Luke), *with* VanderVelde, *supra* note 75, at 838 n.335 (considering Justice Holmes' reasoning in *Rice v. D'Arville* in favor of releasing a female singer from her contract), *and* Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 775 (1982) [hereinafter Eisenberg, *The Bargain*] (citing Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123 (1966)) (providing language according to which the courts may consider whether Dr. Luke and Sony are "more at fault, since [they] deliberately create[d] a kind of transactional incapacity" by both subjecting Kesha to an atmosphere of physical and psychological abuse and then refusing to renegotiate or even cancel Dr. Luke's contractual relationship with Kesha after Kesha affirmatively informed them of the abuse—this series of events could make Kesha's entire contract voidable in Kesha's favor).

104. *Gottwald*, 2016 WL 1365969, at *10 (dismissing only Kesha's collateral claims for statute of limitations). Similarly, under the New York or California statute of limitations, to claim breach of contract does not apply to questions of voidability due to capacity and other matters that go to the basis of the bargain itself, i.e., to resolve the question of whether there is a contract at all. Eisenberg, *The Bargain*, *supra* note 103, at 774–75. Furthermore, and similarly, questions that go to an employee's right to quit their job also are not bound by breach of contract statutes of limitations. Bailey v. Alabama, 219 U.S. 219, 245 (1911) (overruling a statute that used contract law to justify enslavement in violation of the U.S. Constitution), *examined by* VanderVelde, *supra* note 75, at 838 n.335 (noting that while Justice Holmes effectively freed a female singer from her contract in *Rice v. D'Arville*, he nonetheless wanted to do the opposite in *Bailey* to African Americans in the South based on exactly the opposite rationale, where he dissented in favor of upholding an Alabama peonage law).

105. *See* Eisenberg, *The Bargain*, *supra* note 103, at 775–76 (concluding that criminal activity can give rise to "undue influence"); *cf.* VanderVelde, *supra* note 75, at 838 n.335 (indicating that artists like Kesha also should not be enjoined to perform their contracts either by negative or positive injunctions *even if* the contract was legitimate).

crimes is as astounding as it is grotesque.[106] Public concern is justified over the court's decision that alleged serious crimes will not be reviewed under each contracting party's duties of good faith and fair dealing.[107] Outright public fury is justified by the court's decision to review retaliatory SLAPP suits against alleged rape victims trying to contractually extricate themselves from their rapists.[108]

In California, Kesha's private texts warning Lady Gaga about Dr. Luke would be protected by statute.[109] It was not Kesha who made her private texts public, but her accuser, Dr. Luke.[110] Dr. Luke obtained Kesha's private texts through discovery and Dr. Luke published them widely, defaming himself while attempting to convince the public that it was Kesha rather than him that made the public aware of a rumor going around that Dr. Luke raped Katy Perry too.[111]

106. *See supra* notes 87–102.

107. *Gottwald*, 2016 WL 1365969, at *9. *See, e.g.,* Lucia Graves, *The Kesha ruling is offensive, dismissive and utterly predictable*, THE GUARDIAN (Apr. 7, 2016, 10:46 AM), https://www.theguardian.com/commentisfree/2016/apr/07/kesha-ruling-shortcomings-legal-system-rape-dr-luke-judge [https://perma.cc/34GF-8PM5].

108. Gottwald v. Sebert, No. 653118/2014, 2018 WL 4181723, at *4 (N.Y. Sup. Ct. 2018); *cf.* Gottwald v. Sebert, No. 653118/2014, 2020 WL 587348, at *10 (N.Y. Sup. Ct. 2020), *aff'd*, 193 A.D.3d 573 (N.Y. App. Div. 2021).

109. *See* CAL. CIV. PROC. CODE § 425.16(b)(1) (indicating Kesha's private texts would be exempt from evidence at trial). *But see* La Liberte v. Reid, 966 F.3d 79, 87 (2d Cir. 2020) (limiting section 425.16 of the California Civil Procedure Code under the plausibility standard in *Twombly*, a rationale that may be extended to the New York anti-SLAPP statute).

110. Jem Aswad, *Kesha's Legal Team Claims Major-Label CEO Told Her and Lady Gaga About Dr. Luke's Alleged Assault on Katy Perry*, VARIETY (June 15, 2018, 12:30 PM), https://variety.com/2018/music/news/kesha-claims-major-label-ceo-told-her-and-lady-gaga-about-dr-luke-alleged-assault-on-katy-perry-1202848335/ [https://perma.cc/86RH-UALF] (Kesha's legal team issued this statement regarding a rumor spread by "the CEO of a major record label" to Kesha and Lady Gaga: "The startling statement [about Katy Perry, later discussed by Kesha and Lady Gaga through private texts] . . . was neither published nor further distributed [by Kesha or Lady Gaga]. It would have remained completely private, except that Dr. Luke and his team took an email obtained only in discovery and decided to publish it to millions of people in his amended complaint against Kesha, and then claim reputational harm from his own widespread publication.").

111. *Id.* Katy Perry would probably be within her rights to sue Dr. Luke for doing this as well, but according to her deposition she felt pressured by "numerous angry Twitter messages," which seem to have caused her to perceive both Kesha and Dr. Luke as equally responsible for dragging her name into the public spotlight of Dr. Luke's alleged abuse. Maria Pasquini & Jeff Nelson, *Katy Perry Says She 'Felt Pressured' to Support Kesha Against Dr. Luke in Unsealed Deposition*, PEOPLE (Nov. 30, 2018, 4:35 PM), https://people.com/music/katy-perry-felt-pressured-support-kesha-against-dr-luke-unsealed-deposition/ [https://perma.cc/M63U-HF93].

Judge Schecter was unfazed by Dr. Luke's unclean hands publicizing rumors of his alleged rape of Katy Perry through his suit.[112] The New York court appears uninterested in the central question: were *all* of Dr. Luke's alleged defamation damages actually and proximately caused by his intervening acts?[113] If answered in Kesha's favor after discovery, several decisions the court made before discovery might be unsettled as they appear zealously slanted in favor of big business.[114]

Several months after Judge Schecter dismissed all of Kesha's counterclaims, Kesha's team seized upon newly enacted updates to the New York anti-SLAPP statute for "a counterattack against Dr. Luke."[115] Initially, "on or about June 30, 2021" Judge Schecter granted Kesha leave to assert a counterclaim under the new statute, presumably agreeing with a federal district court decision favoring the N.Y. Times in a SLAPP suit filed by Sarah Palin that stated: "It is clear that § 76-a is a remedial statute that should be given retroactive effect."[116] However, an appellate panel reversed Schecter's order on March 20, 2022, deciding that the new statute

112. *See* Aswad, *supra* note 110 (noting evidence of Dr. Luke's unclean hands); *see also supra* notes 90–98.

113. Aswad, *supra* note 110. *Cf.* David Goguen, J.D., *What are 'Intervening' and 'Superseding' Causes in a Personal Injury Case*, NOLO, https://www.nolo.com/legal-encyclopedia/what-are-intervening-and-superseding-causes-in-a-personal-injury-case.html [https://perma.cc/XP5J-63FF] (defining "intervening" and "superseding" causes).

114. Gottwald v. Sebert, 2016 N.Y. Mic. LEXIS 5202, at *12 n.6 (noting that the main reason why Kesha could not dissolve her business relationship with Dr. Luke through a preliminary injunction was to preserve big business, because "it is commercially unreasonable for the SONY entities, having expended more than $11 million in the U.S. and up to $20 million internationally, and willing to spend more millions, not to promote Kesha's albums"—the court actually appeared to perceive its initial denial of Kesha's freedom as a financial favor to her career, as if it couldn't reform the contract to address these things in favor of the party whose rights were violated); Hilary Weaver, *Ties Revealed Between Sony and Judge Who Threw Out Kesha's Claims of Abuse [Updated]*, VANITY FAIR (Aug. 26, 2016), https://www.vanityfair.com/style/2016/08/kesha-ties-revealed-judge-sony-music.

115. N.Y. CIV. RIGHTS LAW § 70-a (enacted in November of 2020); Eriq Gardner, *Kesha Seizes on New Free Speech Law for Counterattack Against Dr. Luke*, HOLLYWOOD RPTR. (Apr. 7, 2021, 2:16 PM), https://www.hollywoodreporter.com/business/business-news/kesha-seizes-on-new-free-speech-law-for-counterattack-against-dr-luke-4162915/.

116. Gottwald v. Sebert, 2022 N.Y. App. Div. LEXIS 1489, at *1 (N.Y. App. Div. 2022) (noting in the section for case history that Judge Schecter granted Kesha's "motion for a ruling that Civil Rights Law § 76-a applies to plaintiffs' defamation claims against her and for leave to assert a counterclaim against plaintiffs under Civil Rights Law § 70-a"); Palin v. N.Y. Times Co., 510 F.Supp.3d 21, 27 (S.D.N.Y. 2020). Sarah Palin's suit was later tossed out on a motion for judgment as a matter of law on March 1, 2022, when the court applied the heightened standard from the newly enacted N.Y. Anti-SLAPP Statute. Palin v. N.Y. Times Co., 2022 U.S. Dist. LEXIS 36035, at *41–42, *81–82 (S.D.N.Y. 2022).

would not "apply retroactively to pending claims such as the defamation claims asserted by plaintiffs in this action."[117]

Ultimately, however, it does *not* necessarily matter whether the anti-SLAPP statute applies retroactively unless to reverse an express repeal of the common law, because free speech rights preexist human laws and were (theoretically at least) created by God or nature.[118] The common law contains protective maxims to help defend these preexisting free speech rights of parties like Kesha without the need of positive laws to reiterate them.[119] However, legislatures have been known to support the common law by codifying preexisting rights into laws like anti-SLAPP statutes that are more immediately accessible than the abstruse treatises of Roger Williams on the natural right of free speech that anticipated and defined the proper objects of the First Amendment.[120]

American courts also began to modernize with Holmesian legal realism, which tends to ignore the common law.[121] The ancient common law

117. Gottwald v. Sebert, 2022 N.Y. App. Div. LEXIS 1489, at *1–4 (N.Y. App. Div. 2022), *disagreeing with Palin*, 510 F.Supp.3d at 27; *but see* Bill Donahue, *Kesha Lost a Big Ruling, But Now the Senator Who Wrote the Law Says That's Wrong*, BILLBOARD (Apr. 21, 2022), https://www.billboard.com/business/legal/kesha-dr-luke-new-york-free-speech-anti-slapp-law-1235061797/ ("in an unusual brief filing this week, Sen. Brad Hoylman told the court that it got the decision wrong and urged it to reconsider").

118. U.S. CONST. amend. I; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); WILLIAMS I, *supra* note 66, at 1, 11–13 (expounding the natural law origins of the First Amendment); N.Y. CIV. RIGHTS LAW § 70-a ("Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, or by statute, law or rule.").

119. Entick v. Carrington (1765) 19 How. St. Tr. 1029, 1066 (Eng.) (using the common law to defend free speech and thought in England, *without* a written constitution), *extended by* Boyd v. United States, 116 U.S. 616, 626 (1886) (using preexiting English common law to define the express rights of the U.S. Constitution); *cf.* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHIC. L. REV. 1181, 1196–1207 (2016) (discussing *Entick* alongside *Wilkes v. Wood* and *Leech v. Money*, each of which involved the common law's defense of free speech in England by refusing to enforce libel laws).

120. N.Y. CIV. RIGHTS LAW § 70-a (expressly preserving "any recovery otherwise authorized by common law"); U.S. CONST. amend. I; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); WILLIAMS I, *supra* note 66, at 1, 11–13 (expounding the natural law origins of the First Amendment); *cf.* 3 EDWARD COKE, INSTITUTES *181–83 (demonstrating how positive laws can be enacted to support the common law: "This Act having declared all monopolies to be void by the common law, hath provided by this clause, that they shall be examined, heard, tried, and determined in the Courts of the Common law according to the Common law, and not the Councell Table, Star-chamber, Chancery, Exchequer chamber, or any other Court of like nature, but only according to the Common laws of this Realm . . . .").

121. Victoria F. Nourse, *Making Constitution Doctrine in a Realist Age*, 145 U. PENN. L. REV. 1401, 1421–22 (1997); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 955–60 (1987) (quoting Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 10 (1936)) (noting Holmes as perhaps the first legal realist to propose a judicial duty of balancing costs

nevertheless requires that statutes should be read to implicitly incorporate preexisting common law terms and to extend preexisting common law rights absent a clear negative stated in the text of the statute to effect a repeal.[122] The Ninth Amendment, which reserves all preexisting natural rights to the people, demonstrates how deeply the constitution's framers nodded to this common law conception of rights.[123]

The Ninth Amendment clarified that the framers did not intend the Bill of Rights to be a limit on the rights previously enjoyed by the people, but that the rights named in the constitution are a floor that the government must not sink below.[124] Even Hobbes thought human beings in a state nature retained their right of free speech, but he contended that humans are insane and through speaking they would only have disputes that would inevitably devolve into absolute war.[125] Hobbes took aim at Aristotle specifically, and endeavored to point out every imperfection of human virtue in order to show that through speech about imperfect justice and other virtues human beings would inevitably cause a perfect war.[126]

Hobbes implied that humans were perfectionists, that we would not be happy with virtues unless they attained absolute perfection, and by this implication (which was very popular in the Puritanical context in which he

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and benefits, and that Holmes was considered "the patron saint" of legal realism, a movement that disparaged common law precedent as "'dry sterile formalism'").

122. Dr. Foster's Case [1614] 11 Co. Rep. 56b, 62a–64b (Eng.); Milborn's Case [1572] 7 Co. Rep. 6b, 7a (Eng.); *see* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–60 (citing to the common law maxim from *Milborn's Case* "*cessante legis prœmio, cessat et ipsa lex*"); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 127 (1857) (citing the common law maxim of statutory construction from *Dr. Foster's Case*).

123. U.S. CONST. amend. IX; *cf.* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 11 (1988) ("There is no reason to suppose that these Federalists did no share the then-prevailing beliefs in rights antecedent to government. For example, the same James Wilson who used a rights-powers argument in his vocal opposition to a bill of rights was an ardent adherent to natural rights.").

124. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. IX; Barnett, *supra* note 123, at 31; O'Connor, *They Often*, *supra* note 45, at 388 (noting that "the Declaration of Independence, for example, speaks of inalienable God-given rights, the abridgement of which permits revolution").

125. HOBBES, *supra* note 2, at 109 (noting that out of humanity's attempts to speak and reason with each other about virtues, that "Disputes, Controversies, and at last War" will inevitably arise, which is "the condition of meer Nature").

126. *Id.* at 105–09 (stating that Aristotle's pro-slavery state of nature idea was "not only against reason; but also against experience," but also contending that humanity's natural equality results in absolute wars that eventually establish slavery "by consent of men").

existed) he attempted to breed cynicism for the human race.[127] Like the Puritans who laid waste to the English government with the help of printing presses, he would see the rioters of January 6, 2021 as proof of concept.[128] He would probably say that the First Amendment and the entire government form established by the U.S. Constitution dangerously opens the U.S. government to the preexisting state of nature, which is absolute war and conquest and that it is just a matter of time until the Republic in America implodes according to the unworkability of Montesquieu's idealism.[129]

Hegel agreed with Hobbes when he expressed "that, as yet, there is no real State in America."[130] Hegel guessed that eventually America would devolve into a dispute between North and South that several antebellum intellectuals took as a prophesy of the Civil War, and that out of this war a *real* State would emerge based on the Hobbesian state of nature that inevitably results in war and slavery.[131] In other words, Hegel probably banked on the idea that America would eventually abandon the Declaration of Independence, which originally named us "the united States of America,"[132] and according to which America embraced Montesquieu's state of nature premised on liberty and peace whence good governments could be established "from reflection and choice."[133]

Despite fighting on the battlefield of Civil War to rebirth the Union originally envisioned by the founders, Justice Holmes eventually joined

127. *Id.*; Patricia Springborg, *Hobbes, Donne and the Virginia Company:* Terra Nullius *and 'the Bulimia of Dominium'*, 36 HIST. POL. THOUGHT 113, 144 (2015) (noting that Hobbes's "Virginia Company experience and, specifically, lurid accounts of the Jamestown massacre, were probably the source of his negative judgment of 'savages of America' characterizing the *state of nature*").

128. RUSSELL, A HISTORY, *supra* note 1, at 547 (noting that "the prospect of" the English Civil War strengthened Hobbes's convictions "when his fears were realized").

129. HOBBES, *supra* note 2, at 105–09; 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 3–4 (Thomas Nugent Trans., 1899) (citing and disagreeing with Hobbes by asserting that the state of nature is liberty and peace); HANNAH ARENDT, ON REVOLUTION 150 (1990) (noting that Montesquieu's "role in the American Revolution almost equals Rousseau's influence on the course of the French Revolution").

130. RUSSELL, A HISTORY, *supra* note 1, at 739; *id.* at 741 (noting that Hegel eventually "fall[s] back on the state of nature and Hobbes's war of all against all").

131. *Id.* at 550 (describing Hobbes's state of nature); *id.* at 739, 741 (noting Hegel's embrace of the Hobbesian state of nature); MONTESQUIEU, *supra* note 129, at 3–4 (observing Hobbes's state of nature was one of absolute slavery and war).

132. THE DECLARATION OF INDEPENDENCE paras. 1, 32 (U.S. 1776).

133. THE FEDERALIST NO. 1 (Alexander Hamilton); THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776) ("assum[ing] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them"); MONTESQUIEU, *supra* note 129, at 3–4.

Hegel and while on the bench he disparaged the idea of preexisting rights, i.e., the rights that preexist governments embodied in the Declaration of Independence.[134] He was raised by poets as his father Holmes, Sr., was a famed fireside poet,[135] and thus Holmes, Jr., may have drawn close to Hegel's mystical assertion that poetry "becomes at the end once more what she was in the beginning: the *teacher of mankind*."[136] Under the influence of Emerson, Holmes proceeded to write a jurisprudence that was a far more poetic tribute to despotism than Hegel's writings ever were.[137]

Enough is wrong with Holmes's jurisprudence that lawyers ought not to follow it blindly, but Holmes's lifelong attempts to engage with the arts opened a door to his salvation.[138] In fact, the New York Courts in Kesha's case could establish Kesha's preexisting human rights by expanding upon Justice Holmes's own reasoning in *Rice v. D'Arville*.[139] As Holmes generally

134. O'Connor, *They Often*, *supra* note 45, at 388 (noting that Holmes "disagreed quite strongly" with the principle of pre-existing natural rights embodied by the Declaration of Independence); Novick, *supra* note 2, at 722 (Holmes's "ideas actually reflected an older version of evolution, most strongly influenced by Hegel").

135. Novick, *supra* note 2, at 707–10 ("Despite Holmes's determination to pursue philosophy (and art), his father made it plain that he would have to earn a living, and Holmes trained for the bar."); Geoffrey Kirsch, *Poetic Justice: Oliver Wendell Holmes's Life in Law and Letters*, LARB (Aug. 27, 2019), https://lareviewofbooks.org/article/poetic-justice-oliver-wendell-holmess-life-in-law-and-letters/ ("Holmes carried the 'literary amateur' label his entire life, and not merely because people confused him with his celebrity father.").

136. GLENN ALEXANDER MAGEE, HEGEL AND THE HERMETIC TRADITION 91 (2001) (quoting and intelligibly explaining G.W.F. Hegel's *System-Program*) (internal quotation marks omitted); Hines, *supra* note 12, at 47.

137. MAGEE, *supra* note 136, at 91 (noting that Hegel was "*not* recommending that philosophers write poetry, or even that they incorporate poetic elements into their work"); Hines, *supra* note 12, at 47 (noting that "under Emerson's definition, much of Holmes' work would qualify as poetry"); *id.* at 42–43 ("Holmes' decision in *Buck v. Bell* (1927) embodied an Emersonian premium on self-reliance.").

138. *See, e.g.*, Hines, *supra* note 12, at 40–45 (admiring Justice Holmes's poetic jurisprudence); Kirsch, *supra* note 135 (explaining Holmes's poetic inspirations). Similarly to how Holmes's interest in poetry and art may help Kesha, the revolutionary lawyer James Otis may have helped Phillis Wheatley to correct the ways the Americans blindly accepted the errors of John Milton when Otis wrote his piece *The Rudiments of Latin Prosody*, which was used by Harvard College as a text book around the time Wheatley was sold at a Boston slave market; it is possible that Otis's book initially aided Wheatley in her studies of the classics and at the very least it seems to indicate that Otis was equipped to hear what poets like Wheatley had to say. Schroeder, *Leviathan*, *supra* note 23, at 159–60 ("Against the blindness of these men, Phillis Wheatley revolutionized Milton and became a better champion for the freedom of mind than Milton's lady ever was, abolishing any reason why Miltonic thought should disfranchise her sex."); *see generally* JAMES OTIS, THE RUDIMENTS OF LATIN PROSODY (1760).

139. Notes of Justice Holmes's opinion in *Rice v. D'Arville* printed in *Note: Lumley v. Wagner Denied*, 8 HARV. L. REV. 172, 172–73 (1894) (expanding upon Justice Holmes's opinion: "In addition to this may there not be a feeling against restraint of the personal liberty of the citizen? Doing personal service because one is ordered to under the pains and penalties which a court of equity can inflict,

preferred to discuss powers over rights, Kesha's potential course correction centering on *D'Arville* could begin with reference to Henry Wadsworth Longfellow's explanation of preexisting powers here:

> Nature is a revelation of God; Art a revelation of man. Indeed, Art signifies no more than this. Art is Power. That is the original meaning of the word. It is the creative power by which the soul of man makes itself known, through some external manifestation or outward sign.[140]

As observed by Longfellow, Kesha is learning to reclaim creative control over her own art as a preexisting power coeval with her existence as a human being.[141] According to her reclamation of this preexisting power, Dr. Luke already lost everything worth owning and is now perhaps, as far as Kesha is concerned, a mere leech on her profits.[142] The courts, in the meantime, appear both unaware and unconcerned about what happens if good people stop considering the court helpful to securing justice, as would-be litigants might be tempted to turn to methods of self-help instead.[143]

This risk is why Justice Holmes fell short when he taught the court to consider only how a "bad man" in the shoes of a party like Kesha sees the

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seems dangerously like temporary slavery. And might not a court well say, 'This is too much to give, whether or not we can do it, even to one who asks for the letter of his bond.'"); Rice v. D'Arville, 162 Mass. 559, 560–61 (1895) (distinguishing *Lumley v. Wagner* and affirming the defendant's contractual repudiation and her decision to find employment elsewhere); *cf.* VanderVelde, *supra* note 75, at 838 n.335 (examining Holmes's beneficial reasoning in *D'Arville* in light of his contradictory reasoning in *Bailey v. Alabama*).

140. HENRY WADSWORTH LONGFELLOW, HYPERION 228–29 (13th ed., 1853) [1839].

141. *Id.;* McCulloch v. Maryland, 17 U.S. 315, 406 (1819) (citing U.S. CONST. amend. X) ("But there is no phrase in the [constitution that] . . . excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described. Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people' . . . ."); *see* Spencer Kornhaber, *Kesha's Vital Public Relations Victory*, THE ATLANTIC (Feb. 23, 2016), https://www.theatlantic.com/entertainment/archive/2016/02/keshas-vital-public-relations-victory/470484/ [https://perma.cc/XKD8-PPTJ] [hereinafter Kornhaber, *Kesha's Vital*] (detailing support for Kesha, despite the outcome of her lawsuit); Spencer Kornhaber, *Kesha's Comeback Message: Love Your Enemy,* THE ATLANTIC (July 6, 2017), https://www.theatlantic.com/entertainment/archive/2017/07/kesha-praying-comeback-message-dr-luke/532773/ [https://perma.cc/N8TL-SGYX] [hereinafter Kornhaber, *Kesha's Comeback*].

142. *Cf.* Eriq Gardner, *Dr. Luke Is No Longer the CEO of Sony's Kemosabe Records Amid Kesha Legal Saga*, BILLBOARD (Apr. 25, 2017), https://www.billboard.com/articles/news/7775107/dr-luke-sony-split-kesha [https://perma.cc/VBW8-YDQN].

143. *See supra* notes 90–98 and accompanying text.

law in order to outthink bad people.[144] It is nothing personal to Kesha for the court to avoid making precedents that could be abused by frauds to get more favorable terms in their record contracts.[145] But it is a gaping insufficiency in Holmesian jurisprudence that a case should end with cutting off the bad without considering what should happen to the good, because it potentially leaves no room for justice.[146]

Hobbes, Hegel, and Holmes would say that justice is a virtue that imperfect humans cannot hope to grasp, and Hobbes especially contended that proceeding to discuss justice will simply devolve into petty disputes that finally end in absolute war.[147] The American Revolutionaries disagreed when they waged a war to establish a just system of government.[148] The idea of justice, they contended, along with the idea of preexisting human rights could justify wars waged by people to sever ties with unjust systems.[149] But once the United States made itself independent, several years of relative peace passed where the founders established a government based on the consent of the governed.[150]

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144. Holmes, Jr., *The Path*, *supra* note 12, at 459.

145. *See, e.g.*, Gottwald v. Sebert, 2016 N.Y. Misc. LEXIS 5202, at *26 (N.Y. Sup. Ct. 2016) (interpreting the law to avoid a situation where a woman could claim rape was a gender-motivated hate crime in an attempt to reform or strike their business contracts with the employers they claim facilitated the alleged rape).

146. *Compare id.*, *with* HOLMES, JR., *supra* note 68, at 42–43 (expressing that "probably most English-speaking lawyers would accept . . . without hesitation" that the infliction of criminal punishment "is only a means to an end," regardless of the fact that this theory seems to "conflict with the sense of justice, and to violate the fundamental principle of all free communities, that the members of such communities have equal rights to life, liberty, and personal security"); *id.* at 46–47 ("the law does undoubtedly treat the individual as a means to an end, and uses him as a tool to increase the general welfare at his own expense").

147. HOBBES, *supra* note 2, at 109, *followed by* G.W.F. HEGEL, PHILOSOPHY OF RIGHT 124 (S.W. Dyde trans., 2001) ("To this place belongs the famous sentence, 'The end justifies the means.'"), *followed by* HOLMES, JR., *supra* note 68, at 42–43, 46–47 (citing generally to Hegel and endorsing the idea that the ends justify the means regardless of whether it serves justice); *cf.* RUSSELL, A HISTORY, *supra* note 1, at 741 (noting how Hegel fell "back on the state of nature and Hobbes's war of all against all"); *id.* at 743–44 (noting how Hegel failed to "take account of the distinction between ends and means").

148. U.S. CONST. pmbl. (noting that one of the basic purpose of forming the U.S. government was to "establish Justice").

149. THE DECLARATION OF INDEPENDENCE paras. 1, 31 (U.S. 1776) (naming "the voice of justice" to support the decision to "dissolve the political bands" that connected the peoples of America with Great Britain); *id.* at para. 10 (blaming the king for obstructing justice in America).

150. *Id.* at para. 2 ("to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed"); *see* 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 643 (Kermit L. Hall & Mark David Hall ed., 2007) (noting that during the founding era the natural right of "unrestrained emigration" is whence the founders derived "the consent of every citizen to its institution and government").

According to the revolutionaries, what a good person thinks mattered—it mattered if justice was served, and if preexisting rights to liberty were respected.[151] The reason it mattered to them was that they were aware that the same terms they used to separate from England could be used to justify a revolution against them.[152] They knew that when good people experience a violation of their rights and find all their attempts to vindicate justice disappointed by the prevailing system of government, that justice itself might support the unrest, violence, and revolution that may follow.[153]

Therefore, in order to avoid unrest, common law due process should be observed by the judiciary looking forward to ensure that anyone in Kesha's situation could seek to duly reform or wind down their contracts in such a way that respects the preexisting rights of all parties.[154] Kesha herself is using her musical platform to assure the public that respecting her rights will not cause the violent disarray that Hobbes, Hegel, and Holmes feared.[155] Rather, Kesha picked up on one of Phillis Wheatley's most anti-Hobbesian themes in her song *Shadow*, regarding her unique expression of love for her enemies:

> So get your shadow out of my sunshine
> Out of my blue skies, out of my good times
> So get your darkness out of my champagne
> I'll be dancing in the rain
> I'ma love you even though you hate me
> I'ma love you even though you hate me[156]

151. U.S. CONST. amend. IX (expressly protecting preexisting, unenumerated rights).

152. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see* Letter from Thomas Boylston Adams to Abigail Adams (Aug. 10, 1793) ("If such things do not destroy our Government it will be because we have none to fall a sacrifice. Like the City of Paris however in the heighth of their Massacres, we are said to be in perfect tranquility; and because the consequences are not immediate, nobody appears alarmed.").

153. Letter from John Adams to Thomas Jefferson (June 30, 1813) (remembering "the terrorism of a former day" when "ten thousand People in the Streets of Philadelphia, day after day, threatened to drag Washington out of his House, and effect a Revolution in the Government, or compell it to declare War in favour of the French Revolution, and against England").

154. Eisenberg, *The Bargain*, *supra* note 103, at 774–75; *see* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–60 (demonstrating how to use common law canons of statutory construction to construe the constitution in the light of its preamble).

155. Kornhaber, *Kesha's Comeback*, *supra* note 141 (speaking of Kesha's song *Praying*: "For all the bitterness in her voice, this is a call to love your enemies, even if, as she sings, 'some things, only God can forgive.'").

156. KESHA, *Shadow*, *on* HIGH ROAD (Sony 2020).

According to Hobbes and his progeny, loving one's enemies is impossible.[157] If it were possible for people in a state of nature to disagree about virtues and have arguments proving the imperfections of human ideals, while still deciding at the end of the day to love one another then the inevitability of Hobbes's state of nature is impossible.[158] Hobbes's entire theory of government hangs on the inevitability of absolute wars flowing from natural rights, like the freedom of speech.[159] But Kesha, as an heir of Phillis Wheatley's spirit of an overarching love for her enemies, offers us a high road; an alternative with a promise that if she can love Dr. Luke and his kind even now (albeit from a distance), that there is still hope for us imperfect humans.[160]

Few contractual details between Sony, Kemosabe Records, Dr. Luke, and Kesha are public, and their business relationships appear to have morphed since the start of litigation.[161] But Kesha's preexisting rights to express love for her enemies,[162] and manage her own work life,[163] could still have broad application beyond helping her disassociate with Dr. Luke.[164] Kesha can seek to challenge any conveyances of her labor and property, including

157. HOBBES, *supra* note 2, at 109 (asserting that absolute war is the inevitable consequence of letting people freely express their opinions about virtues like justice); *see* Teresa M. Bejan, *Hobbes against hate speech*, BRIT. J. HIST. PHIL. 1, 1–2 (2022), https://doi.org/10.1080/09608788.2022.2027340 (citing and quoting HOBBES, *supra* note 2, at 104) ("Thomas Hobbes argued directly for the legal proscription of 'contumely' or insult—which he defined as inclusively as *any* expression of hatred or contempt, by word or deed—as a demand of natural law.").

158. *Compare* HOBBES, *supra* note 2, at 109 (stating that war is the inevitable consequence of free expression regarding the virtues), *with* KESHA, *Shadow*, *on* HIGH ROAD (Sony 2020) (expressing love for her enemies).

159. HOBBES, *supra* note 2, at 109.

160. *Compare* Letter from Phillis Wheatley to Samson Occom (Mar. 11, 1774) (addressing slaveholders and stating "I desire not for their hurt"), *with* KESHA, *Shadow*, *on* HIGH ROAD (Sony 2020).

161. Richard S. He, *How Do You Solve A Problem Like Dr. Luke*, JUNKEE, https://junkee.com/longform/dr-luke-boycott-cancellation (giving probably the closest possible look into the four-way business situation that is almost entirely kept private).

162. Kesha's right to love her enemies is both a free speech right and a religious liberty right. U.S. CONST. amend. I; WILLIAMS I, *supra* note 66, at 1, 11–13; *Matthew* 5:44 ("love your enemies and pray for those who persecute you"); *see, e.g.*, Letter from Phillis Wheatley to Samson Occom (Mar. 11, 1774) (demonstrating that Wheatley desired not to hurt her enemies, but to love them better).

163. U.S. CONST. amends. V, XIII, XIV; 3 EDWARD COKE, INSTITUTES *181–83.

164. *Compare* VanderVelde, *supra* note 75, at 799 (citing Ford v. Jermon, 6 Phila. 6 (Dist. Ct. 1865) and providing a comparison of labor laws and slavery), *with* 3 EDWARD COKE, INSTITUTES *181–83 (arguing a person's right to be free of "monopolies").

copyright in her songs, as not only voidable, but void if they violated any of Kesha's preexisting rights in the conveyance.[165]

The root of copyright law in the right of life, as observed by the *Case of Monopolies* and beyond, confirms Kesha's assertion of preexisting rights are not a mess of straws that she is hopelessly grasping for.[166] Kesha's preexisting rights arise from a unified common law conception of preexisting, natural rights as expressed by Lord Coke in his *Institutes*: "Thou shalt not take the nether or upper milstone to pledge, for he taketh a mans life to pledge."[167] Coke continued, "it appeareth that a mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans trade, taketh away his life, and therefore is so much the more odious."[168]

We may justly imagine Lord Coke standing with Kesha against the powerful forces at any billion dollar entertainment company to say: "Against these Inventers and Propounders of evil things, the holy ghost hath spoken, Inventores malorum, &c. digni sunt morte."[169] Coke's stand against the king's abuse of the lives of the English people through the feudal issuance of patents in the Star Chamber and like courts formed the ideological root of the first IP law, the first antitrust law, the first habeas corpus statute, and a nascent understanding of the separation of powers itself.[170] A judicial recognition of the long established preexisting rights of life in America on behalf of Kesha would not be extravagant; it would simply mark the minimum common law basis that was enjoyed by the founding

165. *See* Melissa Yang, *Void Versus Voidable Contracts: The Subtle Distinction That Can Affect Good-Faith Purchasers' Title to Goods*, 19 NY LITIGATOR 31 (2014) (indicating the legal principles that the court may consider to decide whether a contract transferring Kesha's copyrights to Sony is void); Eisenberg, *The Bargain*, *supra* note 103, at 774–75 (discussing unconscionability and undue influence); *cf.* VanderVelde, *supra* note 75, at 490 n.68 (noting the terms of the Fugitive Slave Clause, which was later amended by the Thirteenth Amendment, that originally endorsed the inescapability of employment contracts including those that created indentured servitude and slavery).

166. Schroeder, *Leviathan*, *supra* note 23, at 274 (quoting 3 EDWARD COKE, INSTITUTES *181).

167. 3 EDWARD COKE, INSTITUTES *181.

168. *Id.*

169. *Id.*

170. *Id.* at 181–84 (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.) (the first IP law and antitrust law, but in England "antitrust law" is usually known by the term "competition law")); Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.) (abolishing the Star Chamber and like courts after the crown refused to stop issuing monopolies by patent to non-inventors despite the *Case* and *Statute of Monopolies*); Schroeder, *Leviathan*, *supra* note 23, at 170, 256 (noting how Phillis Wheatley's completion of "a revolution begun by Edward Coke and John Milton in England to create copyright and patent law into a common law of the land in America" summed up the connections between these basic principles of law, including the nascent English conception of the separation of powers).

poetess and businesswoman Phillis Wheatley herself, who sold her works to the American public for a profit in order to inspire the adoption of "life, liberty, and property" for everyone.[171]

B. RENEWING THE REVOLUTIONARY DISTINCTION BETWEEN RIGHTS AND POWERS

Mathews papered over the feudal and canon law presupposition of a government interest in demolishing, curtailing, removing, or ignoring legally mandated human rights.[172] According to the Declaration of Independence, it is never in the government's interest to demolish rights, and it is always in the government's interest to secure rights.[173] Legal rights set forth by positive laws are not natural rights, but they may secure preexisting natural or common law rights.[174]

The idea that the government created disability rights, rather than merely securing them, greased the hinges of a door to feudal law that *Mathews* swung open.[175] As revealed by the leaked draft opinion in *Dobbs v. Jackson Women's*

171. Schroeder, *Leviathan*, *supra* note 23, at 210 ("The right of authorial attribution is Phillis Wheatley's right to make a living; i.e., the very right of life and the primary policy goal defended by Coke's vision of antitrust law."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amends. I, V, XIV; N.Y. CONST. art. I, § 6. *See, e.g.*, Letter from Phillis Wheatley to Samson Occom (Mar. 11, 1774) (hoping to correct the ironies of avaricious men). *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/T42S-9FF5] (discussing the general details of Brittany Spears's Conservatorship), *with* Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* PHILLIS WHEATLEY, POEMS ON VARIOUS SUBJECTS, RELIGIOUS AND MORAL 7 (1773) (beginning the American tradition of author owned copyrights), *extended by* U.S. CONST. art. I, § 8, cl. 8. *See generally* VanderVelde, *supra* note 75 (describing liberty interests that are tied up in entertainment law contracts for personal services); Zelaya, *supra* note 15 (explaining how Wheatley staged her cause of freedom by working as poet).

172. Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (deciding that the termination of property rights without "an evidentiary hearing . . . fully comport[s] with due process").

173. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. pmbl. (noting that the purpose of ratifying the U.S. Constitution was to "secure the Blessings of Liberty to ourselves and our Posterity").

174. *See, e.g.*, 3 EDWARD COKE, INSTITUTES *181–83 (explaining how the rights enacted by the Statute of Monopolies were the same common law rights originally recognized in the *Case of Monopolies*, and how the statute represented Parliament's requirement that common law rights of life (later enumerated in the Fifth Amendment of the U.S. Constitution) be applied to regulate monopolies rather than feudal or canon law); *cf.* U.S. CONST. amend. I (extending preexisting rights); WILLIAMS I, *supra* note 66, at 1, 11–13 (declaring the freedoms of speech, assembly, and religion were natural rights granted by God, before it was secured by compacts, written constitutions, and positive laws).

175. *Mathews*, 424 U.S. at 332 (citing Goldberg v. Kelly, 397 U.S. 254, 261–62 (1970)); *see, e.g.*, Dobbs v. Jackson Women's Health Org., No 19-1392 unofficial leaked 1st draft opinion 18 (2022)

Health Organization purporting to overrule *Roe v. Wade* and *Casey v. Planned Parenthood*, the *Mathews* balancing regime mentally prepared the court to demolish the previously held common law view of due process regarding the preexisting rights and liberties of the people..[176] Under *Mathews*, the Court no longer inquires about preexisting common law and natural rights even when positive laws are enacted to secure them.[177]

The difference between a common law theory of human rights that protects all humans and a penumbral theory of the United States Constitution to protect only certain classes of individuals can be difficult to discern.[178] In the founding era, the distinction existed in the legal and constitutional disagreements that arose between American and English jurists regarding the important difference between power and right recounted by Justice James Wilson:

> It is very true—we ought to "distinguish between right and power:" but I always apprehended, that the true use of this distinction was, to show that power, in opposition to right, was devested of every title, not that it was clothed with the strongest title, to obedience.[179]

(citing problematic pre-revolutionary English cases like *Regina v. Webb* as controlling common law, without considering whether they are corrupted with illegitimate feudalism and without acknowledging the role the ancient common law writ of trespass on the case by which the common law gradually acknowledged preexisting rights not previously known to or acknowledged by the law).

176. *Id.*; Dobbs v. Jackson Women's Health Org., No. 19-1392 unofficial leaked 1st draft opinion 31–32, 56 (2022) (using Chief Justice Roberts's "deciding vote" in June Medical rejecting cost/benefit balancing to disparage the preexisting human rights to interracial marriage, to marry while in prison, to obtain contraception, to reside with relatives, to make decisions about the education of one's children, to not be sterilized without consent, to not undergo involuntary surgery, to avoid the forced administration of drugs, to enegage in private, consensual sexual acts, and the right to marry a person of the same sex as back door into "rights to illicit drug use, prostitution, and the like," by inappropriately comparing these rights generally and collectively to the specific and very controversial right to commit suicide).

177. *See Mathews,* 424 U.S. at 332 (giving a rationale that ostensibly recognizes all preexisting rights as the same, sidestepping a need to delineate new and distinct rights, while allowing *ad hoc* decisions to issue that can potentially strip all property rights of pre-termination evidentiary hearings).

178. *Compare* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (expounding "penumbral rights of 'privacy and repose'"), *with id.* at 488–93 (Goldberg, J., concurring) (citing U.S. CONST. amend. IX to evince the framers' intention "that the first eight amendments [should not] be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people").

179. 1 WILSON, *supra* note 150, at 740; *cf.* Victoria Nourse, Buck v. Bell*: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 109 (2011) [hereinafter Nourse, *Buck*] (noting that "an astute student will recognize that Holmes's facts assume the single most important constitutional rule of the day—one of power, not right").

The difference between power and right in England was used by Sir William Blackstone to justify an idea that human rights are "subversive of all government."[180] Human rights, according to the English theory of statecraft, resisted by Justice Wilson above, were all surrendered to the Crown in exchange for security according to the Crown's right of conquest.[181] Theoretically, any legally relevant rights retained by English people after entering civilized society were solely derived by grant of the Crown through positive laws.[182]

Justice Holmes disagreed with Justice Wilson because Justice Wilson interpreted substantive human rights arising from facts as the basis for all procedure and law.[183] According to Wilson, if rights are opposed by any power, clothed in whatever procedure or law, such powers, procedures, or laws are *ultra vires* and devested of the title of "law" or "procedure."[184] Chauvinist to the core, Justice Holmes maligned the founding distinction between rights and powers as feminine, cross-dressing, weakling, and a source of sheer embarrassment.[185]

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180. 1 WILSON, *supra* note 150, at 740 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *91) ("The successor of Sir William Blackstone in the Vinerian chair walks in his footsteps.").

181. Campbell v. Hall [1774] 98 Eng. Rep. 1045, 1048 (Eng.) ("It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and *grants them their property, he has a power to fix such terms and conditions as he thinks is proper*.") (emphasis added); *cf.* Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PENN. L. REV. 1157, 1180, 1206 (1976) (explaining how the Crown's right of conquest became the Parliament's right of conquest).

182. *Campbell*, 98 Eng. Rep. at 1048. *But see* 1 WILLIAM BLACKSTONE, COMMENTARIES *17 (noting that the "ancient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman conquest").

183. *Compare* 1 WILSON, *supra* note 150, at 740, *and* U.S. CONST. amend. IX (protecting unenumerated individual rights), *with* Holmes, *Natural Law*, *supra* note 1, at 41–42 (characterizing the notion of natural and preexisting rights as "naïve" and "arbitrary," and describing a right as "only the hypostasis of a prophecy"), *and* Buck v. Bell, 274 U.S. 200, 207 (1927) (disrespecting the natural rights of Carrie Buck). *Cf.* Nourse, *Buck*, *supra* note 179, at 109 (noting that in *Buck* Holmes preferred power over right); James R. Zink, *James Wilson Versus the Bill of Rights: Progress, Popular Sovereignty, and the Idea of the U.S. Constitution*, 67 POL. RSCH. Q. 253, 263 (2014) (explaining Wilson's view that a constitutional bill of rights would stunt the progression and public discourse on natural rights); Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 629–30 (1956) (noting how "[t]he Hamilton-Wilson thesis" convinced James Madison to include the Ninth Amendment).

184. 1 WILSON, *supra* note 150, at 740.

185. Nourse, *Buck*, *supra* note 179, at 109–12 (observing Holmes's direct opposition with the founding distinction between right and power resulted in *Buck*); John Kang, *The Soldier and the Imbecile: How Holmes's Manliness Fated Carrie Buck*, 47 AKRON L. REV. 1055, 1063 (2015) ("effeminacy for

The English position amounted to the rule of legal positivism underlying Holmes and Brandeis' exceptions to state police powers delineated by a penumbra.[186] It was the very same position of Lord Camden in *Entick v. Carrington*,[187] which inspired Justice Brandeis' *Olmstead v. United States* dissent.[188] The sentiment of Camden was expressed in *Entick* thusly: "If it is law, it will be found in our books. If it is not to be found there, it is not law."[189]

Like Lord Camden, Holmes and Brandeis did not intend to apply rights from the bench outside those enumerated in "our books"—but this rule is given by Lord Camden in England and was not in American law books until *Boyd v. United States* reached outside of American law books to put it there.[190] The century long debate of how many rights could be indulged in the shadows of the words of our law books, was technically British.[191] Lord Camden's opinion makes little sense in the United States, where our law books begin with the Declaration of Independence, which "has accordingly always been treated as an act of paramount and sovereign authority."[192]

Holmes was a vice stuffed with narcissism, materialism, and sloth"); *id.* at 1068–70 ("By comparing Carrie's abject need for care with the soldier's courageous sacrifice, Holmes could treat her with moral contempt, something that was not forbidden in a universe where, Holmes said, creeds, including creeds founded on empathy, could 'collapse.'"). The reason Holmes was so passionately against the judicial recognition of human rights and was so obviously for the centralization of state power was his association of human rights with weakness and his association of power with strength. *See* Holmes, *Natural Law*, *supra* note 1, at 41–42 (disparaging the natural right of humans to live by commenting that even "a very tender-hearted judge" would justify the deaths of a few for the greater good); Holmes, *Law in Science*, *supra* note 1, at 457 (characterizing the jury as an escape hatch for effeminate judges who "avow[] [their] inability to state the law"); O'Connor, *They Often*, *supra* note 45, at 389 (presenting Holmes' idea that human rights were "no more than a romantic ideal with no place in the rough and tumble world"); John M. Kang, *Prove Yourselves: Oliver Wendell Holmes and the Obsessions of Manliness*, 118 W. VA. L. REV. 1067, 1080 (2016) (noting that Holmes "was obsessed with . . . the longing to obtain manliness").

186. *See Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting) (revealing his hesitancy to agree that the Fourth and Fifth Amendments' penumbrae covered the defendant); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1957); *cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES *161 (presenting the English theory of Parliamentary omnipotence, which was objectively disproven by the American Revolution).

187. Entick v. Carrington [1765] 19 How. St. Tr. 1029 (Eng.).

188. *Id.* at 1066, *quoted by Olmstead*, 277 U.S. at 474–75 (Brandeis, J., dissenting).

189. *Entick*, 19 How. St. Tr. at 1066.

190. *Id., quoted by* Boyd v. United States, 116 U.S. 616, 627 (1886) (using *Entick* to define what the Fourth Amendment "meant by unreasonable searches and seizures").

191. *Id.*

192. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 211 (noting that "the colonies did not severally act for themselves and proclaim their own independence" and stating that "the declaration of independence of all the colonies was the united act

The things that *Boyd* imported from *Entick*, that inspired Brandeis, were probably holdings repeated from Lord Coke in *The Case of Proclamations*.[193] They stated that the common law did not support inherent executive powers or general warrants, but that illegitimate general warrants arose from the feudal laws of the Star Chamber and Privy Council as observed by Lord Camden here:

> But there did exist a search warrant, which took its rise from a decree of the Star Chamber. . . . By this decree the messenger of the press was empowered to search in all places, where books were printing, in order to see if the printer had a license; and if upon such search he found an books which he suspected to be libellous against the church or state, he was to seize them, and carry them before the proper magistrate. . . . I do very much suspect that the present warrant took its rise from these search warrants that I have been describing. . . .[194]

Lord Camden surmised that unless a positive law or common law supported the executive's search or seizure, it was a plain trespass.[195] Upon an honest search through the centuries of English common law that Camden conducted shortly after the historical search James Otis conducted while

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of all . . . . It was emphatically the act of the whole people of the united colonies . . . . It was an act of original sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new one, whenever necessary for their safety and happiness. . . . No State had presumed of itself to form a new government, or to provide for the exigencies of the times, without consulting Congress on the subject; and when any acted, it was in pursuance of the recommendation of Congress. It was, therefore, the achievement of the whole for the benefit of the whole."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (establishing the fundamental principles of statecraft by which the U.S. Constitution and all the State Constitutions would be drafted and ratified); Schroeder, *Leviathan*, *supra* note 23, at 13 (quoting Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990)) (recognizing that the Declaration of Independence is the first of "the triad of founding documents"); *cf.* ARENDT, *supra* note 129, at 11, 213–14 (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)) (defining "beginning" and "principle" as synonyms, and noting that the beginning of the United States was the American Revolution marked by the Declaration of Independence, and noting that, perhaps, the beginning of the United States in 1776 may also point back to "the beginning of history" itself saying "no cause is left but the most ancient of all").

193. *Compare Entick*, 19 How. St. Tr. at 1066, *with* The Case of Proclamations [1610] 12 Co. Rep. 74, 76 (Eng.) ("[T]he King hath no Prerogative, but that which the Law of the Land allows him.").

194. *Entick*, 19 How. St. Tr. at 1069–70.

195. *Id.* at 1063 ("If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior."). *See* Little v. Barreme, 6 U.S. 170, 179 (1804) ("[T]he [presidential] instructions cannot change the nature of the transaction or legalize an act which without those instructions would have been a plain trespass.").

leading the American Revolutionaries in *Paxton's Case*,[196] Lord Camden only seemed to find Star Chamber precedent for general search warrants, which he honorably rejected as illegal.[197]

While no positive law existed to justify general warrants in England, American Colonies suffered under positive laws authorizing writs of assistance in America.[198] The English Navigation Acts allowed Admiralty Courts to issue writs of assistance that were a particularly degrading form of general warrant (i.e., a warrant that lacks particularity about the people, things, and places to be searched and seized).[199] Lord Camden's opinion in *Entick* echoed James Otis's appeal to the common law that "a man's house is his castle,"[200] but *Entick* was not enough to help the Americans because it did not end the use of general warrants authorized by law outside the physical borders of England.[201] The founders of the United States, therefore, appealed to Lord Coke's decision in *Dr. Bonham's Case*.[202]

196. *See generally* PARKER P. SIMMONS, JAMES OTIS'S SPEECH ON THE WRITS OF ASSISTANCE 1761 (Albert Bushnell Hart & Edward Channing eds., 1906).

197. *Entick*, 19 How. St. Tr. at 1069–70.

198. SIMMONS, *supra* note 196, at 2–5; *see id.* at 12, 20 (noting that the English Navigation Acts were "a plagiarism from Oliver Cromwell"); *An Act for increase of Shipping, and Encouragement of the Navigation of this Nation*, [Oct. 9, 1651], *in* 2 ACTS & ORDS. INTERREGNUM 559–62 (C.H. Firth & R.S. Rait eds., 1911) [hereinafter ACTS]; The Navigation Act 1660, 12 Car. 2 c. 18 (Eng.).

199. *Supra* note 198; Oliver Cromwell, *Underneath—Writ of Assistance* (May 9, 1648), *in* 3 THOMAS CARLYLE, THE LETTERS AND SPEECHES OF OLIVER CROMWELL 385 (S. C. Lomas ed., 1904); *see* Schroeder, *Leviathan*, *supra* note 23, at 139 n.792 (explaining the possible origins for the writ in Cromwell's dictatorship and the reasons why it was particularly degrading).

200. 3 EDWARD COKE, INSTITUTES *162; SIMMONS, *supra* note 196, at 4 (in *Paxton's Case* James Otis was reported to have spoken: "This Writ is against the fundamental Principles of Law.—The Privilege of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle . . . ."); *Entick*, 19 How. St. Tr. at 1064 (noting that general warrants within England "is not supported by one single citation from any law book extant," but also observing "such warrants" were "issued frequently" in England at the time); Donohue, *supra* note 119, at 1204 (noting that in response to *Entick* and other general warrant cases that English newspapers reported that it was affirmed within England "'every Englishman['s] . . . house is his castle'"); *cf. id.* at 1208 (noting that the idea that a man's house is his castle originally came from Lord Coke's opinion in *Semayne's Case*).

201. *Entick*, 19 How. St. Tr. at 1069–70. At the same time Lord Camden was shoring up English rights in *Entick* and other cases, Lord Mansfield was excluding Americans from those very same rights. Campbell v. Hall [1774] 98 Eng. Rep. 1045, 1047 (Eng.) (establishing a geographic limitation for English rights: "An Englishman in Ireland, Minorca, the Isle of Man, or the plantations [in America], has no privilege distinct from the natives."); ADAMS, THE REVOLUTIONARY, *supra* note 26, at 274–75 (expounding Lord Mansfield's opinion in *Rex v. Cowle* as a rubric to treat "the Americans as rebellious vassals, to subdue them, and take possession of their country," which would have effectively transformed the fabric of law at the foundation of American society from the freely held common law to the feudal law, which is slavery and conquest).

202. *See* George P. Smith, II, *Marbury v. Madison, Lord Coke and Dr. Bonham: Relics of the Past, Guidelines for the Present—Judicial Review in Transition?*, 2 U. PUGET SOUND L. REV. 255, 257–58 (1979)

Lord Coke's disbanding of English Star Chambers through the courts led directly to the English Civil War between the Republicans and Royalists.[203] The fracturing of English society during this dispute gave rise to the absolute dictator Oliver Cromwell.[204] While Lord Camden dutifully cited to the first habeas corpus law in *Entick*,[205] he otherwise ignored Cromwell's illegitimate positive laws for general warrants in England.[206]

Out of the wars waged by funds stolen from the English through general warrants,[207] Oliver Cromwell pillaged Ireland and conquered the Spanish territory of Jamaica.[208] Lord Mansfield specifically cited to Cromwell's conquest as the basis of all British Empire on a right to conquest in *Rex v. Cowle*.[209] In *Novanglus*, John Adams cited *Rex v. Cowle* as an example of the English goal of annexing America to England through feudal conquest here:

> We must now turn to Burrows's reports, vol. 2. 834. *Rex vs. Cowle*. . . . This opinion of the court was delivered by lord Mansfield in the year 1759. In conformity to the *system* contained in these words, my lord Mansfield, and my lord North, together with their little friends Bernard and Hutchinson, have

(discussing Coke's decision, which contained precursors to the American legal principles of judicial review and double jeopardy); SIMMONS, *supra* note 196, at 2 (discussing how the colonists resolved "to confer on the judiciary the power to declare unconstitutional statutes void"—the rule from *Dr. Bonham's Case*); JAMES OTIS, *Rights of the British Colonies*, *in* COLLECTED POLITICAL WRITINGS OF JAMES OTIS 175–76 n.* (Richard Samuelson ed., 2015) (citing Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)).

203. 3 EDWARD COKE, INSTITUTES *181–83 (noting that the *Case* and *Statute of Monopolies* required the common law to take precedence over Star Chamber practice); 1 JOHN LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 383 (1849) (stating Coke's resolutions were eventually "made the foundation of the *Habeas Corpus* Act"); *see* Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.) (legally abolishing the Star Chamber).

204. *Instrument of Government* (1653), *in* 2 ACTS, *supra* note 198, at 813–822 (installing Oliver Cromwell as Lord Protector with supreme legislative and executive powers); *Humble Petition and Advice* (1657), *in* 2 ACTS, *supra* note 198, at 1049–57 (granting Oliver Cromwell absolute power for life, like a king); THOMAS HOBBES, BEHEMOTH 130–40 (Ferdinand Tönnies ed., 1990).

205. *Entick*, 19 How. St. Tr. at 1049–51 (citing Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.)).

206. *Id.*; *see, e.g.,* Oliver Cromwell, *Underneath—Writ of Assistance* (May 9, 1648), *in* 3 CARLYLE, *supra* note 199, at 385. Around the time *Entick* was decided, only the Americans leveled an attack on Cromwellian laws in England. SIMMONS, *supra* note 196, at 20.

207. *See, e.g.*, An Ordinance For Raising of Twenty Thousand Pounds a Moneth for the Relief of Ireland, *in* 1 ACTS, *supra* note 198, at 1072, 1099–1100 (showing how Cromwell used general warrants to steal taxes from England to fund his pillages of Ireland).

208. Campbell v. Hall [1774] 20 How. St. Tr. 239, 289 (Eng.) ("Jamaica was conquered by Oliver Cromwell.").

209. Rex v. Cowle [1759] 2 Burr. Rep. 834, 835 (Eng.); *cf. Campbell*, 20 How. St. Tr. at 289, 98 Eng. Rep. at 1048–49 (citing the conquest of Jamaica as well as the conquest of Berwick, which was adjudicated in *Rex v. Cowle*, as bases of the ruling).

> "conceived the great design of annexing" all North America "to the realm of England," and "the better to effectuate this idea, they all maintain, that North-America is holden of the crown."
>
> And, no matter upon what foundation, they all maintained that America is dependent on the imperial crown and parliament of Great Britain: and they are all very eagerly desirous of treating the Americans as rebellious vassals, to subdue them and take possession of their country. And when they do, no doubt America will come back as parcel of the realm of England, from which, by fiction of law at least, or by virtual representation, or by some other dream of a shadow of a shade, they had been originally severed.[210]

The English people later invalidated Cromwell's laws and orders as to themselves, which Lord Mansfield begrudgingly commemorated in *Somerset's Case*.[211] But Mansfield cited Cromwell's conquest of Jamaica in *Rex v. Cowle* and *Campbell v. Hall* as the legal basis of limiting the freedom of England to its national borders, excluding the Americans from the common law protections of English free soil, and ultimately affirming the Navigation Acts, which were "a plagiarism from Oliver Cromwell."[212] In *Cowle* and *Campbell*, Mansfield instantiated the Hobbesian state of nature of absolute war as a general and overriding English feudal law of which its common law antecedent, embodied by *Somerset*, was only an exception.[213]

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210. Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775), *reprinted in* JOHN ADAMS & JONATHAN SEWALL, NOVANGLUS AND MASSACHUSETTENSIS 129–30 (1819).

211. Somerset v. Stewart (1772) 98 Eng. Rep. 499, 500, 510 (Eng.) (noting that by common law English soil is free soil: "the laws of this country, extend itself to those who have been brought over to a soil whose air is deemed too pure for slaves to breathe in it . . . therefore the black must be discharged"); George van Cleve, *"Somerset's Case" and Its Antecedents in Imperial Perspective*, 24 L. & HIST. REV. 601, 603–04 (2006) (noting how *Somerset's Case* was based in the English perspective "during the period 1540 to 1771" that based its conception of English freedom on the distinction of English soil being free and potentially the rest of the world being enslaved or at least less free that England).

212. SIMMONS, *supra* note 196, at 12, 20 (noting that the English Navigation Acts were "a plagiarism from Oliver Cromwell"); *An Act for increase of Shipping, and Encouragement of the Navigation of this Nation*, [Oct. 9, 1651], *in* 2 ACTS, *supra* note 198, at 559–62; The Navigation Act 1660, 12 Car. 2 c. 18 (Eng.); *cf.* Jones Act, 41 Stat. 988 (demonstrating that the United Stated failed to do much better than England when it eventually enacted this law loosely based on the English Navigation Acts).

213. *Cowle*, 2 Burr. Rep. at 835 (explaining that habeas corpus, a common law writ, did not extend to Berwick because it was conquered outside of the national borders of England and thus subject to feudal law); *Campbell*, 98 Eng. Rep. at 1047 ("An Englishman in Ireland, Minorca, the Isle of Man, or the plantations [in America], has no privilege distinct from the natives."); *id.* at 1048 (noting that the world outside of England remains in chaos with no property until the king "receives the inhabitants under his protection and grants them their property" of which "he has a power to fix such terms and conditions as he thinks proper"); RUSSELL, A HISTORY, *supra* note 1, at 550 (noting that in

Establishing this apparent contradiction of common and feudal laws was not actually very complicated from the English perspective around 1776.[214] Mansfield's outlook was rather ordinary, perhaps best embodied in his time by the English anthem *Rule Britannia*, which says that by conquering the world "Britons never, never, never, shall be slaves!"[215] Noticing that *Rule Britannia* exemplified the idea that the freedom of English people was intended to be reserved only to them by conquering everyone else, John Adams once wrote to James Lovell in 1779 that this song "Speaks the Soul of every Englishman. Britannia sings to her Sons."[216]

Back in 1765, when the Americans were still asking Great Britain to extend the common law rights of the Englishman to America, Lord Camden was perhaps unable to find the place in English history where general warrants originated.[217] James Otis similarly could find no legitimate legal origin of writs of assistance in the English law.[218] According to Adams, the laws of the interregnum were all censored at the time Lord Mansfield affirmed them in *Cowle* and *Campbell* as the basis of British Empire.[219]

Lord Mansfield preferred to locate the origin of the British Empire in the pretended right of Cromwell, a regicide, to conquer Jamaica.[220] Mansfield ignored the British Empire's actual origins in Massachusetts and Virginia

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Hobbes's "state of nature, there is no property, no justice or injustice; there is only war, and 'force and fraud are, in war, the two cardinal virtues'"); *cf.* ADAMS, THE REVOLUTIONARY, *supra* note 26, at 274–75 (using *Cowle* to explain how English feudalism structurally excluded America in order to justify the brutality of conquest and re-conquest).

214. 2 WILSON, *supra* note 150, at 1050–51 (noting that by choosing to limit the rights of Englishman geographically to England that "Britain seems determined to merit and to perpetuate, in political as well as geographical accuracy, the description, by which it was marked many centuries ago—'*divisos* toto orbe Britannos'" paraphrasing a well-known quote by Virgil that may be translated as: "The Britons separated from the whole world.").

215. RupertJones, *Rule Britannia – Last Night of the Proms 2009*, YOUTUBE (Sept. 13, 2009), https://www.youtube.com/watch?v=rB5Nbp_gmgQ.

216. Letter from John Adams to James Lovell (Oct. 4, 1779).

217. *See* Entick v. Carrington [1765] 19 How. St. Tr. 1029, 1069–70 (Eng.) (attempting to find the history of general warrants).

218. SIMMONS, *supra* note 196, at 16 n.* ("The form of this writ, was no where to be found; in no statute, no law book, no volume of entries; neither in Rastall, Coke, or Fitzherbert, nor even in the Instructor Clericalis, or Burns Justice. Where then was it to be found? No where, but in the imagination or invention, of Boston Custom House Officers, Royal Governors, West India Planters, or Naval Commanders." (source citation and internal quotation marks omitted)).

219. *Id.* at 16–27 ("[T]hese writs had been issued, though by what authority is not stated.").

220. Rex v. Cowle [1759] 2 Burr. Rep. 834, 835 (Eng.); Campbell v. Hall [1774] 20 How. St. Tr. 239, 289 (Eng.).

under the natural rights of the immigrant.[221] In *Entick*, Lord Camden failed to assist the Americans by properly overruling the Puritanical laws of the interregnum as illegitimate laws, including Cromwell's Navigation Acts, according to *Dr. Bonham's Case*.[222]

The common law facilitated the English Court's invention of almost the entire gamut of tort, contract, property law, and other private forms of suit.[223] The first of these developments apparently occurred in the case of *Rattlesdene v. Grunestone*, where medieval English judges invented implied warranties for wholesome food and drink.[224] Despite "the shock of the Norman Conquest," English judges were able to trick the system in favor of human rights over the brutalities of a conquering crown.[225]

The King only gave an action for trespass *vi et armis*, meaning "with arms."[226] But in *Rattlesdene*, a case about wine debauched with sea water, the judges strategically pretended that arrows and swords were forcefully used to introduce the unwholesome, dirty sea water into the wine.[227] This was likely the birth of the implied warranty of merchantable goods, and the start of the English judiciary's common law resistance to the conquering crown of Normandy.[228]

The English common law, as applied for centuries prior to *Entick*, guided the construction of positive laws to invent new forms of action to be heard in court.[229] The Parliament over the centuries took heed and responded by affirming these preexisting rights, most famously in *The Statute of*

221. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 238 ("[O]ur ancestors were entitled to the common law of England when they emigrated."); *See* OTIS, *supra* note 202, at 162 (citing Jeremiah Dummer, *A Defence of the New-England Charters* [1721]).

222. *Compare Entick*, 19 How. St. Tr. at 1069–70, *with* SIMMONS, *supra* note 196, at 20.

223. J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 60–64, 196–202 (4th ed., 2002)

224. 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).

225. 1 WILLIAM BLACKSTONE, COMMENTARIES *17; *see* BAKER, *supra* note 223, at 60–64. *See, e.g.*, BAKER & MILSOM, *supra* note 224, at 341.

226. BAKER & MILSOM, *supra* note 224, at 213.

227. *Id.*

228. *Id.*

229. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *17 (describing how the common law was adaptable to changing times); *see* BAKER, *supra* note 223, at 60–64. *See, e.g.*, BAKER & MILSOM, *supra* note 224, at 341.

Monopolies.[230] However, the laws of England seemed to develop from exactly the opposite starting point as they developed in America.[231]

For example, while extolling *Entick* as a precursor of the Fourth Amendment, the *Boyd* Court departed from *Entick* in one key and arguably overriding respect: it overruled a duly enacted law as unconstitutional and void in the style of *Dr. Bonham's Case*.[232] The English view, at the time of *Entick* rejected the American interpretation of *Dr. Bonham's Case*.[233] In 1776, English leadership, including Lord Camden, rejected James Otis' invitation to reignite Coke's movement for a free England along the same lines as American independence.[234]

Neither Brandeis,[235] nor Camden,[236] nor especially Holmes,[237] appeared to endorse Coke's destruction of unjust laws wherever they

230. 3 EDWARD COKE, INSTITUTES *182–83 (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)).

231. Where the primacy of English common law seems to have begun with patents, *see* 3 EDWARD COKE, INSTITUTES *182–83 (citing Statute of Monopolies 1623, 21 Jac. 1, c. 3 (Eng.)), in America it appears to have begun with copyrights. *See* JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 1772–1773, at 135, 137–43 (Mass. Hist. Soc'y ed., 1980) (indicating Governor Hutchinson vetoed William Billings' original copyright bill); Thomas Hutchinson, C.J., et al., *To the Public*, [Oct. 1772,] *in* WHEATLEY, *supra* note 171, at 7 (beginning the American tradition of author owned copyrights), *extended in* U.S. CONST. art. I, § 8, cl. 8.

232. Boyd v. United States, 116 U.S. 616, 638 (1886) (holding the warrants "unconstitutional and void" and overruling a law as unconstitutional to do so); *but see id.* at 629 (quoting *Entick v. Carrington* [1765] 19 How. St. Tr. 1029, 1069–70 (Eng.)and stating the warrants were "illegal and void," which is similar but different from the terms unconstitutional and void used by Lord Coke in *Dr. Bonham's Case* and repeated by the Americans in *Boyd*, i.e., Lord Camden did not overrule a law to find the warrants void).

233. 1 WILLIAM BLACKSTONE, COMMENTARIES *91, *quoted in* John V. Orth, *Did Sir Edward Coke Mean What He Said*, 16 CONST. COMM. 33, 35 (1999); *cf.* Tumey v. Ohio, 273 U.S. 510, 524 (1927) (citing Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.)).

234. JOSIAH QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY 516–17 (1865) (noting Lord Camden's disagreement with the holdings of *Dr. Bonham's Case* in a speech to the House of Lords in 1768, stating that though Parliament had no right to tax the Americans that no judge could hold the act unconstitutional or void).

235. *See* Olmstead v. United State, 277 U.S. 438, 472–73 (1928) (Brandeis, J., dissenting) (citing *Buck v. Bell*, 274 U.S. 200 (1927), and deciding that the parties had constitutional rights to privacy when there was a state law to support it, resembling *Entick* rather than *Boyd*).

236. *See* QUINCY, *supra* note 234, at 517 (suggesting Camden probably believed that individuals did have rights, but that they usually could not be adjudicated in a meaningful way).

237. *See Buck*, 274 U.S. at 207 (ignoring the rights of Carrie Buck entirely as irrelevant); *Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting) ("I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant. . . .").

violated human rights.[238] The practice of overruling unjust laws as unconstitutional was fully endorsed by the English Lords Coke and Holt,[239] James Otis in *Paxton's Case*,[240] and the United States Supreme Court in *Marbury* and *Boyd*.[241] In *Entick*, the English court rejected *Dr. Bonham's Case* just as the Americans adopted it.[242]

Nor did Brandeis, Camden, or Holmes comprehend Phillis Wheatley's role in importing common law rights into America in the wake of England's rejection of Lord Coke.[243] As discussed in *The Dark Side of Due Process: Part I*, Justice Brandeis demonstrated ignorance of the copyrights Phillis Wheatley secured for herself and defined the right of privacy as an extension of Star Chamber copyright law cited in *Millar v. Taylor* instead.[244] Lord Camden overruled the Star Chamber precedent Brandeis relied upon in the House of Lords without mentioning the famous Phillis Wheatley who contemporaneously vindicated the very rights he discussed in *Donaldson v. Beckett*.[245] Meanwhile, Justice Holmes seemed to flat out reject the existence of Wheatley's common law rights wholesale by disparaging them as mere penumbra.[246]

Rather, as also discussed in *The Dark Side of Due Process: Part I*, in the progressive era of Justice Holmes people with Phillis Wheatley's skin color

238. *See Buck*, 274 U.S. at 207 (ignoring the rights of Carrie Buck entirely as irrelevant); QUINCY, *supra* note 234, at 517 (suggesting "things may be legal and yet unconstitutional").

239. Dr. Bonham's Case [1610] 8 Co. Rep. 107a, 118a (Eng.); Day v. Savadge [1614] Hob. 85, 87 (Eng.); *cf.* OTIS, *supra* note 202, at 175–76 n.*.

240. SIMMONS, *supra* note 196, at 2.

241. Marbury v. Madison, 5 U.S. 137, 177–80 (1803); Boyd v. United States, 116 U.S. 616, 638 (1886) ("the notice to produce the invoice in this case, the order by virtue of which it was issued, *and the law* which authorized the order were unconstitutional and void") (emphasis added).

242. *Compare* Entick v. Carrington [1765] 19 How. St. Tr. 1029, 1069–70 (Eng.), *and* 1 WILLIAM BLACKSTONE, COMMENTARIES *91, *with* SIMMONS, *supra* note 196, at 2 , *and* OTIS, *supra* note 202, at 175–76 n.*.

243. Schroeder, *Leviathan*, *supra* note 23, at 168 ("The recent rediscovery of the revolutionary figure of Phillis Wheatley, though inspiring, is terribly incomplete; none of us yet captured the legal significance of Wheatley's marvelous feat.").

244. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (quoting Millar v. Taylor [1769] 4 Burr. 2303, 2312 (Eng.)).

245. 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) (labeling Judge Willes's 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").

246. Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting) (disparaging Justice Brandeis's defense of individual rights by calling it a "penumbra").

and gender were placed on the chopping block of eugenics.[247] The progressive era court also made horcruxes inspired by *The Slaughterhouse Cases* for the idea established in *Dred Scott* that not only black people, but perhaps all people, were not counted among the people born with the equal, inalienable rights recognized by the Declaration of Independence.[248] Eugenics appeared to come into fashion after the instantiation of *Dred Scott*-like rationales for the exclusion of women from the voting booth and the practice of law as well.[249]

Michelle Alexander's witness of *The New Jim Crow* proves that we still struggle to affirm the preexisting rights that Phillis Wheatley represents.[250] A part of this struggle remains what we make of those men who first established the United States, as their pursuit of social justice through the inalienable rights of humankind seemed to run aground in a bloody Civil War only to founder again in a eugenic wasteland that both appeared to be prophesied in Hobbes's thoughts about the "*Kingdom of Darknesse*."[251]

247. Buck v. Bell, 274 U.S. 200, 207 (1927) (constitutionalizing eugenics with a cost/benefit balancing test); *cf.* Hon. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) ("Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society.").

248. Dred Scott v. Sandford, 60 U.S. 393, 407 (1856) ("the 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"); 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); Downes v. Bidwell, 182 U.S. 244, 275–76 (1901) (similarly resurrecting a rationale from *Dred Scott*); *cf.* Sarah E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1656–57 n.29 (2018) (explaining what horcruxes are).

249. Minor v. Happersett, 88 U.S. 162, 165–66 (1874); Bradwell v. Illinois, 83 U.S. 130, 140–41 (1872).

250. MICHELLE ALEXANDER, THE NEW JIM CROW 228–29 (2010); Zelaya, *supra* note 15, at 4. These rights were vindicated and defended by Lord Coke and John Milton before her, but they were eventually denied in England. *See* 3 EDWARD COKE, INSTITUTES *182–83; JOHN MILTON, EIKONOKLASTES 13 (2d ed. 1650).

251. HOBBES, *supra* note 2, at 447–48 (noting both foreign and civil war are part of humanity's "diversity of ways in running to the same mark, *Felicity*"); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (noting that among humanity's "certain unalienable rights" is "the pursuit of Happiness"); HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 330 (1922) (arguing that those who are sterilized are "in now way impaired for his pursuit of . . . happiness" and that their sterilization will "prevent[] crime and tend[] to future comfort and happiness of the defective"); *see* Donald Rutherford, *In Pursuit of Happiness: Hobbes's New Science of Ethics*, 31 PHIL. TOPICS 369, 372 (2003) ("Happiness is something that all human beings seek. In this, Hobbes admits, the

Against the temptation of responding to these failures with Hobbesian cynicism, Phillis Wheatley raised her voice to contemplate the uses of unattainable virtues to inspire humanity to make the best of their situation:

> O though bright jewel in my aim I strive
> To comprehend thee. Thine own words declare
> Wisdom is higher than a fool can reach.
> I cease to wonder, and no more attempt
> Thine height t'explore, or fathom thy profound.
> But, O my soul, sink not into despair,
> *Virtue* is near thee, and with gentle hand
> Would now embrace thee, hovers o'er thine head
> Fain would the heaven-born soul with her converse,
> Then seek, then court her for her promised bliss.[252]

Wheatley doubted the capacity of human beings to understand exactly what virtue is and wondered "*Greatness*, or *Goodness*, say what I shall call thee."[253] She denied knowing the answer exactly, but asked virtue, the "[a]uspicious queen," to "[t]each me a better strain, a nobler lay."[254] Wheatley's doubtful hope in virtue directly counteracted Hobbes's certain despair embodied by his well-known replacement theory for virtues based on the pursuit of felicity, which is continual happiness.[255] Wheatley who developed light and dark as symbols for the dual nature of how human beings think, was assisted by her contemporary Goethe who also turned away from Hobbes when he

ancients were correct."); *cf.* William R. Lund, *Hobbes on Opinion, Private Judgment and Civil War*, 13 HIST. POL. THOUGHT 51, 62 (1992) (noting how Hobbes reasoned that by expressing opinions publicly, as we do in the United States, civil war must follow as occurred in England during the Puritan Revolution); Good, *supra* note 1, at 451–53 (noting how American Hegelians appeared to think that Hegel prophesied the American Civil War); O'Connor, *They Often*, *supra* note 45, at 389 (noting that progressives, like Justice Holmes, firmly disagreed with the founding ideals); Nourse, *Buck*, *supra* note 179, at 109–12 (noting that Holmes's disparagement of the type of individual rights defended by the founders facilitated the rebirth of eugenics in *Buck v. Bell*).

252. Phillis Wheatley, *On Virtue* [1773].

253. *Id.*

254. *Id.*

255. *Id.*; HOBBES, *supra* note 2, at 62 (rejecting virtue theory: "Felicity of this life, consisteth not in the repose of a mind satisfied. For there is no such *Finis ultimus*, (utmost ayme,) nor *Summum Bonum*, (greatest Good,) . . . .").

strained to see the complete picture of humanity and wrote, "Where there is much light the shadows are deepest."[256]

So it is actually not very surprising that when we welcomed John Adams, an early advocate of spreading a bright light into government affairs, that James Otis's sister Mercy Otis Warren noticed Adams' deep shadow following closely behind him.[257] As president, for example, Adams signed the Alien & Sedition Acts into law in direct contradiction to his revolutionary defenses of free speech,[258] and he was also one of the founders who was opposed to establishing the equal rights of women.[259] The next and final section below will, therefore, use concepts Phillis Wheatley developed to make the most of Adams' contribution to the founding of the United States without losing sight of Adams' imperfections.[260]

C. HOW JOHN ADAMS' IMAGINATION ILLUMINATED AMERICAN COMMON LAW RIGHTS

In 2020 and 2021, the United States Supreme Court barely vindicated the common law over feudal and canon law in a handful of key cases.[261] These

256. Johann Wolfgang von Goethe, *Götz von Berlichingen* Act I, Scene 3 [1773] ("Wo viel Licht ist, ist starker Schatten."); *see, e.g.,* Phillis Wheatley, *Thoughts on the Works of Providence* [1773] (noting the uses of the darkness: "As reason's pow'rs by day our God disclose, / So we may trace him in the night's repose: / Say what is sleep? And dreams how passing strange! / When action ceases, and ideas range").

257. Letter from Mercy Otis Warren to John Adams (Oct. 11, 1773) (including an original poem regarding the imagination and self-love, noting that vice boasts the same origin as virtue and stating quite memorably: "Self, the sole point in which [Caesar and Brutus] both agreed / By this Romes shackled, or by this shes Free'd, / Self Love, that stimulus to Noblest aim, Bids Nero Light the Capital in Flame"); 3 MERCY OTIS WARREN, A HISTORY OF THE RISE, PROGRESS, AND TERMINATION OF THE AMERICAN REVOLUTION 392–94 (1805) ("After Mr. Adams's return from England, he was implicated by a large portion of his countrymen, as having relinquished the republican system, and forgotten the principles of the American revolution, which he had advocated for near twenty years.").

258. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 28 (describing every common person's right to know "of the characters and conduct of their rulers"); Alien Enemies Act of 1798, 50 U.S.C. §§ 21–24 (the only part of the Alien & Sedition Act that is still on the books).

259. Letter from John Adams to Abigail Adams (Apr. 14, 1776) (expressing his fears that establishing the rights of women "would subject Us to the Despotism of the Peticoat").

260. *See, e.g.,* Schroeder, *Leviathan*, *supra* note 23, at 159–60 (noting how Wheatley gently corrected the errors of her male contemporaries).

261. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1395–96 (2020) (noting that the jury trial mentioned in the Sixth Amendment is "a vital right protected by the common law"); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021) (refusing to "defer to some conflicting reading [of a statute] the government might advance" when the ordinary meaning may be evinced from the text and structure of the statute itself according to the court's tools of common law construction); McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) (upholding the American idea of Native American sovereignty by

cases stood out from the usual "breezy cost-benefit analys[es],"[262] "raw consequentialist calculation[s],"[263] "nebulous balancing test[s],"[264] and other cost/benefit balancing approaches.[265] These inventions of legal realism in America are summed up by the proliferation of *Mathews*' due process framework throughout the country.[266]

Showing *Mathews'* cost/benefit balancing tests to be adverse to the common law conception of due process is only part of the picture.[267]

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extending *Worcester v. Georgia*, a holding that respected the original common law origins of sovereignty in the United States from a purchase rather than conquest or discovery); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) (adding the decisive vote to the plurality opinion in order to preserve the common law doctrine of stare decisis).

262. *Ramos*, 140 S. Ct. at 1401; *cf.* Edward v. Vannoy, 141 S. Ct. 1547, 1555–57 (2021) (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)) (refusing to apply *Ramos* retroactively because "the 'costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application'"—absurdly treating the ancient common law requirement of a jury trial as "new" in order to pretend that it was legitimate for Oregon and Louisiana to violate it prior to *Ramos*; pretending as if the 48 other states all acted spontaneously to secure that ancient right all this time).

263. *Niz-Chavez*, 141 S. Ct. at 1486; *cf.* Matter of LaParra, 28 I&N Dec. 425, 436 (BIA 2022) (pretending that *Lopez v. Barr* was never decided contrary to this rationale in the Ninth Circuit, and acknowledging a contrary Fifth Circuit opinion extending *Niz-Chavez*, but ignoring it as merely persuasive based on a very strange idea that (1) it did not apply the ordinary meaning of the statute when it did, and (2) that a federal agency need not listen to every Circuit Court, much less the U.S. Supreme Court, but only the ones with the theoretical power to directly overrule its decisions).

264. *McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting); *cf.* State *ex rel.* Matloff v. Wallace, 497 P.3d 686, 693–94 (Okla. Crim. App. 2021) (refusing to apply *McGirt* retroactively because of the "disruptive and costly consequences"), *cert. denied sub nom.*, Parish v. Oklahoma, 142 S. Ct. 757 (2022).

265. *See June Medical Servs.*, 140 S. Ct. at 2120–33 (plurality opinion) (applying a cost/benefit balancing test); *id.* at 2182 (Kavanaugh, J., dissenting) ("Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard."). In a leaked draft opinion purporting to overrule *Roe v. Wade* and *Casey v. Planned Parenthood*, Justice Alito used the Court's rejection of the plurality opinion's balancing test in *June Medical* to justify the disparagement of almost every judicial recognition of preexisting rights from *Loving v. Virginia* to *Obergefell v. Hodges* without adequately acknowledging that Chief Justice Roberts's rejection of balancing tests was intended as an affirmation of the right to abortion under *Roe v. Wade*. Dobbs v. Jackson Women's Health Org., No. 19-1392 unofficial leaked 1st draft opinion 31–32, 56 (2022).

266. *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (balancing the interests of the individual and the government actor); *see* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L. J. 1836, 1865 (2015) (noting that "[i]n the due process realm, the reigning [analysis is] *Mathews v. Eldridge*"); Aleinikoff, *supra* note 121, at 948 (explaining the ad hoc nature of *Mathews* balancing, and noting how "ad hoc balancing may undermine the development of stable, knowable principles of law").

267. PHILIP SCHOFIELD, UTILITY & DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM 241 (2006) (describing Bentham's dual projects of legal positivism and utilitarianism as the same project); *cf.* AUSTIN WOOLRYCH, COMMONWEALTH TO PROTECTORATE 271–73, 300 (1982) (noting that legal positivism began with the Massachusetts Bay Puritans); Rutherford, *supra* note 251, at 383 (explaining Hobbes's concept felicity as a rejection of virtue theory that animated his overall theory of government that may have inspired Bentham's adoption of utilitarian cost/benefit balancing).

Despite a few slight rejections of due process balancing tests around 2020, *Mathews*' hold is growing ever stronger in the United States.[268] Perhaps the more pertinent half to the whole is to show how *Mathews*' balancing approaches to due process open the door back to the feudal and canon laws of England.[269]

During the American Revolution, feudal and canon laws were thoughtfully rejected by the founders.[270] The overall sentiment of the founders regarding this topic was presented fully in John Adams' *Dissertation on the Feudal and Canon Laws*, where he observed "a wicked confederacy between the two systems of tyranny."[271] Thus, Adams named the contemptible collusion between priests and princes against the common people of England:

> [T]hat the temporal grandees should contribute every thing in their power to maintain the ascendancy of the priesthood, and that the spiritual grandees in their turn, should employ their ascendency over the consciences of the people, in impressing on their minds a blind, implicit obedience to civil magistracy.[272]

Adams recounted the historical fact that the oppressions wrought by feudal and canon laws in Europe "accomplished the settlement of America."[273] He remembered that the Americans originally set out to establish a "refuge from the temporal and spiritual principalities and powers . . . in direct

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If common law is defined as right reason, then Daniel Kahneman & Amos Tversky's research requires common law to reject Benthamite cost/benefit balancing tests as irrational. KAHNEMAN, *supra* note 48, at 377–78, 381; 2 WILSON, *supra* note 150, at 750 (explaining that the common law is "the golden and sacred rule of reason").

268. *Compare June Medical Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment) (defending common law stare decisis), *with id.* at 2120–33 (plurality opinion) (weighing the costs and benefits of continuing to extend abortion rights to women under *Roe v. Wade*).

269. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) (noting, in the context of a *Mathews* balancing test, that historically "the power to admit or exclude aliens is a sovereign prerogative"), *quoted by* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (applying a prerogative power, derived from English feudalism, to deport asylum seekers without a hearing and dispensing with the balancing test shell that *Landon* was supposed to represent). *Thuraissigiam* applied such a broad prerogative by appearing to disclaim the judicial power to review executive interpretations of the law, and it seems that it transcended Lord Coke's previous limitations, which limited English prerogatives to that which the common law, i.e., the law of the land, allows. The Case of Proclamations, 12 Co. Rep. at 76 ("the King hath no Prerogative, but that which the Law of the Land allows him").

270. *See, e.g.*, ADAMS, THE REVOLUTIONARY, *supra* note 26, at 240 (rejecting the canon and feudal laws in favor of the common law rights of immigrants and Native Americans).

271. *Id.* at 23.

272. *Id.*

273. *Id.*

opposition to the canon and the feudal systems."[274] Adams presented the idea that the founders carried the common law with them to the colonies as presented by Jeremiah Dummer's *Defence of Charters* and argued by James Otis in *Paxton's Case*.[275]

The American Revolutionaries redoubled their longstanding claim that by their flight "into the wilderness" they availed themselves of their natural rights originally granted to them by God.[276] They furthermore asserted that through their emigration away from England they carried with them an inheritance of common law rights.[277] Thus, John Adams took his place alongside numerous others to recount the cause of his ancestors:

> The adventurers so often mentioned, had an utter contempt of all that dark ribaldry of hereditary, indefeasible right,—the Lord's anointed,—and the divine, miraculous original of government, with which the priesthood had enveloped the feudal monarch in clouds and mysteries, and from whence they had deduced the most mischievous of all doctrines, that of passive obedience and non-resistance. They knew that government was a plain, simple, intelligible thing, founded in nature and reason, and quite comprehensible by common sense. They detested all the base services and servile dependencies of the feudal system. They knew that no such unworthy dependencies took place in the ancient seats of liberty, the republics of Greece and Rome; and they thought all such slavish subordinations were equally inconsistent with the constitution of human nature and that religious liberty with which Jesus had made them free. This was certainly the opinion they had formed; and they were far from being singular or extravagant in thinking so.[278]

This is not the doctrine of discovery or rights of conquest to justify European rule over the Americas.[279] Rather, the founders of the United States staked their legitimate rights to govern themselves upon an "actual Purchase from the Natives."[280] This right, originally defended by Roger

274. *Id.* at 24.

275. *Id.* at 23–24, 140–41; OTIS, *supra* note 202, at 162 (quoting Jeremiah Dummer, *A Defence of the New-England Charters* [1721]) ("Thus we see, that the court of admiralty long ago discover'd, no very friendly disposition towards the common law courts here.")

276. ARENDT, *supra* note 129, at 92; *see* ADAMS, THE REVOLUTIONARY, *supra* note 26, at 184 (discussing the troubles of English citizens as they fled their native country).

277. *See supra* note 275; *see also* WILSON, *supra* note 150, at 781 ("As citizens, who emigrate, carry with them their laws, their best birthright; so, as might be expected, they transmit this best birthright to their posterity.").

278. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 26.

279. *Id.* at 240.

280. *Id.* at 139.

Williams and rejected by the Puritan leadership of his day,[281] later became the basis of American law in *Worcester v. Georgia*, and extended in 2020 in *McGirt v. Oklahoma* as a fundamental promise to respect the rights of Native Americans as the basis of *all* rights.[282]

In addition to the colonists effectively carrying over their rights from England, founder of Rhode Island Roger Williams famously asserted that the Native Americans retained all their common law rights as a gift from God, and that the colonists bought into these Native rights through purchases of land, securing them from English oppressions.[283] Matching his revolutionary compatriots, Adams presented Roger Williams's conception as the correct formulation of the colonists' claim to legitimacy:

> Discovery, if that was incontestable, could give no title to the English king, by common law, or by the law of nature, to the lands, tenements, and hereditaments of the native Indians here. Our ancestors were sensible of this, and, therefore, honestly purchased their lands of the natives.[284]

Perhaps Adams can be forgiven for not entirely presenting the basis of this claim, because there are some obvious weaknesses to it—especially the brutal genocide of the Native Pequots of Mystic, Connecticut by the Puritans.[285] The Puritans also mercilessly prosecuted witches, whores,

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281. *See* Roger Williams, *A Just and Generous Assertion of Indian Rights* [1633] (defending Native American common law property rights), *mentioned in* 1 JOHN WINTHROP, WINTHROP'S JOURNAL "HISTORY OF NEW ENGLAND" 116–17 (James Kendall Hosmer ed., 1908) [hereinafter WINTHROP'S JOURNAL].

282. Worcester v. Georgia, 31 U.S. 515, 546 (1832) (noting the patents and charters of the crown "were considered as blank paper so far as the rights of the natives were concerned"), *extended by* McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) ("On the far end of the Trail of Tears was a promise.").

283. *Supra* note 281.

284. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 240. *See also* Roger Sherman, *Remarks on a Pamphlet Entitled, "A Dissertation on the political Union and Constitution of the Thirteen States of NORTH-AMERICA."* 16–17, 40–42 (1784) (quoting *Deuteronomy* 32:8; *Acts* 17:26) ("God hath made of one blood, all nations of the earth, and hath determined the bounds of their habitation.").

285. JOHN MASON, A BRIEF HISTORY OF THE PEQUOT WAR (1736) 15, 18, 20–21 (Paul Royster, ed., 2007) (applying the same terroristic logic Milton later expressed in *Samson Agonistes* at lines 865–68 of that poem to commit genocide on the Pequots in order to steal "*their Land for an Inheritance*"). *See* Letter from Roger Williams to Major [John] Mason, *in* ROGER WILLIAMS, THE LETTERS OF ROGER WILLIAMS 342–46 (John Russell Bartlett ed., 1874) [hereinafter WILLIAMS, THE LETTERS] (accusing John Mason of the heresy of worshiping "the great god self" for perpetrating the Pequot genocide in order to steal Native American lands by force creating an illegitimate title); *Memorial Detailing Conveyance of Mohegan Land to Major John Mason* (May 3, 1715) [hereinafter *Memorial*] (remembering the passing of land title from the Mohegan tribe to John Mason); Mohegan Indians v.

homosexuals, and drunkards with the full effect of canon and feudal processes including bills of attainder and corruptions of blood.[286] Adams, who was busy rallying the forces of revolution, did not adequately respond to these weak points.[287]

Nevertheless, Adams's revolutionary ally Isaac Backus responded to these weaknesses directly in his pro-freedom of speech and religion tracts and orations that helped inspire the First Amendment.[288] Backus successfully vindicated Roger Williams's old defense of the common law rights of the colonists, including the ones now embodied by the First Amendment, arising from purchases of land from the Native Americans during the American Revolution.[289] Thus, the causes of Roger Williams and Anne

Connecticut (1705–1773) (the Mason family's litigation for title and possession of stolen Pequot lands was cut off by the American Revolution). *cf.* Mark D. Walters, *Mohegan Indians v. Connecticut (1705–1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America*, 33 OSGOODE HALL L.J. 785, 804–05 (1995) (showing the Mason family's litigation for title and possession of stolen Pequot lands was cut off by the American Revolution); Schroeder, *Leviathan*, *supra* note 23, at 253 nn.1329–30 (noting the struggles Native Americans continued to experience in the United States with illegitimate transfers of land title through the same theory the Mason family originally raised in *Mohegan Indians v. Connecticut* through a straw purchaser they claimed was a legitimate guardian of the Pequots whom John Mason himself massacred).

286. *See* David C. Brown, *The Forfeitures of Salem, 1692*, 50 WM. & MARY Q. 85, 86–89 (1993) (recognizing that, while the Puritans meant to improve the law, they did not improve very much upon the feudal and canon law of England). *See, e.g.*, THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSET'S BAY 150 (2d ed., 1765) (describing the first recorded execution of a woman convicted of witchcraft); 1 WINTHROP'S JOURNAL, *supra* note 281, at 116 (noting that when Roger Williams attempted to advocate for the common law rights of Native Americans using the printing press, that the Puritans, acting much like a royal censor, physically destroyed his tract *A Just and Generous Assertion of Indian Rights* and yet failed to stop his pro-Native American ideas from spreading anyways until the founders of the United States adopted it as a foundation of their rights). In John Adams's diary, he stated his hope that by defending the Red Coats responsible for the Boston Massacre that he may have helped America avoid "as foul of a Stain upon this Country as the Executions of the Quakers or Witches, anciently." 2 JOHN ADAMS, THE ADAMS PAPERS 79 (L. H. Butterfield ed., 1961) [hereinafter ADAMS, THE ADAMS].

287. *See, e.g.*, ADAMS, THE REVOLUTIONARY, *supra* note 26, at 240 (adopting the generally accepted view that the original colonists "honestly purchased their lands of the natives," but relying on others to supply the historical proof). *Cf.* Howard Ioan Fielding, *John Adams: Puritan, Deist, Humanist*, 20 J. RELIGION 33, 40 (1940) (explaining that Adams "rejected the Calvinistic theology" and "retained much of the Puritan philosophy of life," which is why, perhaps, he did not criticize its weaknesses as much he might have).

288. Isaac Backus, *An Appeal to the Public for Religious Liberty* 25–26 [1773] (quoting WILLIAMS II, *supra* note 66, at 192).

289. *Id.* at 26 (noting the causes of Roger Williams's unjust banishment from Massachusetts Bay); Isaac Backus, *Truth is Great, and Will Prevail* 25–28 [1781] (criticizing the Puritans, in part, for their unjust treatment of the Natives writing, "[i]nstead of civilizing and converting barbarous infidels, as they undertook to do, they became themselves infidels and barbarians").

Hutchinson, whose husband and several followers co-founded Rhode Island with Williams based on an actual principle of religious freedom, were finally vindicated during the American Revolution.[290]

The Pequot Massacre resulted in a claim by the family of Captain John Mason, who originally led the military onslaught of the Pequots of Mystic, of a divine right to own the lands their patriarch stole.[291] But the Mason family soon found themselves tangled up in feudal court, subject to a crown that reserved the right of conquest to itself.[292] Eventually, the Mason family devised a straw purchaser out of the Mohegan Tribe to legitimize their ownership of the land they formerly stole in order to object to the crown's claims by conquest.[293]

During the American Revolution even the Masons, as inheritors of the spoils of America's genocidal past, were forced to adopt the American idea of purchases first popularized by Roger Williams.[294] The apology of former Witch Judge Samuel Sewall was also adopted by the American population at large.[295] This contested history, though relevant and supportive of the

290. *See, e.g.*, Thomas Jefferson, *82. A Bill for Establishing Religious Freedom* [June 18, 1779] (echoing Backus's wisdom: "truth is great and will prevail if left to herself"); U.S. CONST. amend. I (establishing the religious freedom Roger Williams pioneered as a dissenting voice in the Puritan experiment as a basis of the United States form of government).

291. MASON, *supra* note 285, at 15, 18, 20–21; Mohegan Indians v. Connecticut (1705–1773). *Cf.* Walters, *supra* note 285, at 803–04 (attempting to legitimize and legalize the Mohegans' straw conveyance of the lands of the no longer existing Pequot People to the Mason family whose ancestor led the army that murdered the Pequots to take their land).

292. Walters, *supra* note 263, at 792. *Cf.* Campbell v. Hall [1774] 98 Eng. Rep. 1045, 1048 (Eng.) ("It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him.").

293. Walters, *supra* note 285, at 804–05 (showing Mason named himself and "his heirs 'as their Protector and Guardian In Trust for the whole Mohegan Tribe'" in order to cover up the actual reason Mason had possession over Pequot lands, which he claimed in this case were actually Mohegan lands); *cf.* MASON, *supra* note 285, at 15, 18, 20 (recalling the conquest and subsequent conveyance of Mohegan lands); WILLIAMS, THE LETTERS, *supra* note 285, at 342.

294. *See* 1 WINTHROP'S JOURNAL, *supra* note 281, at 116 (noting Roger Williams's advocacy that the colonists' title to land in America derived from the Native Title, and depended upon their God-given common law rights, separate from anything granted or claimed or discovered from Europe); 1 WINTHROP'S JOURNAL, *supra* note 281, at 264–65 (noting how Roger Williams and Anne Hutchinson purchased Rhode Island from the Native Americans); *Memorial*, *supra* note 285 (detailing the subsequent attempt to document a purchase between Mason and the Mohegans); Mohegan Indians v. Connecticut (1705–1773); Walters, *supra* note 285, at 803–04 (showing how the Masons attempted to legitimize their possession of Pequot lands as a conveyance from the Mohegan Tribe).

295. *See* EVE LAPLANTE, SALEM WITCH JUDGE 1–5 (HarperCollins 2009) [hereinafter LAPLANTE, SALEM] (acknowledging the unjust Salem witch hangings, the repentance of one of the witch judges named Samuel Sewall, and the honor Samuel Sewall received for his apology in the public mural titled "Milestones on the Road to Freedom"); *cf.* 2 ADAMS, THE ADAMS, *supra* note 286, at 79

general position of the Americans as a repentant, imperfect people, is difficult to explain.[296]

It was enough, in *Novanglus*, for John Adams to name the feudal law in *Rex v. Cowle* that was being used to oppress the American Colonies.[297] That law, if extended to American Colonies, would have revoked all the rights of the colonists under feudalism, which remains the state of rights versus powers in England today.[298] Inspired by James Otis' cause for the people, Adams explicitly disputed the English formulation of rights and powers:

> Let it be known, that British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts, coequal with prerogative, and coeval with government; that many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed.[299]

In his controversy with William Brattle, for example, Adams located the dependency of judges upon the crown in the feudal law and identified it as one of the primary problems of British government.[300] Adams repeated this conclusion in his 1776 tract *Thoughts on Government*, which was adopted into Article III of the United States Constitution.[301] This was the first and only original addition of the American Revolution into the political science.[302]

(noting his defense of the Red Coats as an attempt at making amends and a sign that Massachusetts repented from the witch trials of its past).

296. Eve LaPlante's stellar works in this area prove that the effort is worth the reward. *See generally* LAPLANTE, SALEM, *supra* note 295 (illustrating social awareness of regrettable past atrocities); EVE LAPLANTE, AMERICAN JEZEBEL (HarperCollins 2010) [hereinafter LAPLANTE, AMERICAN] (documenting atrocities on American soil).

297. *See* ADAMS & SEWALL, *supra* note 210, at 129–30 and accompanying text.

298. *Id.*; Rex v. Cowle [1759] 2 Burr. Rep. 834, 835 (Eng.), *extended by* Campbell v. Hall [1774] 20 How. St. Tr. 239, 289 (Eng.), *aff'd*, *and extended by* R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng. 2008), *rejected by* Boumediene v. Bush, 553 U.S. 723, 751 (2008).

299. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 33.

300. *Id.* at 75–77.

301. *Id.* at 116, 291–92 (speaking of independent judges, "their commissions should be during good behavior, and their salaries ascertained and established by law" and that their offices should be held "during good behavior"), *extended by* U.S. CONST. art. III, § 1 (requiring that federal judges serve during "good Behaviour").

302. *See* ARENDT, *supra* note 129, at 200 (quoting James Madison's statement that the independent judiciary was "the unique contribution of America to the science of government") (internal quotations marks omitted).

Adams hoped that this peculiar contribution would create a system that shunned feudal and canon law forever, as an obvious form of tyrannical absurdity.[303] However, possibly during his stay in England,[304] Adams developed a devout rationalism and believed the human mind could automatically perceive what is in our best interests.[305] However, Nobel Prize winning psychologist Daniel Kahneman recently debunked Adams's rationalism with the help of his research partner Amos Tversky.[306]

While Adams's contribution of independent courts is undoubtedly necessary, Kahneman & Tversky noted that we cannot presume the rationality of judges to know what is in their best interests.[307] It is disappointing, but not surprising, that independent United States judges currently embrace the judicial dependence of canon and feudal law.[308] The unwitting proliferation of judicial forays into the feudal and canon law is observed in several recent U.S. Supreme Court decisions.[309]

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303. *Id.*; ADAMS, THE REVOLUTIONARY, *supra* note 26, at 115.

304. *Cf.* 3 WARREN, *supra* note 257, at 392–94 (noting that something changed regarding Adams after his stay in England).

305. *See* 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 5, 8 (1787) [hereinafter ADAMS, A DEFENCE] (basing his defense of a separation of powers "in nature and reason" and hoping that if the French were reasonable they would adopt the plan rather than listening to Turgot's critiques of American constitutions).

306. KAHNEMAN, *supra* note 48, at 377–78, 381. *Cf.* Letter from John Adams to Thomas Boylston Adams (Apr. 7, 1796) (appearing to offer strong evidence of the irrationality of humankind in the face of his rationalistic endeavors: "Nedham as great a Changling as he was, and as great a Villain, has had more honour done to his weak system than Sir Thomas More, Mr. Harrington or even Plato. It has cost many hundreds of thousands of Lives to cure France of their Idolatry to it. And I am afraid my good Friends the Dutch will have reason too to repent of it. Oh Franklin! Thy Rods will not in a thousand Years save half the Number of Lives that has been destroyed already in France by their inconsiderate Admiration of thy Attachment to Marchmont Nedhams Legislation.").

307. *See* KAHNEMAN, *supra* note 48, at 377–78, 381.

308. *See* Torres v. Madrid, 141 S. Ct. 989, 997 (2021) (citing to the Star Chamber as good law); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1977–82 (2021) (quoting Seila Law v. CFPB, 140 S. Ct. 2183, 2203 (2020) (ignoring the founders' rejection of direct democracy and the fact that the first presidential elections were *not* decided by direct votes of the people: "The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections.")) (extending the privy council inspired theory from *Oil States Energy Servs.* under the unitary executive theory established by *Seila Law*); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1376–77 (2018) (citing to the Privy Council to legitimize PTAB).

309. *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492 (2019), *overruling* Nevada v. Hall, 440 U.S. 410, 414–15 (1979) (rejecting both "the structure of the feudal system" and the "fiction that the King could do no wrong"); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2379, 2383–84 (2020) (prior to the Little Sisters becoming intervenor, this case caption was *Trump v. Pennsylvania*, and Trump remained the central party to the suit while he seemed to

Several of these opinions are papered over with cost/benefit balancing tests.[310] Embedded in many of these recent opinions is the feudal and canon laws' conspiracy to convince the people that all our rights are granted by governments rather than, as the American Revolutionaries contended, that human rights are coeval with governments as their legitimizing basis.[311] In yet another passage, John Adams declared the American position:

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disappear from vision, which is virtually the strategy of John Mason in *Mohegan Indians*, i.e., this is a case where the president defeated Congress with a puritan conception of the freedom of religion as the freedom of one person to take away the freedom of another); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020) (disclaiming the Court's jurisdiction to review "disputes between the school and the teacher" under an exception that amounts to interpreting the First Amendment as the Puritan liberty to take away the liberty of others), *extending* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (creating, for the first time, a ministerial exception to the First Amendment, which allows religious institutions including churches and schools to openly violate federal and state laws); Kaley v. United States, 571 U.S. 320, 340–41 (2014) (disclaiming judicial review of grand jury proceedings, as discussed in *The Dark Side of Due Process: Part II*, is a disturbing mixture of feudal and canon laws, by saying flatly "the answer is: whatever the grand jury decides"); DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (asserting a feudal power of prerogative usually reserved to the crown in the English context); Hernandez v. Mesa, 140 S. Ct. 735, 749–50 (2020) (granting U.S. officials qualified immunity to kill or murder Mexican children playing on the other side of the border—this law arose originally from the maxim that the king can do no wrong applied in *The Bankers Case*, which was a quintessential assertion of feudalism).

310. *See Thuraissigiam*, 140 S. Ct. at 1982 (citing to dicta from *Landon v. Plasencia*, a *Mathews* balancing test case, for its basis of asserting prerogative powers); *Hernandez*, 140 S. Ct. at 749–50 (citing to *Ziglar v. Abbasi*, which administered a balancing test to decide qualified immunity); *Kaley*, 571 U.S. at 340–41 (applying a *Mathews* balancing test to decide the matter in favor of feudal and canon law).

311. *See* U.S. CONST. pmbl. (referring to the people of the United States as the sovereign), *extended by* Chisholm v. Georgia, 2 U.S. 419, 455–56 (1793) ("[W]e should never forget, that, in truth and nature, those, who think and speak, and act, are men," i.e., excluding corporations including public corporations that compose the outer shell of government making them merely legal persons); *id.* at 458 ("The sovereign, when traced to his source, must be found in the man."); *id.* at 462–63 (rejecting the English feudal system by citing to the preamble of the U.S. Constitution); *id.* at 472 ("From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most, stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. Their Princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens."), *extended by Hall*, 440 U.S. at 419, *overruled on other grounds by Hyatt*, 139 S. Ct. at 1489, 1492, 1496, 1498 (referring to *Chisholm* as a "discredited decision" and that it "was incorrect" but not overruling *Chisholm* and not discussing its central issue of popular sovereignty versus feudal sovereignty—the reasons *Hyatt* overruled *Hall* regarded *Hyatt's* endorsement of a very strained, highly technical, and arguably absurd reading of the Eleventh Amendment); *cf.* Schroeder, *We Will*, *supra* note 23, at 42 (explaining why *Hyatt* was absurdly decided); Randy E. Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular*

> Be it remembered, however, that liberty must at all hazards be supported. We have a right to it, derived from our Maker. But if we had not, our fathers have earned and bought it for us, at the expense of their ease, their estates, their pleasure, and their blood. And liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings, and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers. Rulers are no more than attorneys, agents, and trustees, for the people; and if the cause, the interest and trust, is insidiously betrayed, or wantonly trifled away, the people have a right to revoke the authority that they themselves have deputed, and to constitute abler and better agents, attorneys, and trustees.[312]

Embedded in this passage was an endorsement of a progressive tax structure for the benefit of rights secured through public spending in the interest of all classes of people.[313] The rights endowed from our maker were not, in the time of Adams, seen in terms of negative or positive rights.[314] The human rights Adams presented as most vital were as a light shining in the

Sovereignty, 93 VA. L. REV. 1729, 1750 (2007) (examining how Scalia and others blithely conflated the people with their legislatures in several decisions to undermine popular sovereignty in America).

312. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 28.

313. *Id.*; *see* 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 203 (Nathaniel B. Shurtleff ed., 1853) (establishing compulsory education in Massachusetts Bay for all classes of people in 1647: "every towneship in this jurisdiction . . . shall then forthwith appoint one [teacher] within their towne to teach all such children as shall resort to him to write & reade, whose wages shall be paid either by ye parents or masters of such children, or by *ye inhabitants in general*") (emphasis added).

314. *See* ADAMS, THE REVOLUTIONARY, *supra* note 26, at 28 (expounding the right to have an education paid for by the government as of the same quality as the right not to have one's property and chattels searched and seized without reasonable suspicion at least). The non-existence of the new positive/negative rights dichotomy from John Adams's time was emphasized by the leadership of James Otis and Phillis Wheatley, when they electrified the colony by demonstrating that Otis's right not to have one's papers seized by the government is the same right, or at least joined at the hip in a necessary and mutually affirming way, with Wheatley's and William Billings's rights to create those papers in the first place and to sell them to make a living. *See* Schroeder, *Leviathan*, *supra* note 23, at 160–65, 182 ("[W]here Otis's arguments vindicated the private property in curtilage of the home, Wheatley's writings vindicated the underlying *value* of private property as essential to the human capacities of thought and creativity," i.e., it appears that Otis's rights and Wheatley's rights were one in the same, and it furthermore seems that artificially separating them as negative and positive rights respectively could render both theories to fundamental confusion).

darkness,[315] antithetical to penumbral privacy rights that are a "dream of a shadow of a shade."[316] But, rather, Adams's right of the citizenry to know, even facts that embarrassed the government,[317] was situated in the light of knowledge, not in its shadow, dispersed liberally as the sun disperses its enlightening rays among all classes of people.[318]

According to the light spread into America through John Adams's imagination, the United States established independent courts where the judges serve during good behavior.[319] This structural change did not come from English common law, but the ingenuity of Adams himself.[320] New innovations like Adams's took form in America under the auspices of the capacity of human imagination, a capacity that was defended most stridently by the founding poetess Phillis Wheatley.[321]

The common law, while it is not perfectly good and at times endorsed legal errors,[322] is assisted and perhaps even created by the capacity of the

315. *See* ADAMS, THE REVOLUTIONARY, *supra* note 26, at 24 (referring to "enlightened . . . nations," i.e., the metaphor of light used in the enlightenment was still in fashion); *cf. 2 Corinthians* 4:6.

316. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 275.

317. *See id.* at 28 (declaring that ordinary human beings have a "divine right to that most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers").

318. *See id.* at 21 ("[W]herever a general knowledge and sensibility have prevailed among the people, arbitrary government and every kind of oppression have lessened and disappeared in proportion."); *id.* at 27 (defending "knowledge diffused generally through the whole body of the people," and advocating the propagation and perpetuation of knowledge); *id.* at 28 (declaring "liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge," and thus advocating for "the preservation of the means of knowledge among the lowest ranks"); *id.* at 34 (stating "let every sluice of knowledge be opened and set a-flowing," and naming the Stamp Act an attempt "to strip us in a great measure of the means of knowledge"); *id.* at 61 (resisting English attempts "to delude and terrify men out of all their knowledge"); *id.* at 292 (advocated a constitution that "introduce[d] knowledge among the people, and inspire[d] them with a conscious dignity becoming freemen"); *id.* at 321 ("Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them," including in "public schools and grammar schools in the towns").

319. *See supra* note 301 and accompanying text.

320. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 116, 291–92; *cf.* ARENDT, *supra* note 129, at 200.

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

322. 2 WILSON, *supra* note 150, at 1132 (noting that "parts of the common law, which did not suit those who emigrated to America . . . were . . . left behind"). *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 414–15 (1979) (noting that the feudal principle of sovereign immunity was developed by common law, but was originally feudal and therefore, in America, illegitimate), *overruled on other grounds by* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492 (2019).

human imagination.[323] For example, the independent judiciary was borne through Adams's imagination, but its purpose was to defend and expound the common law by reducing or eliminating feudal and canon influence over the bench.[324] Thus the imagination helps the common law as its companion, leader, or queen.[325]

Phillis Wheatley, who authored these metaphors in relation to reason, provided useful terminology to describe how Adams succeeded in America.[326] Common law is right reason or a product of judicial reasoning under centuries of collected wisdom through a slow development under the ancient doctrine known as *stare decisis*.[327] According to Phillis Wheatley, the capacity of human reason is properly understood as the servant of love, and the activity of rationalizing is conducted through our mental processes by

323. *See* Jill Lepore, *The Rule of History*, NEW YORKER (Apr. 13, 2015), https://www.newyorker.com/magazine/2015/04/20/the-rule-of-history [https://perma.cc/389S-BEPF] (explaining how Lord Coke imagined the Magna Carta was a binding constitution in England, and observing how this imagined constitution was actualized in England); *cf.* 2 WILSON, *supra* note 150, at 750–51 (noting that finding the origins of common law in England "is extremely difficult, if not altogether impracticable," however, while guessing a "Grecian extraction," Wilson also noted that the origins of the common law "is not of essential importance" because "their obligatory force arises not from any consideration of that kind, but from their free and voluntary reception in the kingdom").

324. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 76–79, 88–89 (refuting Brattle's claim that an independent judiciary was already structurally established by English common law when it was not, while also defending the common law's apparent requirement that English judges be unbiased and independent in their judgements).

325. Phillis Wheatley seemed to use these metaphors interchangeably. *See* Phillis Wheatley, *On Imagination* [1773] (naming the imagination the queen or leader of the mental train); Phillis Wheatley, *Thoughts on the Works of Providence* [1773] (naming reason the servant of love the "celestial queen" in which "the Godhead [is] shown").

326. Phillis Wheatley, *On Imagination* [1773]; Phillis Wheatley, *Thoughts on the Works of Providence* [1773] (explaining how the motions of the mind between action and repose are mirrored by the existence of the day and the night, the light and the darkness, and suggesting that reason and reasoning exists in the realm of day, while the imagination takes flight in the realm of night while we are resting); *cf.* Mercy Otis Warren, *To Mr. Adams* [1773], *enclosed in* Letter from Mercy Otis Warren to John Adams (Oct. 11, 1773) (providing this wonderful poem that also addresses the imagination, privately enclosed to John Adams). Warren presented the imagination as double-edged: an "aeiry queen, who Guides the Helm of hope," but also "Holds A False Mirrour to the Dazzel'd sight / A Dim perspective, A Delusive light." *Id.*

327. *See* 2 WILSON, *supra* note 150, at 749–50 (giving several definitions of the common law including "the golden and sacred rule of reason" and noting that the common law is reason perfected by time as in the Ciceronian idioms *time will tell* or *test of time*: "Time is the wisest of things. If the qualities of the parent may, in any instance, be expected in the offspring; the common law, one of the noblest births of time, may be pronounced the wisest of laws."); *id.* at 775 ("During many—very many revolving centuries, the common law has been the peculiar and the deserved favourite of the people of England.").

the imagination, the "leader of the mental train," with the help of recollection, the "fair regent of the night."[328]

According to Wheatley, when under the auspices of the human imagination, recollection, and emotion, reason can be an extremely useful ally.[329] This formulation of human mental activity was, perhaps originally, expounded by Cicero in his tracts *Scipio's Dream*, *De Amicitia*, *De Officiis*, and others.[330] Thomas Paine agreed with these formulations in his pamphlet *Common Sense*, which was a tribute to Ciceronian thought.[331]

Paine, like his contemporary John Adams, illustrated how even the most Ciceronian champion of enlightenment can betray their former ideas for the darkness.[332] Both Adams and Paine, as well as Jefferson in the South, betrayed Ciceronian skeptic idealism (known as empiricism in a later age) for the dogmas of absolute reason.[333] Phillis Wheatley contended that

328. Phillis Wheatley, *On Imagination* [1773]); Phillis Wheatley, *On Recollection* [1773]; Phillis Wheatley, *Thoughts on the Works of Providence* [1773].

329. *Supra* notes 327–28.

330. Cicero, *De Re Publica* 6.9.9 (demonstrating the proper way to use one's imagination in the sixth book of *De Re Publica*, which is known as *Scipio's Dream*); Cicero, *De Amicitia* 7.24, 24.89, 25.93 (demonstrating how to use one's experiences of the arts to help define one's terms—Cicero frequently cites to Terence the African playwright to help him define love); Cicero, *De Officiis* 1.4.11 (explaining the capacity of humans to take action in order to change the course of human events); *cf.* Phillis Wheatley, *On Friendship* [1773] (speaking of "amicitia" in Ciceronian Latin); Phillis Wheatley, *To Mæcenas* [1773] (making a place for herself like Terence of Rome in America); OTIS, *supra* note 202, at 64 (preparing America for Wheatley's message by observing Terence's maxim "*Homo sum: humani nihil âne alinum puto*, was attended with a Thunder-Clap of Applause through the whole Roman Theatre. 'He who don't consider himself as related to every one of the human Race, is unworthy [of] the Name *Man*'").

331. THOMAS PAINE, COMMON SENSE 2 (1776) (laying the foundation of his argument upon "the power of feeling").

332. *See* Letter from Thomas Paine to his Fellow Citizens of the United States of America, *in* THOMAS PAINE, THE AGE OF REASON 3 (1877) [1794] [hereinafter PAINE, THE AGE] (arguing reason is "[t]he most formidable weapon against errors of every kind"); *id.* at 86 (declaring his allegiance to the rationalism of Newton and Descartes). Paine's contemporaries in America remained aligned with his earlier thoughts, which were originally galvanized by Wheatley's leadership. G.W. SNYDER, THE AGE OF REASON UNREASONABLE 8 (1798); Anon., *The Folly of Reason* 8, 20, 23 [1794] ("[T]he pretense of the *absolute perfection* of human reason is absurd"—"he who is made the most positive of the sufficiency of his own reason, will be the most likely to be governed by the blindness of his own passions"); ELIAS BOUDINOT, THE AGE OF REVELATION 25–26, 30, 66, 162 (1801) (referring to Thomas Paine's tract *Common Sense* with tentative approval, while reviewing Thomas Paine's tract *The Age of Reason* negatively, and finally naming Paine a "pretender to Common Sense" due to the blunder he made by writing *The Age of Reason*).

333. For each of these three Americans, their default to rationalism appears to be inextricably connected to the French Revolution: PAINE, THE AGE, *supra* note 332, at 5 (writing during and from within the French Revolution); 1 ADAMS, A DEFENCE, *supra* note 305, at 5, 8 (responding to Turgot's rationalistic criticisms of American constitutions with rationalism); THOMAS JEFFERSON, NOTES ON

reason should not be deified, because it would be a usurpation of the proper place of love as the actual image of God.[334]

Notwithstanding the deep shadows of misogyny, slavery, and terror that followed the light bringers Adams,[335] Jefferson,[336] and Paine[337] respectively, the independent courts affirmed Adams's original position.[338] In *Chisholm v. Georgia*, the Court overruled feudalism and upheld the common sense as the proper fountain of justice.[339] Wheatley's framework was established as paramount law in *Chisholm* over the self-betrayals of Adams, Jefferson, and Paine, in order to assist common law rights in the United States.[340]

Those who favor judicial reform, especially after the U.S. Supreme Court's recent shadow docket rulings,[341] may take courage from this analysis.[342] The independent structure of the United States courts was the

THE STATE OF VIRGINIA 166 (Lilly and Wait 1832) (responding to a French inquiry about Virginia: "Reason and free enquiry are the only effectual agents against error."); *cf.* RUSSELL, UNPOPULAR, *supra* note 2, at 33 ("Empiricism, finally, is to be commended not only on the ground of its greater truth, but also on ethical grounds. Dogma demands authority, rather than intelligent thought, as the source of opinion; it requires persecution of heretics and hostility to unbelievers; it asks of its disciples that they should inhibit natural kindliness in favour of systematic hatred.").

334. Phillis Wheatley, *Thoughts on the Works of Providence* [1773]. *Cf.* RUSSELL, UNPOPULAR, *supra* note 2, at 148 ("Universal love is an emotion which many have felt and which many more could feel if the world made it less difficult.").

335. Letter from John Adams to Abigail Adams (Apr. 14, 1776) (claiming that extending equal rights to women would "compleatly subject Us [i.e., men generally] to the Despotism of the Peticoat").

336. JEFFERSON, *supra* note 333, at 143 (proposing to change the common law of England by "mak[ing] slaves distributable among the next of kin, as other moveables").

337. PAINE, THE AGE, *supra* note 332, at 57–60 (acknowledging the existence of the French Terror that Paine himself had a hand in causing, without endeavoring to answer any of the important questions regarding how "the guillotine and the stake outdid the fire and the faggot of the church"—Robespierre subsumed religion with his cult of reason, and yet even as Paine nearly lost his head according to this cult, Paine's faith in reason did not break, but appeared to get even stronger).

338. Chisholm v. Georgia, 2 U.S. 419, 453–54 (1793) (deciding upon "the principles of common sense" rather than notions of absolute reason).

339. *Id.* (giving the basis of common sense for the decision); *id.* at 458 (debunking "the English maxim, that the King or sovereign is the fountain of Justice").

340. *Id.* at 453–54 (relying on Thomas Reid's exposition of the Ciceronian common sense); Cicero, *De Oratore* 1.12 (modelling the common sense pursued by American jurisprudence); *cf.* Phillis Wheatley, *On Imagination* [1773] (resembling Cicero's thought experiment in *Scipio's Dream*); Phillis Wheatley, *On Friendship* [1773] (resembling Cicero's similar focus on friendship as perhaps the ultimate expression of human love)..

341. *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495–96 (2021).

342. *See* Rachel Maddow, *'This is a Courts Problem': Supreme Court Flop on Abortion Law Prompts Calls for Reform*, MSNBC (Sept. 2, 2021), https://www.msnbc.com/rachel-maddow/watch/-this-is-a-courts-problem-supreme-court-flop-on-abortion-law-prompts-calls-for-reform-120104005730

product of Adams's judicial reform efforts to assist the common law, but it did not come from the common law.[343] Thus, reforming the judiciary is a founding American tradition, while freezing judicial structures as they were in 1789 is not.[344]

CONCLUSION: REMEMBERING THE FLEXIBILITY OF COMMON LAW DUE PROCESS

Most American lawyers take for granted that the common law established almost all the ordinary causes of action we know today.[345] As Joseph Story's *Commentaries* acknowledged, the common law is the basis of the entire U.S. system of law.[346] Common law struggled with feudal and canon forms and eventually transformed them for the benefit of ordinary people even in the face of the most heinous travesties of the English and American past.[347]

The Witch Judges of Salem, Massachusetts and the Parliament of Saints in England did not prevail through despotic radicalism to demolish the common law through codification.[348] Legal positivism always seemed to spatter large amounts of human blood across the countries that adopted it.[349] There is no rational reason for the people of the United States to re-

[https://perma.cc/T8RF-V6EF] (addressing the problem of *Whole Woman's Health* as a structural issue for the courts in an interview with U.S. Supreme Court expert Dahlia Lithwick).

343. ADAMS, THE REVOLUTIONARY, *supra* note 26, at 76–79, 88–89.

344. *Id.*

345. 1 WILLIAM BLACKSTONE, COMMENTARIES *17; BAKER, *supra* note 223, at 60–64; BAKER & MILSOM, *supra* note 224, at 341.

346. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 157 ("The whole structure of our present jurisprudence stands upon the original foundations of the common law.").

347. 2 WILSON, *supra* note 150, at 767 ("The common law, as now received in America, bears, in its principles, and in many of its more minute particulars, a stronger and a fairer resemblance to the common law as it was improved under the Saxon, than to that law, as it was disfigured under the Norman government.").

348. WOOLRYCH, *supra* note 267, at 271–73, 300; CHRISTOPHER HILL, GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 171, 273 (1970).

349. *See, e.g.*, HILL, *supra* note 348, at 171, 273 (the Napoleonic Code, based on the Code Cromwell Bentham wished for, were developed to oversee times of extreme onslaughts against the rights of humankind); 4 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., 1843) ("Behold what was said in his day by *Cromwell!* In my eyes, it ranks that wonderful man higher than anything else I ever read of him:—it will not lower him in yours."); M. DUMONT, PRINCIPLES OF LEGISLATION: FROM THE MS. OF JEREMY BENTHAM 120, 231–36 (John Neal trans., 1830) ("If it be better for the greatest happiness of the greatest number that a man should die . . . *cut him [down] without mercy*.") (emphasis added); *cf.* SCHOFIELD, *supra* note 267, at 241 (noting that legal positivism was developed by Bentham in pursuit of his happiness principle, but failing to capture the

adopt legal positivism to administer rigid formalities that the common law exists to relieve.[350]

Due process under the common law is not confusing.[351] It is simply due process under the written law according to the common sense rules for statutory construction that are confirmed by the test of time.[352] But the common law requires that when rights are taken away, it is not done in secret, by a dependent political body, or without a jury trial.[353] According to common law if a positive law fails to mention the requirements of due process, a legitimate court may imply them into the law.[354]

The founders gave us many clues and shortcuts to apply the common law, including numerous references to it in the Bill of Rights and United States Constitution.[355] These short cuts are so easy for Americans, that even our brightest jurists take them for granted and often forget their origin.[356] These jurists are prone to follow the legal realism and positivism

irony of Bentham's involvement in the French Revolution as a possible cause for the extreme unhappiness and terror of those times).

350. *See, e.g.*, 2 WILSON, *supra* note 150, at 767.

351. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–61 (citing Chisholm v. Georgia, 2 U.S. 419 (1793)) (explaining how to use the common law to construe the U.S. Constitution, including due process clauses, by using the objects stated in the preamble to inform the application of the other provisions of the U.S. Constitution).

352. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–61, 1789, 1908, 1941, 1949 (defining the due process clause according to the common law and stating: "Let us never forget that our constitutions of government are solemn instruments, addressed to the common sense of the people, and designed to fix and perpetuate their rights and their liberties. They are not to be frittered away by the demagogues of the day. They are not to be violated to gratify the ambition of political leaders. They are to speak in the same voice now and forever. They are of no man's private interpretation. They are ordained by the will of the people; and can be changed only by the sovereign command of the people.").

353. *Id.*; 3 EDWARD COKE, INSTITUTES *182–83 (the common law was first tried and vindicated in the English Civil War, where monopolies and the Star Chamber were abolished in favor of preexisting rights of life and the adversarial process); Schroeder, *Leviathan*, *supra* note 314, at 180 (noting the Council of the North was one of the royal Star Chamber-like courts that eventually caused the English Civil War by refusing to adhere to the common law mandated by the Statute of Monopolies).

354. 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."). *Cf.* Dr. Foster's Case [1616] 11 Co. Rep. 56b, 62a–64b (Eng.) (demonstrating how to imply preexisting rights into statutes to ensure their constitutionality).

355. U.S. CONST. arts. I–III; U.S. CONST. amends. I–X.

356. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, THE TANNER LECTURES ON HUMAN VALUES 113 (Mar. 8 & 9, 1995) (characterizing the common law as anti-democratic and thereby, apparently,

of Justice Scalia in the project of rejecting the very common law that brought our courts into being.[357]

The *Mathews* framework for due process especially appeals to these jurists.[358] But as shown above, where *Mathews* is taken to its final end, it will consume itself and potentially destroy the very shortcuts to the common law that made its ruling possible.[359] Perhaps it will take losing these common law shortcuts through *Mathews*' self-destruction for American jurists to realize what is actually at stake in our debates over what process is due.[360]

One of the most ironic and absurd characteristics of legal positivists from Justice Oliver Wendell Holmes, Jr. to Justice Antonin Scalia, is that they never quite figured out how to quit the common law.[361] Every so often they unwittingly embraced a common law rule despite themselves.[362] This fact emphasizes the holes in legal positivist theory, including that it cannot work but as a parasite upon the common law, because the common law is a complete fabric of law.[363]

The common law always seemed to find the cracks in feudal and canon laws to replant itself like a rose growing from concrete, even if by sheer

unconstitutional by ignoring the several references to the common law in the U.S. Constitution, especially in the Suspension Clause and the Supremacy Clause).

357. *Compare id.* at 113, *with* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 157 ("The whole structure of our present jurisprudence stands upon the original foundations of the common law."); *id.* at § 453 (noting portions of the United States Constitution that referred directly to the common law).

358. *See, e.g.*, Aleinikoff, *supra* note 121, at 963 (noting that balancing tests reflect an "up-beat, 'can-do' judicial attitude"); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2120–33 (2020) (plurality opinion) (applying a balancing test to achieve a presumably liberal result).

359. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)) (citing to the dicta stated in the context of a *Mathews* cost/benefit balancing decision to justify the use of anti-immigrant prerogatives).

360. *See, e.g.*, *id.* at 2015 (Sotomayor, J., dissenting) (showing how the loss of habeas corpus for asylum seekers caused Justice Sotomayor to break away from the majority and acknowledge the reality that the majority opinion was "nothing short of a self-imposed injury to the Judiciary, to the separation of powers, and to the values embodied in the promise of the Great Writ").

361. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 40–41 (2001) (creating and developing common law stare decisis); Hamdi v. Rumsfeld, 542 U.S. 507, 575–76 (Scalia, J., dissenting) (criticizing the majority for engaging in "judicious balancing" which "has no place where the Constitution and the common law already supply an answer"); Moore v. Dempsey, 261 U.S. 86, 91–92 (1923) (vindicating the common law writ of habeas corpus).

362. *See, e.g.*, *Kyllo*, 533 U.S. at 40–41 (developing the common law in a case of first impression); *Moore*, 261 U.S. at 91–92 (vindicating the common law writ of habeas corpus).

363. *See* Jeffrey D. Goldsworthy, *The Self-Destruction of Legal Positivism*, 10 OXFORD J.L. STUD. 449, 471–72 (1990).

human imagination.[364] Let us, therefore, not despair.[365] Rather, let us water the cracks in the concrete and scatter seeds in unlikely places as well,[366] because something new may be formulating in the darkness below, preparing to break into the light, to give new life to the law in America.[367]

364. Tupac Shakur, *The Rose that Grew from Concrete* [1999]. *Compare* 2 WILSON, *supra* note 150, at 767, *with* Phillis Wheatley, *On Imagination* [1773], *and* HOBBES, *supra* note 2, at 3–13 (discussing imagination).

365. Phillis Wheatley, *On Virtue* [1773]; FLANNERY O'CONNOR, A PRAYER JOURNAL 22 (2013).

366. *Cf.* Tupac Shakur, *The Rose that Grew from Concrete* [1999] (providing an example of the talent that can spring up from unlikely places).

367. Frederick FREDERICK DOUGLASS, What to the Slave is the 4th of July? (July 5, 1852), *in* ORATION DELIVERED IN CORINTHIAN HALL, ROCHESTER 38 (1852)("The fiat of the Almighty, 'Let there be Light,' has not yet spent its force."); *cf.* Phillis Wheatley, *To the Rev. Dr. Thomas Amory on Reading His Sermons on Daily Devotion, in which that Duty is Recommended and Assisted* [1773] ("In vain would *Vice* her works in night conceal, For *Wisdom's* eye pervades the sable veil."); Phillis Wheatley, *Ocean* [1773] (showing us a prospect of creation of light out of darkness).