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THE DARK SIDE OF DUE PROCESS: PART II WHY PENUMBRAL RIGHTS AND COST/BENEFIT BALANCING TESTS ARE BAD

JOSHUA J. SCHROEDER*

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

This is Part II of a three-part series known as "The Dark Side of Due Process" published with The St. Mary's Law Journal. Parts I and III will precede and follow 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 GOOD THINGS ENGRAINED IN EVIL SYSTEMS

Justice Holmes showed us that by trying to use the bad man's idea of the law, even in an attempt to force bad men to be good men, a judge is prone to become a bad man in the process.[1] However, as Kafka assured us,[2] a judge's consideration of the evils of bad men is not only appropriate but required.[3] Taking a cue from Flannery O'Connor's focus on Kafka, Part II examines the dark side of due process as applied in recent cases.[4]

Flannery O'Connor, who was arguably Kafka's most brilliant student, explained the uses of extending Kafka's style of thinking about evil, specifically in the American context.[5] O'Connor's writings existed "in territory held largely by the devil" to show the devil to us, lest he "convince

1. Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069, 2079 (2011); Buck v. Bell, 274 U.S. 200, 207–08 (1927).

2. FLANNERY O'CONNOR, A PRAYER JOURNAL 16 (2013) [hereinafter O'CONNOR, A PRAYER] ("Please give me the necessary grace, oh Lord, and please don't let it be as hard to get as Kafka made it."); *see* Robert Fulford, *'We ought to read only the kind of books that wound us': How literature teaches us to be human*, NATIONAL POST (Sept. 19, 2016), https://nationalpost.com/entertainment/books/we-ought-to-read-only-the-kind-of-books-that-wound-us-how-literature-teaches-us-to-be-human [https://perma.cc/KQM5-2M7W] (quoting from Kafka: "'A book must be the axe for the frozen sea within us. That is my belief.'"); *infra* notes 5–7 and accompanying text.

3. O'CONNOR, A PRAYER, *supra* note 2, at 26; Maxwell S. Kennerly, *Lessons from Kafka: Aaron Swartz and Prosecutorial Overreaching (Updated)*, LITIG. & TRIAL (Jan. 14, 2013), https://www.litigationandtrial.com/2013/01/articles/series/special-comment/kafka-aaron-swartz/ [https://perma.cc/6T2A-H4RC] (noting how Kafka examined the unsatisfying nature of a world where the law is not rationally concerned with correcting bad men, but is "frustratingly incomprehensible"); *cf.* Edith H. Krause, *Wisdom and the Tightrope of Being. Aspects of Nietzsche in Kafka's The Metamorphosis (1915)*, 15 DIALOGUE AND UNIVERSALISM 21, 24, 29 (2005) (noting that Kafka's *Metamorphosis* is a study of the meaninglessness and arbitrariness of Neitzsche's *übermensch* ideology).

4. O'CONNOR, A PRAYER, *supra* note 2, at 13, 16, 26.

5. *Id.*; *see* FLANNERY O'CONNOR, MYSTERY AND MANNERS: OCCASIONAL PROSE 97–98 (Sally Fitzgerald & Robert Fitzgerald eds., 1969) [hereinafter O'CONNOR, MYSTERY] (explaining Franz Kafka's *The Metamorphosis*: "The fact is that this story describes the dual nature of man in such a realistic fashion that it is almost unbearable.").

us that he does not exist."[6] Thus, at the very outset of her writing career, O'Connor made this entry in her prayer journal,

> Hell, a literal hell, is our only hope. Take it away & we will become wholly a wasteland not a half a one. Sin is a great thing as long as it's recognized. It leads a good many people to God who wouldn't get there otherwise. But cease to recognize it, or take away from devil as devil & give it to devil as psychologist, and you also take away God. If there is no sin in this world there is no God in heaven. No heaven. There are those who would have it that way.[7]

O'Connor used her stories to show us how even the devil can be used by God to redeem the world—unwilling as the devil may be in such a project.[8] Her stories, therefore, used the devil to "accomplish[] a good deal of the groundwork that seems to be necessary before grace is effective."[9] For O'Connor, it was "frequently . . . an action in which the devil has been the unwilling instrument of grace" that may one day turn her highly problematic, racist, sexist, murderous, and extremely evil characters "into the prophet[s they were] meant to become."[10]

After January 6, 2021, when a violent mob nearly destroyed democracy in the United States, O'Connor's belief in the sort of radical grace that extends especially to the worst of us who may, for all we know, be motivated by Satan himself, is encouraging.[11] O'Connor furthermore considered the duality of human vices in her prayer journal, but focused on despair rather than Hobbesian pride:

> I will always be staggering between Despair & Presumption, facing first one & then the other, deciding which makes me look the best, which fits most comfortably, most conveniently. I'll never take a large chunk of anything. I'll nibble nervously here & there. Fear of God is right; but God, it is not this

6. O'CONNOR, MYSTERY, *supra* note 5, at 112, 118.
7. O'CONNOR, A PRAYER, *supra* note 2, at 26.
8. O'CONNOR, MYSTERY, *supra* note 5, at 113, 118.
9. *Id.* at 117.
10. *Id.* at 113, 118.
11. *Id.* at 118; *cf.* JESSICA HOOTEN WILSON, GIVING THE DEVIL HIS DUE: DEMONIC AUTHORITY IN THE FICTION OF FLANNERY O'CONNOR AND FYODOR DOSTOEVSKY 19, 45–46 (2017) (giving a perspective on the uses O'Connor had for the devil and evil men).

> nervousness[.] . . . Sin is large & stale. You can never finish eating it nor ever digest it. It has to be vomited.[12]

O'Connor, who routinely spent her evenings reading Thomas Aquinas' *Summa Theologica*, did not need Hobbes to explain to her how vices worked.[13] However, Hobbes may be interpreted as one of O'Connor's unwilling prophets[14] because he intended to follow Satan to the lowest circles of hell and then somehow assisted humanity despite himself.[15] For Hobbes explained vices to Protestants, agnostics, and atheists so that they might hear what Catholics already knew, so that Phillis Wheatley could one day gently correct the generally non-Catholic, English speaking world in order to cause the American Revolution.[16]

With Hobbes, we can freely depart from teachings of the Church that have grown stale.[17] For example, Hobbes departed from the idea that vice

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12. O'CONNOR, A PRAYER, *supra* note 2, at 22.

13. FLANNERY O'CONNOR, THE HABIT OF BEING: LETTERS OF FLANNERY O'CONNOR 93–94 (Sally Fitzgerald ed., 1988), *cited by* ST. THOMAS AQUINAS, SUMMA OF THE SUMMA 11 (Peter Kreeft ed., 1990); *cf.* THOMAS HOBBES, LEVIATHAN 46–48 (A. R. Waller ed., 1904) (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).

14. O'CONNOR, MYSTERY, *supra* note 5, at 113, 118.

15. HOBBES, *supra* note 13, at 46–48 (seeking to refute Aristotle's virtue theory, Hobbes ironically provided a better statement of the virtues); *see, e.g.*, Devin Stauffer, *"Of Religion" in Hobbes's Leviathan*, 72 J. POL. 868, 878 (2010) (explaining how Hobbes redefined virtues: "His new principles may be less exalted than the traditional ones he sought to replace, but he argues that they are clearer and more rational."); *cf.* BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 548, 551 (1945) [hereinafter RUSSELL, A HISTORY] (noting that "[t]he pacts and covenants by which 'Leviathan' is first created take the place of God's fiat when He said 'Let Us make man' . . . [t]his 'Leviathan' is a mortal God[,]" i.e., the human beings that make up a nation-state as a whole are considered as God and the nation or state is a Leviathan, an artificial God that resembles the actual God; thus, Leviathan commands the worship of individuals to the central idea of God-as-the-people, by accepting their worship as a stand-in for the whole people—this entire analogy is pointedly anti-Christian or at least outside of Christianity and it was criticized in Hobbes's day as such, but it resembles modern ideas of the people and the state so well that Hobbes is far less criticized today, even by those that profess Christianity).

16. HOBBES, *supra* note 13, at 46–48; *see* 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, 63 (2021) [hereinafter Schroeder, *We Will*] (referencing Phillis Wheatley's action that sparked the American Revolution).

17. *See* Stauffer, *supra* note 15, at 873 ("Again, it was by way of contrast with the gods produced by the anxiety-gripped imaginations of ignorant men that Hobbes turned, as a digression, to discuss God as the incomprehensible first cause."); *cf.* RUSSELL, A HISTORY, *supra* note 15, at 549 (explaining

is sin, which the Protestant Church characterized as actions or deeds rather than, as Hobbes suggested, an oxymoronic emotional state.[18] This freed Hobbes to correct the Protestants in some places, including in their definition of sin, where perhaps the Protestants needed correction, and possibly presenting a more accurate version of humanity.[19]

To achieve his evil ends, Hobbes needed to outdo the church's version of virtues and vices enough to make vices seem preferable.[20] In so doing, Hobbes may have become the very instrument of grace from the sins of the Church that he did not intend to be.[21] Therefore, evil and evil systems are worth considering not only to avoid them, but also to steal from them when they unwittingly unleashed the very blessings that they meant to hold back.[22]

From the Arendtian perspective, we can see that evil is essentially banal and Hobbes's tracts were not banal; rather, the tracts were rich and marvelous, notwithstanding his ends being undoubtedly evil.[23] Therefore, there must be some good in his writing to steal from Hobbes before cutting him off from his desired end.[24] Similarly, Kierkegaard stole from Hegel

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how Hobbes was far more modern than his Puritan contemporaries, for example, he thought the "[b]elief that dreams are prophetic is a delusion; so is the belief in witchcraft and in ghosts").

18. HOBBES, *supra* note 13, at 46–48; *cf.* RUSSELL, A HISTORY, *supra* note 15, 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'").

19. HOBBES, *supra* note 13, at 46–48.

20. *Id.*; *cf.* RUSSELL, A HISTORY, *supra* note 15, at 550 (offering a perspective on Hobbes's redefinition of vices as virtues).

21. HOBBES, *supra* note 13, at 46–48; *see* Jennifer Billingsley, *Works of Wonder, Wondering Eyes, and the Wondrous Poet: The Use of Wonder in Phillis Wheatley's Marvelous Poetics*, *in* NEW ESSAYS ON PHILLIS WHEATLEY 174 (John C. Shields & Eric D. Lamore eds., 2011) (describing how Wheatley both accepted the gifts of Hobbesian philosophy, while refuting its biggest errors).

22. Billingsley, *supra* note 21, at 174; *see* Karla V. Zelaya, *Sweat the Technique: Visible-izing Praxis Through Mimicry in Phillis Wheatley's "On Being Brought from Africa to America"* 3 (Sept. 2015) (Ph.D. dissertation, University of Massachusetts, Amherst) (available on Scholar works of University of Massachusetts, Amherst) ("Wheatley in fact established a poetic prototype for 'a poaching raid of sorts, a stealing of signs' that had already existed in colonial culture."); RUSSELL, A HISTORY, *supra* note 15, at 555 ("Let us now try to decide what we are to think of the *Leviathan.* The question is not easy, because the good and the bad in it are so closely intermingled.").

23. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 54 (1963); *see* Billingsley, *supra* note 21, at 174 (describing Hobbesian wonder).

24. HOBBES, *supra* note 13, at 3–13 (Hobbes's descriptions of the imagination and the consequence or train of imaginations are almost certainly included in the material Hobbes established that benefited humankind and is worth preserving); *see* Billingsley, *supra* note 21, at 174 (explaining how

and invented Existentialism, a very useful frame of thought that inspired thinkers like Heidegger and Sartre.[25]

Flannery O'Connor stole directly from Satan himself (or at least, she thought of herself as doing so).[26] James Baldwin stole from Nietzsche to make a place for himself in France and America; in the same way, Phillis Wheatley told Mæcenas, "I'll snatch a laurel from thine honour'd head."[27] So too, American lawyers may steal from Justice Holmes to preserve the blessings he did not mean to impart, including his firm assertion of common law *de novo* review of state criminal cases that he required in *Moore v. Dempsey*.[28]

The Dark Side of Due Process: Part II will focus on the practical, recent effects of the dark side of due process in court. It will begin with a response to recent shadow docket activity that led to the nullification of *Roe v. Wade*[29] in the 2021 case *Whole Woman's Health v. Jackson*.[30] Then it will discuss Kelli Dillon's witness against California's resurrection of eugenics in the 2000s.[31] Finally, it will name several recently established Star Chambers in America linked to the *Mathews v. Eldridge*[32] cost/benefit balancing framework.[33]

Wheatley "invokes the miraculous wonder Hobbes described"); *see also* Zelaya, *supra* note 22, at 3 (arguing Wheatley exemplified the "strategic re-citation of Anglo European literary markers").

25. JON STEWART, KIERKEGAARD'S RELATIONS TO HEGEL RECONSIDERED 185–87 (2003). *See generally* SØREN KIERKEGAARD, EITHER/OR (1843) (reshaping Hegelian ideology into a useful philosophy known as Existentialism).

26. O'CONNOR, MYSTERY, *supra* note 5, at 113, 118.

27. Phillis Wheatley, *To Mæcenas* [1773]; JAMES BALDWIN, THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS 78 (Randall Kenan ed., 2010) (paraphrasing FRIEDRICH NIETZSCHE, THUS SPAKE ZARATHURSTRA 169 (Thomas Common trans., 1896)).

28. Justice Sandra Day O'Connor was perhaps the most vigilant preserver of the unintended gifts of Holmesian ideology in the past era. *See* Wright v. West, 505 U.S. 277, 299–303 (1992) (O'Connor, J., concurring) (addressing and adding to a list started by Justice Thomas, giving several decisions that applied *de novo* review in habeas cases, beginning with "*Moore v. Dempsey*, 261 U.S. 86 (1923) . . . , and *Frank v. Mangum*, 237 U.S. 309 . . . (1915)"); 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, 394–95 (1992) [hereinafter O'Connor, *They Often*] (describing the significance of *Moore* and *Frank*).

29. Roe v. Wade, 410 U.S. 113 (1973).

30. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (calling *Ex parte Young* into question); *id.* at 2498 (Sotomayor, J., dissenting) (noting that the Court chose not to "enjoin a flagrantly unconstitutional law").

31. *See generally* BELLY OF THE BEAST (Erika Cohn dir., 2020).

32. Matthews v. Eldridge, 424 U.S. 319 (1976).

33. *See* Joshua J. Schroeder, *Conservative Progressivism in Immigrant Habeas Court: Why Boumediene v. Bush is the Baseline Constitutional Minimum*, 45 THE HARBINGER 46, 51–52 n.13 (2021) [hereinafter Schroeder, *Conservative*] (explaining how cost/benefit balancing tests are used by conservative judges to

A. REGARDING THE SHADOW DOCKET AND THE NULLIFICATION OF *ROE V. WADE*

The United States Supreme Court's "shadow docket" first exploded into view in 2014 when the Court issued an equitable order on behalf of Wheaton College to clog legally mandated contraceptive coverage.[34] The issuance of an equitable order prior to administering any legal process to justify it is completely imprudent and counter to the Court's general, prior practice.[35] The shockwaves that *Wheaton College v. Burwell*[36] caused were the conceptual birth of the shadow docket.[37]

This is to say that Professor William Baude coined the term "shadow docket" to characterize the *Wheaton College* injunction.[38] But even the term

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"bypass liberal criticism"); *id.* at 56. *Compare* Kaley v. United States, 571 U.S. 320, 340 (2014), *and* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (quoting Landon v. Placensia, 459 U.S. 21, 32 (1982) (applying a *Mathews* balancing test)), *with* Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L. J. 405, 446 (2020).

34. Wheaton Coll. v. Burwell, 573 U.S. 958, 959 (2014); *see* Joshua J. Schroeder, *America's Written Constitution: Remembering the Judicial Duty to Say What the Law Is*, 43 CAP. U. L. REV. 833, 877–84 (2015) [hereinafter Schroeder, *America's*] ("The Court ventured into a minefield when it contradicted the authority of its own *stare decisis*, using an equitable injunction before a case or controversy was heard by the Court."); *see also* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 7–8 (2015) (describing the peculiar nature of *Wheaton College* in the dissent by the Justices).

35. *Wheaton Coll.*, 573 U.S. at 959 (contradicting *Hobby Lobby* and directly violating the Affordable Care Act (ACA) by allowing Wheaton College to affirmatively block women from obtaining contraceptive insurance coverage that the federal law mandated); *id.* at 960–61 (Sotomayor, J., dissenting) (noting that "[i]njunctions of this nature are proper only where 'the legal rights at issue are indisputably clear'" and emphasizing that the legal rights involved in *Wheaton College* were anything but clear) (quoting Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers)); Schroeder, *America's*, *supra* note 34, at 877–84; *cf.* Baude, *supra* note 34, at 23.

36. Wheaton Coll. v. Burwell, 573 U.S. 958 (2014).

37. *See supra* notes 34–35; Dahlia Lithwick & Sonja West, *Quick Change Justice: While You Were Sleeping,* Hobby Lobby *Just Got So Much Worse*, SLATE (July 4, 2014, 2:59 PM), https://slate.com/news-and-politics/2014/07/wheaton-college-injunction-the-supreme-court-just-sneakily-reversed-itself-on-hobby-lobby.html [https://perma.cc/3R6G-LHMM] (explaining the shocking shadow docket behavior in *Wheaton College* without the term "shadow docket" because it had not yet been coined by Professor William Baude); Baude, *supra* note 34, at 7–8 (coining the term "shadow docket" in reference to the *Wheaton College* injunction).

38. Baude, *supra* note 34, at 5–8; *cf.* Charlie Savage, *Texas Abortion Case Highlights Concern Over Supreme Court's 'Shadow Docket'*, N.Y. TIMES (Sept. 2, 2021), https://www.nytimes.com/2021/09/02/us/politics/supreme-court-shadow-docket-texas-abortion.html [https://perma.cc/6YVT-ESER] (noting that the Court's "orders docket . . . was

"shadow docket" was created out of Baude's boredom with "the Term's merits cases," which he thought "were a fizzle rather than a bang."[39] Baude began speaking of a shadow docket with an air of apparent indifference, while I reported on the fireworks caused by the Court feigning positivism, which pinnacled in *Hobby Lobby* and was completely "obliterated by the *Wheaton* injunction" only three days later.[40]

Wheaton College's extreme assertion of equitable power right after *Hobby Lobby* promised never to do such a thing broke Justice Sotomayor's trust in the Court to do what it says it will do.[41] A similar turning point occurred in Justice Stevens' career when he wrote in *Pennhurtst State School v. Halderman*:[42] "This case has illuminated the character of an institution."[43] Baude failed to recognize that as a result of *Wheaton College*, Sotomayor's trust in the integrity of the Court was broken to the point that she would no longer presume to take the Court at its word.[44]

Instead, Baude picked at Sotomayor for not seeing the Court's character sooner—a cruel thing to say about someone right after they realized how they had been duped.[45] According to Baude's own seemingly smug analysis, the shadow docket remained uninteresting to most lawyers until

deemed the 'shadow docket' in 2015, in an influential law journal article by William Baude, a University of Chicago law professor").

39. Baude, *supra* note 34, at 3.

40. Wheaton Coll. v. Burwell (Wheaton Temporary Injunction), 573 U.S. 943 (2014) (granting Wheaton College a temporary injunction on June 30, 2014, which presumably ended on June 3, 2014 when the injunction was made effectively permanent as long as Wheaton kept litigating); *Wheaton Coll.*, 573 U.S. at 958–59 (inventing an informal way for Wheaton College to initiate their own injunction against the government "[i]f the applicant informs the Secretary of Health and Human Services in writing" on July 3, 2014); Wheaton Coll. v. Azar, 2018 U.S. Dist. LEXIS 219163, at *4–5 (N.D. Ill. 2018) (granting a permanent injunction and noting how this result occurred by other shadow docket behavior of the U.S. Supreme Court after the Wheaton College injunction that seemed to indicate that once you get an adverse shadow docket ruling that it is effectively permanent and will be enforced eventually by actually calling it a permanent injunction years later); *Schroeder, America's, supra* note 34, at 834–36, 874. I originally wrote "four days" after Hobby Lobby because much of the news coverage was received by the public on the Fourth of July of 2014 and presumably that was when Wheaton College initiated the conditions for the injunction stipulated by the court and the question of when things happened in this scrunched timeline is a matter to technicality. *Id.* at 859, 874 (noting the extremely confusing events that occurred as the 2013 term ended).

41. Schroeder, *America's*, *supra* note 34, at 865.

42 Pennhurst State Sch. v. Halderman, 465 U.S. 89 (1984).

43. Pennhurst State Sch. v. Halderman, 465 U.S. 89, 126 (1984) (Stevens, J., dissenting).

44. Baude, *supra* note 34, at 7–8.

45. *Id.* ("Justice Sotomayor herself granted Little Sisters a temporary stay on New Year's Eve, (just before she led the countdown for the ball-drop in Times Square).").

Roe v. Wade was nullified by the shadow docket in 2021 and it is now being investigated by Congress.[46] Even as it may have dawned on Professor Baude after *Whole Woman's Health* was decided that he might have made a molehill out of a mountain, Professor Charles Fried spoke up for the old guard, "'I think the fuss about the shadow docket lacks perspective.'"[47]

In response to *Wheaton College's* betrayal of principle, Justice Sotomayor issued a ringing dissent joined by the women of the Court.[48] This dissent reverberated in news coverage over the next several weeks, initiating discussions in which law professors, starting with Professor Baude, began referring to the Court's equity docket as the shadow docket.[49] By naming an order a part of the shadow docket, lawyers, including Professor Baude, simply mean to take heed of Justice Sotomayor's warning in *Wheaton College*—that we can no longer take for granted that the Court's equity will follow law or precedent.[50]

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46. *Id.*; Savage, *supra* note 38 (noting that the nullification of *Roe v. Wade* caused many to have concern over the United States Supreme Court's shadow docket); Samantha O'Connell, *Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives*, ABA (Apr. 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps/ (noting that death penalty cases affected by the shadow docket also piqued the interest of lawyers regarding the shadow docket in 2021).

47. Lana Barnett, *Pay No Attention to the Justices Behind the Curtain*, HARV. L. TODAY (Sept. 23, 2021), https://today.law.harvard.edu/pay-no-attention-to-the-justices-behind-the-curtain/ [https://perma.cc/CU52-NHBJ] (noting that "the Court's emergency orders are not 'decisions,' because the Court makes only procedural rulings rather than binding precedent on the shadow docket"); *but see* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J. L. & PUB. POL'Y 827, 830–31 (2021) (arguing stays fall into three categories in a precedential value spectrum).

48. Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting) ("Those who are bound by our decisions usually believe they can take us at our word. Not so today.").

49. *Id.*; Brett LoGiurato, *Female Justices Issue Scathing Dissent In The First Post-Hobby Lobby Birth Control Exemption*, BUS. INSIDER (July 3, 2014, 5:14 PM), https://www.businessinsider.com/sotomayor-ginsburg-kagan-dissent-wheaton-college-decision-supreme-court-2014-7 [https://perma.cc/DA3M-GY28].

50. *Wheaton Coll.*, 573 U.S. at 960 (Sotomayor, J., dissenting); Schroeder, *America's*, *supra* note 34, at 877–84; Baude, *supra* note 34, at 15 ("The [*Wheaton College*] Court issued a four-paragraph unsigned opinion that left the legal standard and its legal basis a mystery."); *see* Dahlia Lithwick & Mark Joseph Stern, *The Supreme Court Is Making Real Judges' Jobs Extremely Difficult*, SLATE (Feb. 14, 2022, 4:29 PM), https://slate.com/news-and-politics/2022/02/supreme-court-voting-rights-shadow-docket-gaslighting.html (noting how the United States Supreme Court used the shadow docket to freeze an injunction supported by a 225-page decision from a three judge panel without explanation).

In the shadow docket, the Court issues orders prior to or in lieu of a decision on the merits, and oftentimes, directly contradicting written law.[51] For example, Wheaton College was granted an equitable order that allowed it to violate federal law.[52] Perhaps *Wheaton College* would have been the natural progression after *Burwell v. Hobby Lobby Stores, Inc.*,[53] but the injunction prematurely ended litigation before the law could be changed to actually justify the injunction.[54]

When district courts reversed certain controversial Trump policies, naming them illegal or unconstitutional, the shadow docket was used to set aside these decisions.[55] This made the Court appear to boldly tamp down

51. Baude, *supra* note 34, at 5, 15 ("[I]n her *Wheaton College* dissent, Justice Sotomayor pointed out that members of the majority had previously written that an injunction could issue only if the plaintiffs' entitlement to relief was 'indisputably clear.'"); *see, e.g.*, Barr v. Lee, 140 S. Ct. 2590, 2591–92 (2020) (per curiam); *id.* at 2594 (Sotomayor, J., dissenting) ("The Court forever deprives respondents of their ability to press a constitutional challenge to their lethal injections, and prevents lower courts from reviewing that challenge. All of that is at sharp odds with this Court's own ruling mere months earlier.").

52. *Wheaton Coll.*, 573 U.S. at 961 (Sotomayor, J., dissenting) (noting that their order "block[ed] the operation of a duly enacted law and regulations, in a case in which the courts below have not yet adjudicated the merits of the applicant's claims and in which those courts have declined requests for similar injunctive relief").

53. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

54. *Wheaton Coll.*, 573 U.S. at 959, 961 (granting an injunction that allowed Wheaton College to block its employees from accessing contraceptives that would have been paid for through their insurance solely by the federal government); *id.* at 961 (Sotomayor, J., dissenting); *see Hobby Lobby*, 573 U.S. at 692 (noting that the law as it existed at the time of *Wheaton College*, under the ACA and Food and Drug Administration (FDA) regulations, employees of corporations that were granted religious exemptions would "still have access to insurance coverage without cost sharing for all FDA-approved contraceptives" under the ACA and FDA regulations).

55. *See* Schroeder, *Conservative*, *supra* note 33, at 50 n.11 (noting the shadow docket's role in sidelining *Innovation Law Lab v. Wolf*, a case that determined that the Migrant Protection Protocols were unlawful, and how there was behavior similar to the Supreme Court's shadow docket orders at the district level in *Ms. L v. ICE*, where enforcement of an injunction previously granted was largely denied likely based in part upon an *Iqbal/Twombly* dismissal of the suit it granted a preliminary injunction for); *see also* El Paso Cty. v. Trump, 407 F. Supp. 3d 655, 667 (2019) ("Defendants do not have compelling reasons justifying an administrative stay of this decision as they have requested."), *stay granted pending appeal* El Paso County v. Trump, 2020 U.S. App. LEXIS 567, at *2–3 (5th Cir. 2020) (per curiam) (citing Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.) (staying a similar Ninth Circuit injunction)) (demonstrating that the Circuit Courts engage in shadow docket behavior inspired by the U.S. Supreme Court as well); Lopez v. Barr, 925 F.3d 396, 401 (9th Cir. 2019) ("[N]either we nor DHS can override the clear statutory command that time and place information be included in *all* Notices to Appear."), *rehearing granted by* 948 F.3d 989 (9th Cir. 2020) ("The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit."), *order staying en banc proceedings pending the issuance of an opinion by the United States Supreme Court in Niz-Chavez v. Barr*, 2020 U.S. App.

on Trump policies on the record, while nothing happened in the practical sense.[56] Along these lines, state voting regulations to make voting easier during COVID were reversed in the shadow docket without an actual law or decision.[57]

The Court's use of the shadow docket was also capable of speeding things up.[58] For example, the Court shut down several Eighth Amendment cases in *Barr v. Lee*[59] without a briefing, hearing, or evidence, which sped up President Trump's death penalty orders.[60] Also, *Ragbir v. Homan*[61] was vacated under *Department of Homeland Security v. Thuraissigiam*,[62] extending *Thuraissigiam* to cases involving lawful permanent residents without a hearing on the merits.[63]

Lee and *Ragbir* may seem exceptional, and yet they exemplify the United States judiciary's equity docket today.[64] Nobody who went to law school

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LEXIS 18019 (9th Cir. 2020), *petition granted, remanded,* 998 F.3d 851 (9th Cir. 2021) (presumably lifting the stay and ending en banc review after *Niz-Chavez* was decided, but failing to clarify whether *Lopez v. Barr* may now be cited as good precedent as *Niz-Chavez* appears to have extended and strengthened *Pereira* as well as the rationale of *Lopez*).

56. *Supra* note 55 and accompanying text; *infra* notes 57–64; Lithwick & Stern, *supra* note 50 (citing Singleton v. Merrill, 2022 U.S. Dist. LEXIS 17362, *277 (N.D. Ala. 2022), *stay granted by sub nom.* Merrill v. Milligan, 142 S. Ct. 879 (2022)); *cf.* McFadden & Kapoor, *supra* note 47, at 866–68 (explaining how stays override preliminary injunctions without engaging in the rigorous analysis of whether the preliminary injunction was correctly granted).

57. *See, e.g.*, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1208 (2020) (per curiam) (referencing "[t]he stay [as] granted pending final disposition of the appeal by United States Court of Appeals").

58. *See, e.g.*, Barr v. Lee, 140 S. Ct. 2590, 2591–92 (2020) (per curiam) (vacating the lower court's preliminary injunction to allow for the death penalty to go forward as planned).

59. *Id.* at 2590.

60. *Id.* at 2591–92; *see also* Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, AP NEWS (Jan. 15, 2021), https://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50 [https://perma.cc/RC3V-RNTD] (detailing the federal executions of death row inmates under the Trump Administration).

61. Ragbir v. Homan, 923 F.3d 53 (2d Cir. 2019), *cert. granted, judgment vac'd sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020).

62. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020).

63. *Ragbir*, 923 F.3d at 78, *cert. granted, judgment vac'd sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020) (exclusively citing *Dep't of Homeland Sec. v. Thuraissigiam* to vacate *Ragbir* while granting a writ of certiorari).

64. *See* Lawrence Hurly et al., *The 'Shadow Docket': How the U.S. Supreme Court Quietly Dispatches Key Rulings*, REUTERS (Mar. 23, 2021, 5:29 AM), https://www.reuters.com/article/legal-us-usa-court-shadow-video/the-shadow-docket-how-the-u-s-supreme-court-quietly-dispatches-key-rulings-idUSKBN2BF16Q [https://perma.cc/3PAR-3U8H] ("[T]he short-circuit approach, intended only for

learned how to deal with anything in the realm of this sort of judicial abuse; most lawyers still read the opinions on the record and reasonably presume they control the Court's decisions at equity.[65] The mass denial or ignorance among lawyers of shadow dockets in America may be the sole basis of their existence.[66]

As in *Ragbir*, in conjunction with a grant of certiorari, the Court now issues small orders along with the grant of certiorari, like mini-decisions.[67] For example, in *Biden v. Knight First Amendment Institute*,[68] the Court reversed the Second Circuit decisions involving the president's use of Twitter as moot.[69] Killing an opinion made when a case was ripe without offering a reason or hearing arguments about mootness is a radical waste of judicial resources.[70]

Further, in *Knight First Amendment Institute*, Justice Thomas wrote a long "concurrence" defending Donald Trump's abuses of Twitter.[71] Thomas appeared to blame Congress for allowing Twitter to violate Trump's right of free speech after Trump used Twitter to incite lawless violence at the Capitol Building that is located directly across the street from the U.S.

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emergencies, isn't reserved for death penalty cases. It has, in the last four years, significantly changed the way the high court does business.").

65. Barnett, *supra* note 47 (demonstrating a clear lack of consensus about the shadow docket, and a lack of direction for students to follow); *see* Nina Totenberg, *Justice Alito Calls Criticism of the Shadow Docket 'Silly' and 'Misleading'*, NPR (Sept. 30, 2021, 7:12 PM), https://www.npr.org/2021/09/30/1042051134/justice-alito-calls-criticism-of-the-shadow-docket-silly-and-misleading [https://perma.cc/N8TE-CL4C] (referencing Justice Kagan's criticism of the "shadow docket" and how it "may depart from the usual principles of appellate process").

66. Barnett, *supra* note 47 (explaining that major shadow docket decisions like "an emergency stay of a Florida district court opinion in a case that essentially disenfranchised approximately 800,000 ex-felons before the 2020 presidential election" resulted "with significantly less fanfare" than *Whole Woman's Health* and *Barr v. Lee*). This suggests that the legal community and public's ignorance and denial of the full extent of shadow docket activity may be the primary factor that keeps the shadow docket going. *Id.*

67. *Supra* note 63

68. Biden v. Knight First Amend. Inst., 141 S. Ct. 1220 (2021).

69. *Id.* at 1220–21 ("The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit with instructions to dismiss the case as moot.").

70. *Id.*; Ragbir v. Homan, 923 F.3d 53, 78 (2d Cir. 2019), *cert. granted, judgment vac'd sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020).

71. *Knight First Amend. Inst.*, 141 S. Ct. at 1227 (Thomas, J., concurring) (arguing, in the wake of the January 6, 2021 insurrection according to which Twitter decided to block Trump from its platform that he used to encourage people to storm the Capitol Building, that "the more glaring concern must perforce be the dominant digital platforms themselves . . . the right to cut off speech lies most powerfully in the hands of private digital platforms").

Supreme Court —this opinion was then cited favorably in a 2022 shadow docket dissent in *Netchoice, LLC v. Paxton* in which Justice Alito argued that a controversial Texas law HB20 that appeared to be aimed at granting Thomas's wishes should go into force prior to being adjudicated.[72] Thus, Justice Thomas used the shadow docket to make his political druthers public at an extremely imprudent time for the Court itself, and perhaps the most telling fact of all, was that nobody on the Court balked at it—Thomas's concurrence was considered business as usual until the news noted its oddity.[73] Then, Justice Alito publicly defended the Court's shadow docket generally, stating that criticizing such bad judicial behavior is "silly," even though "good behavior" is expressly required of all federal judges by the United States Constitution.[74]

Thomas's current views are unsurprising because they are merely Justice Holmes's marketplace of ideas reborn.[75] If the Supreme Court's embrace of Holmes's marketplace of ideas can justify burning crosses,[76]

72. *Id.*; *Id.*, cited by Netchoice, LLC v. Paxton, No. 21A720, slip op. at 4 (2022) (Alito, J., dissenting); Twitter, *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/Q2MV-6A92] (explaining Twitter's reasons for banning Donald Trump from Twitter for violating its "Glorification of Violence policy" by making publishing tweets that "can be mobilized by different audiences, including to incite violence"); Brandenburg v. Ohio, 395 U.S. 444, 451 (1969) (noting that "incitement of imminent lawless action" is not protected under the First Amendment); *cf.* Kate Conger, *Jack Dorsey Says Twitter Played a Role in U.S. Capitol Riot*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/business/jack-dorsey-twitter-capitol-riot.html [https://perma.cc/AVZ7-C7HB] ("Jack Dorsey [is] Twitter's chief executive . . . .").

73. *Knight First Amend. Inst.*, 141 S. Ct. at 1227 (decided on April 5, 2021, almost three months to the day after the insurrection); Berin Szóka & Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, LAWFARE (Apr. 14, 2021, 10:30 AM), https://www.lawfareblog.com/justice-thomass-misguided-concurrence-platform-regulation [https://perma.cc/72N3-TSLS] ; *cf.* Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court*, NEW YORKER (Jan. 21, 2022), https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court [https://perma.cc/7EQB-XY2B] ("Many Americans first became aware of Ginni Thomas's activism on January 6, 2021.").

74. Totenberg, *supra* note 65; U.S. CONST. art. III, § 1 (providing that judges "shall hold their offices during good Behaviour.").

75. *Compare Knight First Amend. Inst.*, 141 S. Ct. at 1223–27 (Thomas, J., concurring) (describing the marketplace of ideas under common carrier common law and the problems with Twitter's "right to cut off speech" that "lies most powerfully in the hands of private digital platforms"), *with* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is to the power of the thought to get itself accepted in the competition of the market").

76. Virginia v. Black, 538 U.S. 343, 364 (2003) (Opinion of O'Connor, J.).

Nazi marches,[77] and the Charlottesville protests,[78] then perhaps toppling the Capitol is also a legitimate expression of free speech.[79] Democracy may, as Justice Holmes theorized, need to survive in the brutal marketplace; if it falls, it is merely proof of its weakness; its lack of fitness for a "free" society.[80]

Holmes was hardly consistent about First Amendment rights.[81] He wrote the majority in several decisions favoring state power over free speech,[82] before dissenting in *Abrams v. United States*,[83] only to return to the majority again in *Whitney v. California*.[84] The Warren Court's attempted correctives for *Abrams* were not enough[85] because Holmes's decision in

77. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977) (per curiam).

78. *Id.*; Steven R. Shapiro, *Reflections on Charlottesville*, 14 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 45, 50 (2018) (arguing that, according to the old marketplace of ideas theory, "the remedy for speech is 'more speech, not enforced silence'") (quoting Whitney v. California, 274 U.S. 254, 279–80 (1927) (Brandeis, J., concurring)).

79. *See Knight First Amend. Inst.*, 141 S. Ct. at 1227 (Thomas, J., concurring) ("[W]hether a government actor violated the First Amendment by blocking another Twitter user.").

80. *Abrams*, 250 U.S at 630 (Holmes, J., dissenting); Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 449 (1899) [hereinafter Holmes, Jr., *Law in Science*] (demonstrating "a lively example of the struggle for life among competing ideas, and of the ultimate victory and survival of the strongest"); *id.* at 456–57 (naming his preference for laws over facts and bright line rules over judges that lack a sufficient backbone to strike forth); Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) [hereinafter Holmes, Jr., *Natural Law*] (referring to preexisting natural rights as the mere product of "fighting . . . to maintain them," rather than an actual reality established by God or nature, concluding disparagingly about natural rights, "A dog will fight for its bone."); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 238 (1881) ("The possession of rights, as it is called, has been a fighting-ground for centuries . . . .").

81. *See* Rodney A. Smolla, *The Trial of Oliver Wendell Holmes*, 36 WM. & MARY L. REV. 173, 217 (1994) (noting that "[i]n cases like *Debs* [Holmes was] the great oppressor, and then later in *Abrams* and other cases, [Holmes was] the great emancipator," and also emphasizing that Holmes did not consider himself as being inconsistent at all—Holmes *believed* he was being consistent).

82. Debs v. United States, 249 U.S. 211, 214–17 (1919); Frohwerk v. United States, 249 U.S. 204, 206 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919); Patterson v. Colorado, 205 U.S. 454, 462 (1907).

83. *Abrams*, 250 U.S. at 624–30 (Holmes, J., dissenting); *cf.* Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Schaefer v. United States, 251 U.S. 466, 486 (1920) (Brandeis, J., dissenting); Pierce v. United States, 252 U.S. 239, 271 (1920) (Brandeis, J., dissenting).

84. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *id.* at 380 (Brandeis, J., concurring) ("MR. JUSTICE HOLMES joins in this opinion."); *cf.* Smolla, *supra* note 81, at 216–17 (highlighting Holmes's inconsistencies).

85. Brandenburg v. Ohio, 395 U.S. 444, 451 (1969) (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

Schenck v. United States[86] was extended to try whistleblowers like Chelsea Manning and Reality Winner ever since.[87] Holmes's rejection of a strong First Amendment right to be a whistleblower infamously enabled the neglect of Dawn Wooten when she blew the whistle on nonconsensual sterilizations occurring in immigrant detention centers.[88]

However, as bad as this is and by great contrast, Justices Brandeis and Holmes did *not* take the lead in *Near v. Minnesota*,[89] which established a firm prohibition on prior restraints of speech.[90] The Warren Court extended *Near* in *Bantam Books, Inc. v. Sullivan*,[91] which was extended again in *New York Times Co. v. United States*.[92] The mixed result was that, although whistleblowers like Snowden would still likely face jail time under the Espionage Act if they were caught,[93] and Ms. Wooten's bosses can professionally exile those who reveal their crimes,[94] newspapers could openly publish materials exposed by whistleblowers.[95]

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[86] Schenck v. United States, 249 U.S. 47 (1919).

87. *See* Joshua Nevett, *Daniel Ellsberg: The 90-year-old Whistleblower Tempting Prosecution*, BBC NEWS (June 7, 2021), https://www.bbc.com/news/world-us-canada-57341592 [https://perma.cc/JWG8-AK9A] (connecting *Schenck* with Ellsberg, Snowden, and other whistleblowers); *cf.* Daniel Ellsberg, *Daniel Ellsberg: Snowden Would Not Get a Fair Trial—and Kerry is Wrong*, THE GUARDIAN (May 30, 2014, 7:45 AM), https://www.theguardian.com/commentisfree/2014/may/30/daniel-ellsberg-snowden-fair-trial-kerry-espionage-act [https://perma.cc/M7T4-4SFL].

[88] David Remnick, *The Trials of a Whistle-blower*, NEW YORKER RADIO HOUR (Jan. 21, 2022), https://www.newyorker.com/podcast/the-new-yorker-radio-hour/the-trials-of-a-whistle-blower [https://perma.cc/R6KQ-49Z4] (containing reporter Sarah Stillman's interview with Dawn Wooten).

89. Near v. Minnesota, 283 U.S. 697 (1931).

90. *Id.* at 733 (extrapolating a First Amendment restriction on prior restraints on the freedom of speech from Joseph Story's *Commentaries* at § 1874); Stromberg v. California, 283 U.S. 359, 369 (1931).

91. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 75 (1963).

92. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971); *see also* Org. for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971) (citing *Near*, 283 U.S. at 697).

93. Espionage Act of 1917, 40 Stat. 217; *see* Ellsberg, *supra* note 87; Spencer Ackerman & Ed Pilkington, *Obama's War on Whistleblowers Leaves Administration Insiders Unscathed*, THE GUARDIAN (Mar. 16, 2015, 3:39 PM), https://www.theguardian.com/us-news/2015/mar/16/whistleblowers-double-standard-obama-david-petraeus-chelsea-manning [https://perma.cc/DW2U-UV9H].

94. Remnick, *supra* note 88.

95. *N.Y. Times Co.*, 403 U.S. at 714.

The Court's recent overemphasis of Holmes's marketplace of ideas,[96] which had no role in *Near*,[97] seemed to come from a fundamental misunderstanding of Holmes's statement in *Lochner v. New York*[98] that the United States Constitution "does not enact Mr. Herbert Spencer's *Social Statics*."[99] Most jurists assumed this line meant that Holmes was against reading economic theories into the Constitution.[100] But this cannot be true, because Holmes read John Stuart Mill's economic theory into the First Amendment when he established the marketplace of ideas ideology in *Abrams*.[101]

Under a generous reading of recent opinions protecting the speech of the Ku Klux Klan (KKK),[102] white supremacists,[103] and homophobes,[104] one may hope that the same rules would be applied equally to civil rights leaders, free speech advocates, and ordinary citizens.[105] But this hope was dashed repeatedly.[106] The rulings that favor bad men are not normally extended

96. 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 v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting)); Texas v. Johnson, 491 U.S. 397, 418–19 (1989) (citing Abrams v. United States, 250 U.S. 616, 628 (Holmes, J., dissenting)).

97. *Near*, 283 U.S. at 632–633 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874).

98. Lochner v. New York, 198 U.S. 45 (1905).

99. *Id.* at 75 (Holmes, J., dissenting).

100. Obergefell v. Hodges, 576 U.S. 644, 696 (2015) (Roberts, C.J., dissenting) (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)); *see id.* at 705–06 (Roberts, C.J., dissenting) ("As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart Mill's *On Liberty* any more than it enacts Hebert Spencer's *Social Statics*."); *cf.* O'Connor, *They Often*, *supra* note 28, at 385 ("[Justice Holmes] taught us that . . . the Constitution 'does not enact Mr. Herbert Spencer's *Social Statics*.'").

101. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Jill Gordon, *John Stuart Mill and the "Marketplace of Ideas,"* 23 SOC. THEORY & PRAC. 235, 241 (1997); Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J. L. & HUMANS. 35, 61–62 (2010); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 19.

102. Virginia v. Black, 538 U.S. 343, 367 (2003) (Opinion of O'Connor, J.).

103. *Id.* (Opinion of O'Connor, J.); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977) (per curiam).

104. Snyder v. Phelps, 562 U.S. 443, 458 (2011).

105. *See* Mckesson v. Doe, 141 S. Ct. 48, 50 (2020) (per curiam) (noting a police officer injured as a result of an unknown person's violence attempted to sue a single civil rights leader whose speech they hate—the Fifth Circuit did not shut down the judicial circus aimed at ending DeRay Mckesson's involvement in civil rights movements prior to this decision).

106. *See* THE INTERNET'S OWN BOY: THE STORY OF AARON SWARTZ 1:30:50 (Participant Media 2014) (discussing the unjust prosecution of Aaron Swartz under 18 U.S.C. § 1343); WAR

to protect anyone else, and even when they are, there is a palpable double standard slanted in favor of the bad.[107]

Perhaps the Supreme Court is not meant to distinguish between good or bad, because that is a moral judgment imprudent for judges to exercise.[108] This is why we must abide by the principles that underlie the First Amendment rather than our personal moral proclivities.[109] However, Justice Holmes and the parade of marketplace of ideas rulings that followed after him pointedly departed from the principles for which the founders ratified the First Amendment.[110]

The marketplace of ideas was invented by the utilitarians,[111] purveyors of rationalist philosophy,[112] whose leader Jeremy Bentham was staunchly opposed to the American idea of rights.[113] The Benthamite plan was to

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MACHINE (Netflix 2017) (explaining reporter Michael Hastings' role in ousting Stanley McChrystal after embedding himself in McChrystal's inner circle); *cf.* Max Kennerly, Esq., *Examining the Outrageous Aaron Swartz Indictment for Computer Fraud*, LITIG. & TRIAL (July 19, 2011), https://www.litigationandtrial.com/2011/07/articles/series/special-comment/aaron-swartz-computer-fraud-indictment/ [https://perma.cc/L8W8-DAD3] (providing context to the prosecution of Aaron Swartz); Jason Howerton, *Police Have Said Some Weird Stuff About Reporter Michael Hastings' Car Crash*, BUSINESS INSIDER (July 23, 2013, 4:05 PM), https://www.businessinsider.com/what-we-now-know-about-michael-hastings-mysterious-car-crash-2013-7 [https://perma.cc/D5EA-B6AM] (considering the suspicious death of Michael Hastings after criticizing U.S. military officials).

107. *See, e.g.*, Debs v. United States, 249 U.S. 211, 216 (1919); *cf.* Ackerman & Pilkington, *supra* note 93 (describing the double standard normally applied in such cases). The double-standard in this area is perhaps clearest when considering the way Jeffrey Toobin acquired and almost exposed government secrets for profit compared with Edward Snowden, Chelsea Manning, and Reality Winner whose lives were ruined after whistleblowing for no profit. *See* Mike Masnick, *Reporter Toobin Lashes Out at Reporters Who Use 'Stolen' Documents; Leaves out His Own History of Doing the Same*, TECHDIRT (Aug. 26, 2013, 3:50 PM), https://www.techdirt.com/articles/20130826/12565024316/are-old-school-journalists-more-upset-about-leaks-about-their-own-failures-obsolescence.shtml [https://perma.cc/TPN9-RR9F].

108. *See* David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's* The Path of The Law, 72 N.Y.U. L. REV. 1547, 1548 (1997) ("Holmes briskly and brutally demolishes law's claim to occupy the moral or logical high ground").

109. *Id.* at 1551 ("[T]he only path he mentions in the speech itself is 'the narrow path of legal doctrine,' bounded by the twin pitfalls of morality and logic.") (quoting Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 464); U.S. CONST. amend. I.

110. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

111. Ten Cate, *supra* note 101, at 61–62; Blasi, *supra* note 101, at 19.

112. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 377–78, 381 (2011) (using Bentham's brand of utilitarianism as a baseline for studying Rationalist ideology since it is so basic, based on pain and pleasure).

113. Jeremy Bentham, *Short Review of the Declaration*, *in* JEREMY BENTHAM & JOHN LIND, AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 131–32 (1776).

divorce rights from morality by presuming that as long as humans are free to say what they like, progress in society would eventually materialize.[114] But the presumption of automatic progress was a mere guise for panoptic fantasies.[115]

The First Amendment did not guarantee progress, nor did it have the purpose of divorcing the freedom of speech from morality.[116] The authors of the First Amendment followed in the tradition of Ciceronian Skeptic Idealism featured in Cicero's *De Divination* and *De Natura Deorum*.[117] Thus, while they doubted whether they could attain absolute universals like those in Plato's heaven, they nevertheless decided to hold onto the gods.[118]

The founders, from Thomas Jefferson in the South to Isaac Backus in the North, relied upon Roger Williams's contribution and found two purposes of First Amendment freedoms.[119] The first purpose of the First

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114. Ten Cate, *supra* note 101, at 74 ("For Mill, reason, checked by experience, allows humans to rise above the arbitrary circumstances that resulted in their initial convictions, and provides the key to overcoming prejudices and achieving progress."). *But see* KAHNEMAN, *supra* note 112, at 377–78, 381 (approaching a complete debunking of Mill and Bentham's hope that reason could accurately be informed by human experience).

115. JEREMY BENTHAM, PANOPTICON iii, 122 (1791) (claiming Bentham's utopic madness was in full bloom in France during the French Revolution, by which he claimed a magical utopia would emerge by his theories, "Morals reformed, health preserved, industry invigorated, instruction diffused, public burdens lightened, economy seated as it were upon a rock, the Gordian knot of the Poor-laws not cut but untied—all by a simple idea in architecture[!]"); *cf.* DAVE EGGERS, THE CIRCLE 316–24 (2013) (symbolizing Benthamite Utopians as a vicious shark that devours everything, and demonstrating how Americans' faith in automatic progress leads to opening the door for this shark to devour everything).

116. U.S. CONST. amend. I; *infra* notes 119–120. *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) ("[H]e who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. [T]hat ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point; and like the air in which we breathe, move, and have our physical being, incapable of confinement ore exclusive appropriation.").

117. *See, e.g.*, ELIHU S. RILEY, CORRESPONDENCE OF "FIRST CITIZEN"—CHARLES CARROLL OF CARROLLTON, AND "ANTILON"—DANIEL DULANY, JR., 1773 196 (1902) (quoting and translating Cicero, *De Natura Deorum* 1.2.4–5) ("Groundless opinions are destroyed, but rational judgments, or the judgments of nature, are confirmed by time.").

118. *Id.*; *see* Cicero, *De Divinatione* 2.17.41 ("[I]t is evident that divination has been destroyed and yet we must hold on to the gods.").

119. Thomas Jefferson, *Virginia Statute for Religious Freedom* 5 [1777] ("[T]ruth is great and will prevail if left to herself"); Isaac Backus, *Truth is Great, and Will Prevail* 3–5 [1781]; Isaac Backus,

Amendment was to increase the chances that humanity might find the truth.[120] The pursuit of truth protected by the First Amendment is neither absolute nor relative, but it is a right to express the truth as one sees it regarding specific beliefs, facts, or circumstances.[121]

The second purpose of the First Amendment is to foster peace by lessening the felt need to appeal to violence.[122] Again, the pursuit of peace allowed under the First Amendment is neither absolute nor relative.[123] Rather, it is a practical peace created by allowing worship, gatherings, and speech so that rather than engaging in religious wars, individuals can peacefully try their disputes in the court of public opinion.[124]

Curiously, these two purposes seem to be the opposite of Hobbes's two bases of statecraft—force and fraud.[125] The First Amendment is not supposed to protect fighting words,[126] nor fraudulent statements.[127]

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]).

120. ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION, FOR CAUSE AND CONSCIENCE 1, 3 (1644) [hereinafter WILLIAMS I] (beginning a conversation between the two purposes of truth and peace ordained by God through freedom of speech: "It is the will and command of *God*, that (since the comming his Sonne the *Lord Jesus*) a *permission* of the most *Paganish, Jewish, Turkish, or Antichristian consciences* and *worships*, bee granted to *all* men in all *Nations* and *Countries:* and they are onely to bee *fought* against with that *Sword* which is only (in *Soule matters*) *able* to *conquer*, to wit, the *Sword of Gods Spirit*, the *Word* of *God*."); *id.* at 273 (rejecting Hobbesian "force or fraud" as the antithesis of the peace and truth established by God through natural freedoms of speech, assembly, and religion).

121. WILLIAMS I, *supra* note 120, at 1, 273.

122. *Id.* at 1, 372 ("the *two-edged Sword* of the *Spirit* . . . hang[s] not about the *loines* or *side*, but at the *lips*"); U.S. CONST. amend. I.

123. *See supra* note 119; U.S. CONST. amend. I.

124. *See supra* notes 119, 123.

125. *Compare* JAMES OTIS, COLLECTED POLITICAL WRITINGS OF JAMES OTIS 241 (Richard Samuelson ed., 2015) (disputing "*Hobbesian* maxims" including "[t]hat dominion is rightfully founded on force and fraud"), *with* WILLIAMS I, *supra* note 120, at 273 ("God hath given them the spirit of slumber, eyes that they should not see, &c. all which must be spoken of the very conscience, which he that hath the golden key of David can only shut and open, and all the Picklocks or Swords in all the Smiths shops in the *World* can neither by *force* or *fraud* prevent his time.").

126. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), *extended and quoted by* Gertz v. Robert Welch, Inc., 418 U.S. 323, 385 (1974) (explaining that the First Amendment does not preclude the government from punishing citizens for saying "'fighting' words—those which by their very utterance, inflict injury or tend to incite immediate breach of the peace').

127. New York Times Co. v. Sullivan, 376 U.S. 254, 274, 289–90 (1964), *extended and quoted by Gertz*, 418 U.S. at 339–40 ("But there is no constitutional value in false statement of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."); *cf.* Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (describing laws that would have a chilling effect on speech as a violation of free speech).

These two categories of speech are not supposed to be protected, because they tend toward violence and the proliferation of lies, which undercuts the exact purposes of ratifying the First Amendment.[128]

Justice Holmes's marketplace of ideas, however, opened the door to protecting force and fraud as legitimate free speech.[129] His other opinions regarding the Espionage Act and state syndication laws allowed merciless prosecutions.[130] One direct result of failing to correct Holmes's errors in free speech cases, which slanted the courts toward punishing the good and exonerating the bad, was the failed presidency of Donald J. Trump.[131]

President Trump got on Twitter, invited thousands to join him in Washington, D.C. on January 6, 2021, and proceeded to attempt a *coup d'état*.[132] Trump, as of now, likely will not be prosecuted for his online speech because Holmes's marketplace of ideas protects him.[133] The reason why Eugene Debs was found guilty under the Espionage Act and Donald J. Trump likely never will, was triumphally exemplified by Justice Thomas in his recent Twitter rant in *Knight First Amendment Institute*.[134]

Rather than bring Trump to justice for his role in the events of January 6, 2021, the United States Supreme Court is focused on delivering on the political goals of the former president.[135] In only the first year after

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128. *See supra* notes 121–22, 125.

129. *Supra* note 96; *see* Ten Cate, *supra* note 101, at 56–59 (noting how "Holmes's deference to dominant forces" opened up the possibility of "violent upset[s]"—"Holmes's appreciation of a battle is reflected in the reference to the 'competition of the market' in the *Abrams* dissent."); *id* at 65–68 (noting "Holmes's references to the truth . . . are 'puzzling'" because Holmes doubted the human capacity to know truth—his solution was to see what truth could get itself accepted in the marketplace, which necessarily opened the door to fraud, and because Holmes's views about how little one could know of the truth, it opened the door very widely to fraud).

130. *Supra* note 82.

131. *See supra* note 71–80 and accompanying text; *see also* Thomas B. Edsall, *Have Trump's Lies Wrecked Free Speech?*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/opinion/trump-lies-free-speech.html [https://perma.cc/MVD8-8MVB].

132. Amy Sherman, *A timeline of What Trump Said Before Jan. 6 Capitol Riot*, POLITIFACT (Jan. 11, 2021), https://www.politifact.com/article/2021/jan/11/timeline-what-trump-said-jan-6-capitol-riot/ [https://perma.cc/NN38-SQTG].

133. S.V. Date, *Trump May Get Away With Obstruction Of Congress. Again.*, HUFFPOST (Oct. 13, 2021, 4:05 PM), https://www.huffpost.com/entry/trump-obstruction-january-6_n_616726b0e4b0f3be08ddf8be [https://perma.cc/KP6A-FJ8V].

134. *Supra* notes 71–72; *cf.* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (allowing the government to administer punishments of speech that is an "incitement of imminent lawless action").

135. *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021); Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1227 (2021) (Thomas, J., concurring). Texas v. Biden,

Trump's presidency ended, the Supreme Court nullified *Roe v. Wade* in the shadow docket.[136] The nullification did not overrule *Roe*, but was rather a failure of federal equitable enforcement of *Roe* against a Texas law that clearly violated it.[137]

In short, the *Whole Woman's Health v. Jackson*[138] Court drew *Ex parte Young*[139] into question for the first time, and with it, the power of the Court to enforce federal standards on the states.[140] "*Young*," as Chief Justice Rehnquist once remarked, "gives life to the Supremacy Clause."[141] The *Young* decision arose in opposition to federal railroad standards, and if it had gone the opposite way, the United States may have created fifty separate railroad systems rather than one.[142]

Upon the basis of equitable power expressed in *Young*, the United States was able to administer an interstate highway system, a telecommunications system which is the backbone of the internet, civil rights and voting standards, healthcare standards, national immigration standards, and several other nationwide standards of law.[143] If *Young* is ever overruled, all these systems would be in jeopardy of nullification in the same way as *Roe*.[144] The Court may choose not to overrule everything *Young* stands for, but it appears that the Court today is not afraid to pick and choose which laws it feels are worthy of *Young's* protections.[145]

No. 2:21-CV-067-Z, 2021 WL 3603341, at *27–28 (N.D. Tex. 2021) (finding termination of the Migrant Protection Protocols (MPP) violated the Administrative Procedures Act, and enjoining the Biden administration from ending it through an executive memorandum), *application for stay denied*, 142 S. Ct. 926, 927 (2021) (mem.) (citing DHS v. Regents of the Univ. of Cal., 140 S Ct. 1891 (2020)); Innovation Law Lab v. Wolf, 951 F.3d 986, 989–91 (9th Cir. 2020) (finding that the MPP were unlawful and violated the Administrative Procedures Act, and enjoining Trump to set aside the MPP), *application for stay granted*, 140 S. Ct. 1564 (2020), *vacated as moot sub nom.* Mayorkas v. Innovation Law Lab, 141 S. Ct. 2842 (2021).

136. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

137. *Id.*

138. *Id.* at 2494.

139. *Ex parte* Young, 209 U.S. 123 (1908).

140. *Whole Woman's Health*, 141 S. Ct. at 2495.

141. Green v. Mansour, 474 U.S. 64, 68 (1985).

142. *Young*, 209 U.S. at 128.

143. *See, e.g.*, *Green*, 474 U.S. at 68 ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

144. *Id.* at 68; *Whole Woman's Health*, 141 S. Ct. at 2495.

145. *See, e.g.*, *Whole Woman's Health*, 141 S. Ct. at 2495 (citing *Ex Parte Young*, 209 U.S. 123, 163 (1908)) ("Nor is it clear whether, under existing precedent, this Court can issue an injunction against

It is as if the *Whole Woman's Health* Court has fully endorsed the deplorable antics of the twice disgraced Alabama Supreme Court Justice, Roy Moore.[146] State legislatures and private actors may choose, in the style of former Justice Moore, to abide by only the federal standards they feel the current United States Supreme Court will support.[147] If five justices seem likely not to support a single issue like abortion or gun regulations, the states may now wager that the federal court will treat settled federal standards as unenforceable before a hearing on the merits.[148]

It appears that, even after Trump, there are not yet five justices willing reverse course on gay marriage.[149] However, the Court does have at least five justices willing to treat the Eighth Amendment,[150] *Roe v. Wade*,[151]

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state judges asked to decide a lawsuit under Texas' law."); Wheaton Coll. v. Burwell, 573 U.S. 958, 959 (2014).

146. *Compare Whole Woman's Health*, 141 S. Ct. at 2495 (seemingly deciding when and when not to apply judicial precedent), *with* Roy S. Moore, *Administrative Order of the Chief Justice of the Alabama Supreme Court* 4 (2016) (attempting to block the United States Supreme Court's opinion *Obergefell v. Hodges* from taking effect in Alabama).

147. *See, e.g.*, Second Amendment Preservation Act, 2021 Mo. HB 85, § 1.430 (enacted) ("All federal acts, laws, executive orders, administrative orders, rules, and regulations, regardless of whether they were enacted before or after the provisions of section 1.410 to 1.485, that infringe on the people's right to keep and bear arms as guaranteed by the Second Amendment to the Constitution of the United States and Article I, Section 23 of the Constitution of Missouri shall be invalid to this state, shall not be recognized by this state, shall be specifically rejected by this state, and shall not be enforced by this state."). *Cf.* Ariane de Vogue, *Supreme Court to hear restrictive Mississippi abortion law on December 1*, CNN POLITICS (Sept. 20, 2021, 9:52 PM), https://www.cnn.com/2021/09/20/politics/supreme-court-mississippi-abortion-law/index.html [https://perma.cc/DXH5-PEBK]; Norah O'Donnell, *Missouri's Second Amendment Preservation Act Outlaws Local Enforcement of Federal Gun Laws*, CBS: 60 MINUTES (Nov. 7, 2021), https://www.cbsnews.com/news/missouri-gun-law-second-amendment-preservation-act-60-minutes-2021-11-07/ [https://perma.cc/DXH5-PEBK].

148. *See* Second Amendment Preservation Act, 2021 Mo. HB 85, § 1.430 (enacted) (providing a statute by the Missouri legislation that rejects "[a]ll federal acts, laws, executive orders, administrative orders, rules, and regulations" infringing the Second Amendment); *see, e.g.*, Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 663 (2022) (per curiam) ("Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.").

149. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1736–37 (2020) (noting only three Justices dissented with the majority opinion protecting gay rights). *But see* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (holding the city's interests in protecting same-sex adoptive parents was not compelling enough to overcome adoptive agency's free exercise interests).

150. Barr v. Lee, 140 S. Ct. 2590, 2591–92 (2020). *But see* Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (clarifying the state's responsibility with respect to the Eighth Amendment).

151. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

immigrant rights,[152] and voting rights as unenforceable.[153] The recent legislation on these tense political issues in Republican controlled states, previously protected by the federal courts, is unsurprising, but it is also unsettling for the future role, if any, of general, efficacious federal standards of law in American life.[154]

B. THE WITNESS OF KELLI DILLON: HOW BRANDEIS'S IDEA OF PRIVACY RENDERED ITSELF MOOT

In the deepest night, when even the moon has set, "There is no light in earth or heaven / But the cold light of stars."[155] According to Henry Wadsworth Longfellow, in such a darkness "the first watch of night is given / To the red planet of Mars."[156] This first watch was not a "star of love and dreams," but a "star of the unconquered will,"

> O star of strength! I see thee stand
> And smile upon my pain;
> Thou beckonest with thy mailed hand,
> And I am strong again.[157]

And so, we see this spirit of strength in Kelli Dillon, who traveled through such dark nights in America.[158] She was forced into the shadows of a rehabilitated eugenics program in California.[159] Without knowing exactly how these systems were unleashed upon her, she nevertheless set about to

152. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020); Texas v. Biden, No. 2:21-CV-067-Z, 2021 WL 3603341, at *27–28 (N.D. Tex. 2021), *application for stay denied*, 142 S. Ct. 926, 927 (2021) (mem.) (citing DHS v. Regents of the Univ. of Cal., 140 S Ct. 1891 (2020)); Innovation Law Lab v. Wolf, 951 F.3d 986, 989–91 (9th Cir. 2020) (finding that the MPP were unlawful and violated the Administrative Procedures Act, and enjoining Trump to set aside the MPP), *application for stay granted*, 140 S. Ct. 1564 (2020), *vacated as moot sub nom.* Mayorkas v. Innovation Law Lab, 141 S. Ct. 2842 (2021).

153. Shelby County v. Holder, 570 U.S. 529, 556–67 (2013).

154. *See* Dahlia Lithwick, *The Conservative Justices' Reasoning in the Texas Abortion Case Is Legal Mansplaining*, SLATE (Sept. 2, 2021), https://slate.com/news-and-politics/2021/09/conservative-justices-abortion-legal-mansplaining.html [https://perma.cc/S8E3-JYYC] ("[T]he U.S. Supreme Court ended 50 years of abortion rights in Texas without full briefing or oral argument[.]").

155. Henry Wadsworth Longfellow, *The Light of Stars* [1839].

156. *Id.*

157. *Id.*

158. *Compare id.*, *with* BELLY OF THE BEAST 16:50 (Erika Cohn dir., 2020). (telling the story of Kelli Dillon, the difficulties she faced in prison, and her choice to rise above).

159. BELLY OF THE BEAST 16:50 (Erika Cohn dir., 2020).

blow them apart with the help of her notoriously bejeweled advocate Cynthia Chandler.[160]

It is an open secret on the liberal wing of the bench that *Mathews v. Eldridge*[161] is a redux of *Buck v. Bell*.[162] The false hope of Justice O'Connor kept this open fact secret with statements such as: "The Court has never cited *Buck v. Bell*, for instance, as support for any important proposition."[163] O'Connor maintained a hopeful ruse, "this part of Holmes's jurisprudence has [indeed] become 'obscure'—it may still be recalled, but it no longer possesses any vitality."[164]

O'Connor was incorrect.[165] *Buck* was cited for propositions in several cases, including Justice Brandeis's influential dissent in *Olmstead v. United States*[166] that gave birth to *Griswold v. Connecticut's*[167] penumbral rights theory,[168] *Roe v. Wade* expressly vindicated *Buck*,[169] and *Buck* was directly applied in *Madrigal v. Quilligan*.[170] In fact, *Buck's* due process framework

160. *Id.* at 1:15:14–1:15:35.

161. Mathews v. Eldridge, 424 U.S. 319 (1976).

162. BELLY OF THE BEAST 48:05–49:00 (Erika Cohn dir., 2020) (Californian eugenicists "had always used cost/benefit as the justifier for why they were doing what they were doing"); Buck v. Bell, 274 U.S. 200, 207 (1927) (extending a *Jacobson* balancing test "to cover cutting the Fallopian tubes"); *Mathews*, 424 U.S. at 347–48 (expanding a cost/benefit balancing test to cover potentially all procedural due process claims); Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in* Buck v. Bell, 43 CATHOLIC LAWYER 125, 131–32 (2004) ("In *Buck v. Bell*, the court employed a utilitarian calculus of weighing costs and benefits to determine the Virginia legislation's appropriateness."); *see* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1059–60 (2000) [hereinafter Sunstein, *Cognition*] (attempting to vindicate cost/benefit balancing tests after then-Senator Biden rebuked then-Supreme Court nominee Stephen Breyer as "incredibly presumptuous and elitist" for endorsing cost/benefit balancing tests).

163. O'Connor, *They Often*, *supra* note 28, at 390.

164. *Id.* at 390–91.

165. *Buck*, 274 U.S. at 200, *cited in* Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting), *and* Roe v. Wade, 410 U.S. 113, 154 (1973); *cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 101 (1973) (Marshall, J., dissenting) (noting that "the limited stature" of abortion rights in *Roe v. Wade* "is evident from the fact that at the same time [the Court sought to protect a fundamental right of women] the Court reaffirmed its initial decision in *Buck v. Bell*").

166. Olmstead v. United States, 277 U.S. 438 (1928).

167. Griswold v. Connecticut, 381 U.S. 379 (1965).

168. *Id.* at 494 (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)); *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 . . . .").

169. Roe v. Wade, 410 U.S. 113, 154 (1973) (using *Buck* to limit women's right to abortion).

170. Madrigal v. Quilligan, No. 75–2057, 1978 U.S. Dist. LEXIS 20423, at *1 (9th Cir. 1978).

was implicitly revitalized by *Mathews* and perhaps came to define O'Connor's era more than any other law.[171]

As discussed in *The Dark Side of Due Process: Part I*, Justice Holmes dissented with Brandeis in *Olmstead*, but disagreed with Brandeis's assertion of constitutional rights arising from the "penumbra."[172] The metaphor that human rights are like spectral shadows emanating from the law, rather than preexisting the law as the basis of United States government, was invented by Holmes, author of *Buck v. Bell*, to undercut human rights.[173] Thus, the *Griswold* penumbral rights theory originated as a rejection of rights in *Olmstead*, an inauspicious beginning.[174]

We can now see the penumbral forms of Holmes's version of "due" process emerging like the tentacles of a *Leviathan* wrapped around United States citizens like Ms. Dillon to crush them in a paradox.[175] However, momentary cries for justice like those hurled by Ms. Chandler flashed like bolts of lightning over the sea to expose the beast to us, so that we might "reach the heart of the monster" in time to save ourselves.[176] In response to Ms. Chandler's alarm, this subsection is intended as a light shining directly into the penumbral laws of the United States.[177]

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171. Buck v. Bell, 274 U.S. 200, 207 (1927), *extended by* Mathews v. Eldridge, 424 U.S. 319, 347–48 (1976), *extended by* Landon v. Plasencia, 459 U.S. 21, 34 (1982).

172. Olmstead v. United States, 277 U.S. 438, 469–70 (1928) (Holmes, J., dissenting) ("I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant . . . . But I think, as Mr. Justice BRANDEIS says, that apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act.").

173. *Id.*

174. Griswold v. Connecticut, 381 U.S. 379, 485 (1965) (emphasizing the penumbra metaphor was taken from Holmes even though Brandeis's *Olmstead* dissent is later cited as the origin).

175. BELLY OF THE BEAST 27:47 (Erika Cohn dir., 2020) (citing the supposed "cost effectiveness" of using sterilization as nonconsensual birth control as the reason why women were being sterilized against their will in California women's prisons); *cf.* Pauli Murray, *An American Credo*, 1945 COMMON GROUND 23 (referring to racism as an American *Leviathan*, writing: "Its tentacles will engulf us unless we reach the heart of the monster.").

176. BELLY OF THE BEAST 27:47 (Erika Cohn dir., 2020) (presenting whistleblower evidence of the minutes of a California Department of Corrections committee meeting received by Cynthia Chandler to corroborate that sterilizations were in fact being performed on women like Kelli Dillon without their consent based on a cost/benefit analyses); Murray, *supra* note 175, at 23; *see* Clint Schemmer, *GCC, UMW to Screen Film on Forced Sterilization of Women in Prison*, THE FREE LANCE-STAR (Mar. 27, 2021), https://fredericksburg.com/news/local/gcc-umw-to-screen-film-on-forced-sterilization-of-women-in-prison/article_fc54f112-60cd-5093-9e29-d2d08376d5e2.html [https://perma.cc/LG7C-DM2C].

177. Murray, *supra* note 175, at 23; Schemmer, *supra* note 176.

We believed so blindly in the inherent rationality of judges that it came as a shock when Kelli Dillon uncovered a eugenic sterilization program in California.[178] California officially banned eugenic sterilization in 1979, in the wake of a failure of federal courts to rein in the practice in the infamous decision of *Madrigal v. Quilligan*.[179] More recently, in an attempt to reform a broken prison system, California prisons were placed in a federal receivership.[180]

After learning about Ms. Dillon's unwanted oophorectomy, Ms. Chandler directly questioned the federal receiver regarding the existence of eugenic sterilization in California.[181] While the Supreme Court itself affirmed the California receivership with the best of intentions, Ms. Chandler revealed that the receiver knew about and appeared to endorse California's sterilization program.[182] Though Ms. Dillon wrought a change in California Law in 2021 to make reparations to victims like her, there is still much to be done,

> [N]ow that there's been a small victory they're blocking advocates or anyone who's coming in from the outside from being able to come in freely to interview inmates. There are women today that need reproductive care but absolutely cannot get it because of the retaliation. The doctor told me, 'thanks to your fellow inmates, I'm not doing nothing.' . . . None of the CDCR

178. BELLY OF THE BEAST 16:50 (Erika Cohn dir., 2020).

179. CAL. HEALTH & SAFETY CODE § 24210(b)(1) (noting that "state-sponsored sterilization conducted pursuant to eugenics laws . . . existed in the State of California between 1909 and 1979"); Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 AM. J. PUB. HEALTH 1128, 1128–30 (2005) (explaining that in 1979 "Calif. Assemblyman Art Torres . . . introduced a bill to the legislature to repeal the state's sterilization law" after he learned about the miscarriage of justice in *Madrigal v. Quilligan*—Assemblyman Torres's law banning eugenic sterilization in California became the law).

180. *See* Brown v. Plata, 563 U.S. 493, 543 (2011) (affirming the constitutionality of the lower court's decision to place California prisons in a federal receivership).

181. BELLY OF THE BEAST 27:58–28:40 (Erika Cohn dir., 2020) ("Federal and state laws prohibit sterilizing people in prison for the purpose of birth control, but they were doing it anyway. So we sent a list of questions to the federal receivership. The whole job of that office is to make sure the laws are followed in healthcare/delivery in the prisons. One of the questions was how they in fact started sterilizing women during labor and delivery, and the response was that "yes" they were doing that at two women's prisons. This was signed by the federal receiver himself. And could he be so clueless that he wouldn't even know that he had just, like, stuck his foot in his mouth?").

182. *Compare id.* (revealing that the federal receivership knew about the eugenic sterilizations occurring in California and would not stop them from occurring), *with Plata*, 563 U.S. at 543 (approving of California's receivership in order to oversee California's compliance with federal law).

> [California Department of Corrections and Rehabilitation] doctors or officials faced consequences for their actions. CDCR declined interview requests, but issued a statement noting 'an enhanced focus on women's health' since the bill passed.[183]

And so, after Ms. Dillon completed her task of doing everything she could to strike a better chord in American law, she raised a rallying cry for us: "We have yet to get an apology, we have yet to be acknowledged. We have to crack this thing wide open. CDC has to be made accountable."[184] Ms. Dillon and her mighty advocates know that California's legal ban in 1979, as well as its reiteration in 2021, obviously do not contain effective prohibitions and did not bring about an end to eugenics in America, but only threw it deeper into the shadows.[185]

Forcing injustice into the shadows is better than letting it grow unchecked in the light.[186] However, the state of the law after the 2021 reparation law was passed[187] revealed that positive laws are themselves subject to the

183. BELLY OF THE BEAST 1:14:37, 1:16:38 (Erika Cohn dir., 2020).

184. *Id.* at 1:15:14–1:15:35.

185. Amanda Morris, *'You Just Feel Like Nothing': California to Pay Sterilization Victims*, N.Y. TIMES (July 11, 2021), https://www.nytimes.com/2021/07/11/us/california-reparations-eugenics.html [https://perma.cc/VX24-CU2G] ("Even after California repealed its eugenics law in 1979, it continued to sterilize women in prison . . . according to a 2014 state report . . . ."); *see* Stern, *supra* note 179, at 1128–30 (discussing the repeal of California's sterilization law in 1979); VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 30–32 (2008) ("Two years after *Buck* was decided, twelve states has passed new sterilization legislation . . . ."). The role of federal jurisprudence in the maintenance of state level eugenics policies ought not to be ignored. Victoria Nourse, Buck v. Bell*: A Constitutional Tragedy form a Lost World*, 39 PEPP. L. REV. 101, 110–11 (2011) [hereinafter Nourse, *Buck*] ("The suit that brought *Buck* to the Court was constructed precisely because sterilization laws had become a dead letter due to hostile state court constitutional rulings. Carrie's lawyer was affiliated with the very hospital she was suing. The 'due process' with which she was provided involved a woman who, as Professor Paul Lombardo found, concluded that the 'look' of Buck's seven-month-old child, Vivian, proved her imbecilic. Then, too, the major evidence against Buck was constructed by Harry Laughlin, the author of [state level] sterilization laws throughout the country. This hardly reflects the disinterested scrupulosity that Holmes represented.").

186. *See* NOURSE, *supra* note 185, at 16, 120, 159 (repeatedly noting how "*Skinner's* great innovation" of "strict scrutiny" helped "human rights . . . take on an entirely new character in constitutional law" despite failing to affirmatively overrule *Buck v. Bell* to completely dispel "the shadow of Hitler's horrors").

187. Forced or Involuntary Sterilization Compensation Program, CAL. HEALTH & SAFETY CODE § 24211.

fabric of law that controls the word "due" in "due process of the law."[188] The federal receivership failed to stop eugenic sterilization in California because "due" is still largely defined by ad hoc judgements under *Mathews v. Eldridge* rather than common law stare decisis.[189]

Ms. Dillon's ovaries were surgically removed in a California women's prison by Dr. James Heinrich without her consent.[190] Heinrich's tortious and criminal battery on Ms. Dillon's person caused her to suffer a dangerous loss of weight that could have resulted in death.[191] In response, Heinrich told Ms. Dillon she "should be happy" to have "lost weight," and that "so many women would love to have lost the amount of weight that" Ms. Dillon lost.[192]

This twisted appeal to the vanity of male decision makers regarding Ms. Dillon's fate is central to the classic justification of eugenics in America.[193] Weighing and balancing eugenic policies favorably in court requires the

188. BELLY OF THE BEAST 27:58–28:40, 29:27–29:35 (Erika Cohn dir., 2020) (noting the federal receiver knew about and oversaw eugenic sterilization, revealing that federal versus state control is less important than the fabric of law the respective government will apply—"we were met with comments like, 'well those women wouldn't want to have any more children, would they?'"); *cf.* Justin Ray, *California's Central Role in the Eugenics Movement*, L.A. TIMES (July 20, 2021, 5:30 AM), https://www.latimes.com/california/newsletter/2021-07-20/california-eugenics-reparations-sterilization-essential-california [https://perma.cc/5MEP-UTW2] (revealing that while Governor Davis was officially apologizing for California's involvement in eugenics, it was continuing in California's women's prisons).

189. Victoria Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 798 (2009) [hereinafter Nourse, *A Tale*] (tracing the origin of a *Mathews*-like balancing consideration to the *Lochner* era in order to note a clear inconsistency between fundamental rights holdings like *Skinner* and substantive due process holdings like *Lochner*, resulting in penumbral rights holdings as in "*Lawrence v. Texas*, where the Court refused to enumerate a right and instead spoke of liberty"); *cf.* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1865 (2015) (addressing "the reigning *Mathews v. Eldridge* analysis—under which the court balances the individual's private interest at stake against the government's interest and the potential accuracy benefits from different or additional procedures"); *id.* at 1860, 1908 n.323, 1917 (defending the constitutionality of the "imposition of a special master and receiver" upon "the California prison system").

190. BELLY OF THE BEAST 16:50 (Erika Cohn dir., 2020).

191. *Id.*

192. *Id.* at 16:50–17:00 ("The doctor thought that maybe I was a hypochondriac and he said that I should be happy that I lost weight; so many women would love to have lost the amount of weight that I lost.").

193. *Id.* at 48:05–49:00 (noting that Californian eugenicists "had always used cost/benefit as the justifier for why they were doing what they were doing").

belief that patients who undergo eugenic procedures benefit from them.[194] The sickening idea that a patient actually benefits from a doctor's unwanted battery was discussed by investigative reporter Corey G. Johnson as an integral part of California's eugenics legacy at work in Kelli Dillon's case:

> At the point that Dr. Heinrich was hired sterilization procedures had been going on for years at multiple prisons. He strongly believed that there were women that were gaming the system and that needed to be stopped. . . . That attitude tracked precisely to the historical attitude of the California leaders of the eugenic movement. They had always used cost/benefit as the justifier for why they were doing what they were doing. So in that way Heinrich was part of a legacy.[195]

The eugenic legacy Dr. Heinrich followed is certainly Californian, but it is not solely Californian.[196] Take, for example, famed eugenicist Harry Laughlin's advocacy of eugenics that earned him a prize at the University of Heidelberg, Germany in the 1930s for inspiring the Nazis to oppress and murder as many Jewish people as possible.[197] Laughlin's Model Eugenic Law for the United States began with a cost/benefit analysis to justify its existence over the claims of one's natural and civil rights to keep their reproductive organs intact.[198]

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194. *Id.* at 48:05–49:00; *see* Buck v. Bell, 274 U.S. 200, 207 (1927) (extending the *Jacobson* balancing test).

195. BELLY OF THE BEAST 48:05–49:00 (Erika Cohn dir., 2020).

196. *See* HARRY HAMILTON LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 454 (1922) (giving an example to all fifty states to follow from an Iowan, educated in Missouri, and working and residing in New York at an organization dedicated to advocating for eugenics).

197. *Id.*; *Harry Laughlin and Eugenics: Nazi Connection*, TRUMAN ST. UNIV., https://historyofeugenics.truman.edu/exchanging-ideas/international-discourse/nazi-connection/ [https://perma.cc/F3M9-FNGK].

198. LAUGHLIN, *supra* note 196, at 454 (beginning his model eugenic sterilization law with a cost/benefit balancing test: "The certain great racial and social benefit, the possible benefit to the individual, the ultimate great saving in money by the state must be weighed against the taking away of a natural power, a possible miscarriage of justice, a possible mistaken diagnosis, a possible surgical shock, and a possible physiological ill to the person alleged to be a potential parent of defective stock."); *cf.* BELLY OF THE BEAST 1:16:56 (Erika Cohn dir., 2020) ("Dr. Heinrich also declined [interview requests], but responded in writing: 'the new rule deprived women of the option to have their tubes tied after multiple pregnancies, and thereby sentenced them to suffer through inadvertent pregnancies and to bear children that they did not wish to bear.'").

The cost/benefit analyses of Californian eugenicists that claimed to save the state millions of dollars required the presupposition that all civil and human rights be rendered ineffective in tort suits for damages resulting from unwanted, illegal surgeries.[199] As a former obstetrician nurse for Dr. Heinrich recently noted, California's 2021 reparations law did not convince her that eugenics itself was a bad thing the purpose of saving state money:

> As to whether I think it [i.e., eugenic sterilization] should be illegal, not necessarily. Even if it's not medically necessary, it could, or would in the long run save the State funds like Doctor [Heinrich] was saying. Uh, so, you know, was he wrong in that estimation? Probably not. Because, as I said, the ideal time to do it to them is when you're already in there. It just takes a couple more minutes and then a couple more snips.[200]

The Supreme Court in *Brown v. Plata*,[201] recently endorsed a reading of the Eighth Amendment that should allow tort suits in California.[202] However, it overlooked the federal receivership's own role created by *Plata* in administering eugenic policies.[203] Ms. Dillon revealed that an entire Star Chamber can be administered in the void created between state and federal officers that each blame the other for the wrongs both committed.[204]

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199. BELLY OF THE BEAST 48:05–49:00 (Erika Cohn dir., 2020); *cf.* Forced or Involuntary Sterilization Compensation Program, CAL. HEALTH & SAFETY CODE § 24211 (future courts may properly decide that this law waived all claims the state might have made to qualified immunity for any and all eugenic-based programs).

200. BELLY OF THE BEAST 1:15:41 (Erika Cohn dir., 2020) (statement of Former OB Nurse, Valley State Prison).

201. Brown v. Plata, 563 U.S. 493 (2011).

202. *Id.* at 545 ("The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment.").

203. *Compare id.* ("The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA."), *with* BELLY OF THE BEAST 27:58–28:40 (Erika Cohn dir., 2020) (recognizing the role of the federal receivership).

204. *Compare Plata*, 563 U.S. at 545 (justifying the use of a federal receiver to ensure that California complied with federal legal standards), *with* BELLY OF THE BEAST 27:58–28:40, 1:15:41 (Erika Cohn dir., 2020) (demonstrating that the federal receivership did not do what it was supposed to do in at least two California women's prisons); *cf.* Frank Riebli, *The Spectre of Star Chamber: The Role of an Ancient English Tribunal in the Supreme Court's Self-Incrimination Jurisprudence*, 29 HASTINGS CONST. L.Q. 807, 808–09 (2002) (explaining that the Star Chamber represents themes of "brutality, abuse of power, oppressive state might overpowering the helpless individual, and persecution" and was "usually a foil, contrasted with our own courts and legal systems, by adjectives like 'hated,' 'obnoxious,' and 'opprobrious'"). *But see* Torres v. Madrid, 141 S. Ct. 989, 997 (2021) (citing Countess of Rutland's Case

The Holmesian practice of trying to separate procedure from substance was itself a pretext to uphold potentially any federal or state law.[205] It was based upon a Social Darwinist supposition that human beings are not inherently equal as the Declaration of Independence strongly maintained.[206] Justice Holmes thus betrayed the "heaven-defended race"[207] referred to in the Declaration of Independence in order to split hairs according to the eugenic era's hypothetical cost/benefit analyses given in *Jacobson v. Massachusetts*[208] here:

> [The hypothetical rational decision maker] would have . . . recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use . . . .[209]

This so-called balancing test is never actually applied.[210] Rather, the hypothetical existence of a balancing test that could weigh in favor of the

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[1605] 6 Co. Rep. 52b (Eng.) (Star Chamber)) (showing how the Supreme Court recently began using Star Chamber opinions as legitimate precedent to help it define the terms of the United States Constitution).

205. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("The attack is not upon the procedure but upon the substantive law."); G. Kristian Miccio, *The Death of the Fourteenth Amendment:* Castle Rock *and Its Progeny*, 17 WM. & MARY J. WOMEN & L. 277, 296 (2011) (the use of the word "substantive" in relation to due process is itself "artificial").

206. Alexander Tsesis, *Deliberative Democracy, Truth, and Holmesian Social Darwinism*, 72 S.M.U. L. REV. 495, 496 (2019) ("Justice Holmes's Social Darwinistic approach to the marketplace of ideas is fraught with callous notions of preference for powerful speakers. It stands in opposition to a more equalitarian understanding of markets, which recognizes the policy balance governments sometimes undertake to advance important interests that protect open dialogue, while empowering indigent and powerless individuals to join the conversation."); Seth Vannatta, *Justice Holmes, The Social Darwinist*, 14 THE PLURALIST 78 (2019) (noting that "the label of Social Darwinist for [Justice Holmes] is quite fitting"); Allen Mendenhall, *Oliver Wendell Holmes Jr. and the Darwinian Common Law Paradigm*, 7 EURO. J. PRAGMATISM AM. PHIL., 129, 131 (2015); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

207. Phillis Wheatley, *To His Excellency George Washington* [1776].

208. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

209. *Id.* at 24–25 (quoting Commonwealth v. Pear, 183 Mass. 242, 247 (1903)), *extended by* Buck v. Bell, 274 U.S. 200, 207–08 (1927).

210. *Id.* (quoting *Pear*, 183 Mass. at 247), *extended by Buck*, 274 U.S. at 207–08; Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976). The point of judicial balancing is not to balance interests, but rather to open the door to "*ad hoc*" decision-making in which the presupposition that judicial review of fundamental rights firmly upheld in *Crowell v. Benson* is set aside for the anti-common law ideology that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method

Court's decision is cited.[211] As is relevant to today's COVID pandemic, *Jacobson* was a state police-powers decision,[212] and the Supreme Court in *NFIB v. Sebelius*[213] disclaimed any federal police power to do such a thing nationally.[214] If the Court ever went back on this promise, *Buck* might be unleashed in America on the national level along the lines of *Jacobson*.[215]

There are a few decisions that extend substantive due process rights to individuals, such as *Griswold v. Connecticut*, which was extended in *Roe v. Wade*, *Lawrence v. Texas*,[216] and *Obergefell v. Hodges*.[217] However, these decisions were still made under the same framework that doubted the legitimacy of substantive rights in that the very term "*penumbra*" stands for the idea that the rights are not actually found in the United States Constitution.[218] Accordingly, the judges that decided these cases missed their opportunity, represented by Justice Goldberg's *Griswold* concurrence, to expressly reverse *Buck v. Bell* under the Ninth Amendment.[219]

As a direct result, Chief Justice Roberts' dissent in *Obergefell v. Hodges*[220] asserted that *Griswold's* applications of substantive rights under the Due Process Clause were an *extension* of the rationale in *Dred Scott*.[221] Had the

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of decision-making in all circumstances"—this presupposition opened the door to *Mathews'* actual, ad hoc (i.e., non-precedential) holding: "We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process." *Id.*

211. *Jacobson*, 197 U.S. at 124–25 (quoting *Pear*, 183 Mass. at 247 (holding that vaccines give more benefits than costs to the state, and therefore individuals have no right to contest them even to confirm that the vaccines given by the state are actually vaccines and do actually create the benefits the Court presumes they do)), *extended by Buck*, 274 U.S. at 207–08 (applying the same logic, without weighing or balancing, to eugenic sterilization), *extended by Mathews*, 424 U.S. at 348–49.

212. *Jacobson*, 197 U.S. at 24–25.

213. NFIB v. Sebelius, 567 U.S. 519 (2012).

214. *Sebelius*, 567 U.S. at 557 ("Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.").

215. *Compare id.* at 593 (Ginsburg, J., dissenting) (explaining the state may not compel citizens to pay medical bills), *with Buck*, 274 U.S. at 207.

216. Lawrence v. Texas, 539 U.S. 558 (2003).

217. Griswold v. Connecticut, 381 U.S. 379, 481–82 (1965). *But see* Nourse, *A Tale*, *supra* note 189, at 798 (maintaining that these cases only "spoke of liberty" and not substantive due process rights).

218. Nourse, *A Tale*, *supra* note 189, at 798–99.

219. *Griswold*, 381 U.S. at 630 (Goldberg, J., concurring); *cf.* NOURSE, *supra* note 185, at 172 (similarly criticizing *Skinner* for not affirmatively overruling *Buck*); Dred Scott v. Sandford, 60 U.S. 393 (1857), *superseded by* U.S. CONST. amends. XIII–XIV (1868).

220. Obergefell v. Hodges, 576 U.S. 644 (2015).

221. *Id.* at 695–96 (Roberts, C.J., dissenting) (citing Dred Scott v. Sandford, 60 U.S. 393 (1857)).

Court expressly overruled *Osborn v. Nicholson*,[222] as it ought to have in *Obergefell*,[223] then it might have been more difficult for Roberts to draw a false connection between the right of gay men to marry and *Dred Scott* when he wrote:

> The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott v. Sandford*, 19 HOW. 393, 15 L.Ed. 691 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so.[224]

Dred Scott's apparent overruling of the Missouri Compromise was a red herring;[225] when *Dred Scott* was decided the Missouri Compromise was already repealed, and the main issue decided in *Dred Scott*, that slavery extended to the territories, supported the constitutional legitimacy of the Compromise of 1850, which included the Fugitive Slave Act of 1850, a wretched law that the Taney Court declared constitutional a year later in *Ableman v. Booth*.[226] Nor did *Dred Scott* cite to substantive due process as

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222. Osborn v. Nicholson, 80 U.S. 654 (1871).

223. *Id.* at 662–63 (refusing to decide that black people have a natural right to marry after the Civil War, stating that the recognition of such a right would have taken hypothetical property away from slaveholders: "The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be 'without due process of law.'"). At best we can try to say that *Obergefell* implicitly abrogated *Osborn*, but nothing more. *Obergefell*, 576 U.S. at 664 ("[T]he right to marry is fundamental under the Due Process Clause.").

224. *Obergefell*, 576 U.S. at 695–96 (Roberts, C.J., dissenting).

225. *Id.*

226. Kansas-Nebraska Act of 1854, 10 Stat. 277 (repealing the Missouri Compromise); Fugitive Slave Act of 1850, Pub. L. 462, §§ 2–6, 10 (repeating "State or Territory" several times to ensure that this Act's scope encompassed the entire country, and authorizing slave catchers "to seize or arrest and transport such [fugitive slaves] to the State or Territory form which he escaped"); The Compromise of 1850 and the Fugitive Slave Act, PBS, https://www.pbs.org/wgbh/aia/part4/4p2951.html ("Finally, California would be admitted as a free state. To pacify slave-state politicians, who would have objected to the imbalance created by adding another free state, the Fugitive Slave Act was passed. Of all the bills that made up the Compromise of 1850, the Fugitive Slave Act was the most controversial. It required citizens to assist in the recovery of fugitive slaves. It denied the fugitive's right to a jury trial. [etc.]"); Dred Scott v. Sanford, 60 U.S. 393, 455 (1857) (choosing to ignore the Compromise of 1850, the Kansas-Nebraska Act of 1854, and the Fugitive Slaves Act of 1850 while also affirming that it could have overruled these acts in favor of freedom in *Dred Scott* by asserting the Court's power to overrule the Missouri Compromise even though that law was no longer was on the books: "the eighth section

Chief Justice Roberts claimed.[227] Rather, *Dred Scott* was an apt example of what happens when due process is misapplied, which can properly be traced directly from *Dred Scott* to Holmes's *Lochner* dissent, rather than *Lochner's* majority opinion.[228]

Justice Holmes dissented in *Lochner* and similar cases in defense of government powers against individual liberties,[229] as clarified in his *Olmstead* dissent.[230] Chief Justice Roberts did not see the irony of his own statement, "As Justice Holmes memorably put it, 'The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,' a leading work on the philosophy of Social Darwinism."[231] Obviously, in *Buck v. Bell*, Holmes

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of the act of 1820, known commonly as the Missouri Compromise law . . . was unconstitutional"); Ableman v. Booth, 62 U.S. 506, 526 (1858) ("[I]n the judgment of this court, the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States . . . ."); *cf.* Downes v. Bidwell, 182 U.S. 244, 273–74 (1901) (noting the further errors in Chief Justice Taney's *Dred Scott* opinion; specifically that "before the Chief Justice gave utterance to his opinion upon the merits, he had already disposed of the case adversely to the plaintiff upon the question of jurisdiction, and that, in view of the excited political condition of the country at the time, it is unfortunate that he felt compelled to discuss the question upon the merits"—this, in turn, should cast strong doubts upon Taney's previous invention of the political question doctrine years earlier in *Luther v. Borden*). *But see* Letters to the Editor, *What 'Dred Scott' did and didn't do*, WASH. POST (Oct. 13, 2016), https://www.washingtonpost.com/opinions/what-dred-scott-did-and-didnt-do/2016/10/13/693280e6-8fdf-11e6-bc00-1a9756d4111b_story.html [https://perma.cc/6584-MX8F] (expressing disagreement with one of Washington Post's articles for stating that *Dred Scott* "'held the Fugitive Slave Act to be valid'" when *Dred Scott* did not discuss the Fugitive Slave Act—while *Dred Scott* could have, and actually should have addressed the Fugitive Slave Act as it was the most unjust part of the Compromise of 1850 that was actually law at the time instead of the Missouri Compromise, this letter writer was technically correct that the Taney Court waited until *Ableman v. Booth* to declare the Fugitive Slave Act constitutional in order to preempt free state habeas corpus proceedings in the North).

227. *Dred Scott*, 60 U.S. at 450 (citing generally to "due process" but not distinguishing types of due process; there were no categories of due process established in this case).

228. *Compare id.* (disregarding the due process rights of Dred Scott), *with* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (disregarding the due process rights of workers); *cf.* Nourse, *A Tale*, *supra* note 189, at 781 (noting how public hatred for *Dred Scott* was coopted by President Roosevelt to attack the majority opinion of *Lochner*, leading to problematic myths about what *Lochner* stood for, and obscuring what *Lochner* actually was).

229. *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

230. Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting) (establishing that Holmes believed in upholding state laws regardless of whether individual rights were served by them).

231. Obergefell v. Hodges, 576 U.S. 644, 696–97 (2015) (Roberts, C.J., dissenting) (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)).

pushed the envelope of a Social Darwinist economic theory farther than anyone else in United States history.[232]

Holmes, like all legal positivists, did not take a principled stand against legislating from the bench.[233] Rather, his disagreement with *Lochner*'s alleged adoption of Spencer's *Social Statics* was about policy, not principle.[234] The economic theories Holmes inserted into our jurisprudence were redoubled and embellished in *Mathews v. Eldridge*,[235] but may yet be reversed by the Court under *Crowell v. Benson's*[236] requirement of *de novo* judicial review.[237]

Investigative reporter Corey G. Johnson uncovered California's perpetuation of a penumbral rights framework while he was investigating Kelli Dillon's surgery.[238] It was difficult for Johnson to uncover any evidence of eugenic sterilization in California because patient privacy rights were asserted by the state to justify refusing anyone's request for information.[239] Johnson was only able to get a partial view of how big the system had grown from a whistleblower.[240]

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232. Buck v. Bell, 274 U.S. 200, 205–06 (1927) (restating the precepts of eugenic pseudo-science in order to destroy the rights of "defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety"); *cf. Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (noting that he was not categorically against constitutionalizing economic theories stating "I should desire to study it further and long before making up my mind"); Holmes, Jr., *Law in Science*, *supra* note 80, at 450–51 (expounding "another evolutionary process which Mr. Herbert Spencer has made familiar to us by the name of Integration"—Holmes explains that his adoption of an idea, and even his decision of whether to constitutionalize an economic theory, has to do with the idea's survival in a Darwinian battle for its life rather than any sort of reasoned principle that economic theories should never be used).

233. *See* Holmes, Jr., *Law in Science*, *supra* note 80, at 450–51 (citing approvingly to Herbert Spencer).

234. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (the reason Holmes would not join the majority was simply because "a large part of the country does not entertain" the economic theories embraced by the court—if a clear majority to Holmes's mind, embraced the constitutionalization of economic theories, then he would also have embraced it, as he jubilantly did in *Buck v. Bell*); Thompson, *supra* note 162, at 131 ("Holmes['s] decision [in *Buck v. Bell*] can be attributed to his utilitarianistic beliefs reflected by his personal association with prominent utilitarians and his extensive reading of John Austin, John Stuart Mill, and Jeremy Bentham.").

235. *Buck*, 274 U.S. at 207, *extended by* Mathews v. Eldridge, 424 U.S. 319, 347–48 (1976).

236. Crowell v. Benson, 285 U.S. 22 (1932).

237. *Id.* at 58–59.

238. BELLY OF THE BEAST 48:05–49:00 (Erika Cohn dir., 2020).

239. *Id.*

240. *Id.*

Johnson's investigative work revealed how Brandeis's concept of privacy rights are enjoyed by "civilized" men to destroy the privacy rights of women like Kelli Dillon.[241] The *arcana imperii* of the state to perform eugenics was justified with the penumbra ever since Justice Brandeis's ironic Star Chamber defense of privacy rights, and in this sense Brandeis's own theory mooted itself.[242] Natural human rights, including privacy rights, were meant to animate government form, and so the correct analogy for human rights should be a natural life-giving light; a light that is meant to shine in through the Ninth Amendment, the proverbial skylight of the United States Constitution, to facilitate discourse about natural rights as if they were sunlight or starlight that can help us navigate difficult matters of statecraft, rather than mere shadows emanating from the constitutional text.[243]

C. HOW *MATHEWS'* DEFINITION OF "DUE" OPENED A DOOR TO AMERICAN STAR CHAMBERS

As demonstrated in *The Dark Side of Due Process: Part I*, Justice Powell managed to open a door to Star Chambers in *Mathews* by using as strategy he lifted from *The Slaughterhouse Cases*.[244] As made evident by the Powell Memo and Powell's chairmanship over the committee that drafted the Anti-Terrorism & Effective Death Penalty Act of 1996, Justice Powell did not seem to care much about creating a cost/benefit "supermandate," or

241. *Id.*

242. *Compare id.*, *with* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (basing American privacy rights on *Millar v. Taylor's* citation of Star Chamber history as common law precedent), *and* Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (citing Buck v. Bell, 274 U.S. 200 (1927)).

243. McCulloch v. Maryland, 17 U.S. 316, 415 (1819) (emphasis in original) (noting that the United States Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs"); Weems v. United States, 217 U.S. 349, 378 (1910) (noting how the United States Constitution "may acquire meaning as public opinion becomes enlightened by humane justice"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."); *see also* O'Connor, *They Often*, *supra* note 28, at 388 ("[T]he Declaration of Independence, for example, speaks of inalienable God-given rights, the abridgement of which permits revolution."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. pmbl; U.S. CONST. amend. IX.

244. *The Dark Side of Due Process: Part I* discussed how Justice Powell learned how to make a horcrux for *Buck v. Bell* in *Mathews* from the way *The Slaughterhouse Cases* made a horcrux for *Dred Scott*. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (quoting The Slaughterhouse Cases, 83 U.S. 36, 71 (1873)); Holmes, Jr., *The Path*, *supra* note 109, at 460–61, *extended by* Buck v. Bell, 274 U.S. 200, 207–08 (1927), *and* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

anything of the like.[245] His interest in balancing costs and benefits in *Mathews* and *Stone*, like Justice Holmes's in *Buck v. Bell*, was far more practical to securing his own personal agendas through the old Hegelian maxim that the ends justify the means.[246]

Mathews, which is a basic reiteration of this Hegelian ideology, opens the door to the possibility of Star Chambers in America.[247] Its due process framework is built to affirm almost any "process" administered by the government as long as the result *might* have been a rational determination of an unbiased decision maker; its approval of administrative tribunals (as demonstrated below) can include executive tribunals coopted and refashioned into illegitimate, unreviewable Star Chambers.[248] For feudal law is unwritten and lives in the hearts of the conquered; according to Hobbes it may always be applied once the people make a bargain with their rulers to avoid a state of absolute war and death.[249]

Mathews' role as a precedent for the ad hoc denial of due process suits was emphasized by its express decision that no evidentiary hearing was required

245. Confidential Memorandum from Lewis F. Powell, Jr. to the U.S. Chamber of Commerce on the Attack on American Free Enterprise System (Aug. 23, 1971), https://www.greenpeace.org/usa/democracy/the-lewis-powell-memo-a-corporate-blueprint-to-dominate-democracy/ [https://perma.cc/V3QD-9LHU] [hereinafter Powell Memo]; Lewis F. Powell Jr., Habeas Corpus Committee – Report, Lewis F. Powell Jr. Papers, Box 777/Folder 6, at 7–27 (1990) [hereinafter Powell Report] (advocating the virtual suspension of habeas corpus by statute without engaging in the ruse of cost benefit balancing), adopted by Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104–132, 110 Stat. 1214; *see* Cass R. Sunstein, *Legislative Forward: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 309 (1996) ("I have suggested that a general requirement of cost-benefit balancing—a substantive super mandate—should be enacted.").

246. GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 142 (S.W. Dyde trans., 2001) ("To this place belongs the famous sentence, 'The end justifies the means.'"); Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L. Q. 703, 706, 722 (1992) (noting how Holmes was "strongly influenced by Hegel").

247. *Mathews*, 424 U.S. at 349 (deciding that "an evidentiary hearing is not required prior to the termination" of a property right); Riebli, *supra* note 204, at 810–11 (noting that prior to *Mathews*, the Court regularly used the Star Chamber as a foil to define what the United States Constitution was designed to preclude); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.").

248. *Mathews*, 424 U.S. at 348–49; *see Buck*, 274 U.S. at 207 (affirming the government's authority to sterilize individuals with mental disabilities).

249. HOBBES, *supra* note 13, at 85–86 (explaining that humans in a state of nature exist in a state of "warre of every man against every man"); *id.* at 119 (explaining that when humans choose to avoid the state of nature by forming a society "[t]his is the Generation of that great LEVIATHAN").

to administer due process.[250] Its one-and-done ad hoc approach eventually disconnected large swathes of federal jurisprudence from the common law principle of *stare decisis*.[251] It convinced most plaintiff counsels to pursue the application of balancing tests rather than structural arguments under *Crowell v. Benson*.[252] However, a successful balancing analysis is extremely rare, the work must be repeated in every similar case, and the ad hoc nature of the *Mathews* framework makes decisions made under *Mathews* extremely vulnerable to reversal.[253]

This was all by design, because *Mathews*' ad hoc decisionmaking tends to give judges the comforting feeling of control in an increasingly uncertain world.[254] *Mathews* was decided on February 24, 1976—early in the term, signaling it was not seen as one of the Court's more important decisions that year.[255] On the same day, *Stone v. Powell*[256] was argued.[257] In *Stone*, which was seen as the more important decision at the time, Justice Powell repeated his reasoning from *Mathews* and revealed its origins in the idea of finality expressed by Professor Paul M. Bator.[258]

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250. *Mathews*, 424 U.S. at 348 (setting forth the standard for "ad hoc[] weighing of fiscal and administrative burdens against the interests of a particular category of claimants."). The basic problem with *Mathews* may be summed up as a "quality of justice" issue as explained by Justice Stevens when he said that "there can be only one answer to that question no matter *what* standard of appellate review is applied." Jackson v. Virginia, 443 U.S. 307, 327–28 (1979) (Stevens, J., concurring in the judgment) (emphasis in original).

251. *Mathews*, 424 U.S. at 348.

252. *Id.* (trusting the final decisions regarding a class of property right to bureaucracy); Crowell v. Benson, 285 U.S. 22, 57 (1932) (the *Crowell* Court would probably have interpreted the *Mathews* Court as inappropriately "establish[ing] a government of a bureaucratic character alien to our system, wherever fundamental rights depend").

253. *Mathews*, 424 U.S. at 348; *see* Kaley v. United States, 571 U.S. 320, 340 (2014) (applying *Mathews* to decide that the grand jury's determination cannot be revisited).

254. *Compare* Sunstein, *Cognition*, *supra* note 162, at 1068 (touting the use of cost/benefit balancing tests as a way of collecting and sharing knowledge "by placing the various effect on-screen," which is a very comforting kind of activity), *with* LULU MILLER, WHY FISH DON'T EXIST 14–15, 97–106 (2020) (noting that the activity of collecting knowledge is extremely effective at easing psychological anxiety).

255. *Mathews*, 424 U.S. at 319.

256. Stone v. Powell, 428 U.S. 465 (1976).

257. *Compare Mathews*, 424 U.S. at 319 (decided on Feb. 24, 1976), *with Stone*, 428 U.S. at 465 (argued on Feb. 24, 1976).

258. *Compare Mathews*, 424 U.S. at 348 ("conserving scarce fiscal and administrative resources is a factor that must be weighed."), *with Stone*, 428 U.S. at 475–76 nn.7–9, 493 n.35 (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465–74, 488–91, 509 (1963)) (premising the question of whether habeas corpus review should occur upon an

In *Stone*, Powell repeated his reasoning from *Mathews* as follows: "The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims."[259] Thus, Powell endorsed the possibility that a mob-dominated Court could be an unbiased tribunal.[260] Justice Brennan dissented, writing that cost/benefit balancing "does violence to the congressional power to frame" statutes.[261]

Over the decades, *Mathews* took increasing precedence over *Stone* until 2004, when Justice O'Connor authored the plurality opinion in *Hamdi v. Rumsfeld*.[262] In *Hamdi*, a watershed habeas corpus decision in the War on Terror, O'Connor cited to *Mathews* without mentioning *Stone*.[263] Thus, the *Hamdi* Court signaled that *Stone* was forgotten, or at least invisible under *Mathews*, in the habeas context.[264]

Though *Stone* was considered far more important in its day,[265] habeas courts did not consistently refer to *Stone's* balancing approach, especially

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overriding concern about the conservation of the fiscal and administrative resources of the court). The issue of statutory "finality" raised in *Mathews* is near exactly the opposite of Bator's characterization of "finality" of state court criminal trials in that the former is required to establish federal jurisdiction and the latter is grounds for prudential dismissal. *Stone*, 428 U.S. at 475–76 nn.7–9, 493 n.35 (1976); *Mathews*, 424 U.S. at 331 n.11.

259. *Stone*, 428 U.S. at 489.

260. *Id.* at 476 (after reviewing *Frank v. Mangum*, which analyzed "proceedings which resulted in his conviction for murder had been dominated by a mob," the court decided to deny habeas *de novo* review, instead applying the ad hoc balancing approach, which can result in affirming mob rule in future cases).

261. *Id.* at 515–16 (Brennan, J., dissenting) ("[T]he Court admits that respondents have sufficiently alleged that they are 'in custody in violation of the Constitution' within the meaning of § 2254 and that there is no 'constitutional' rationale for today's holding. Rather, the constitutional 'interest balancing' approach to this cases is untenable, and I can only view the constitutional garb in which the Court dresses its result as a disguise for rejection of the longstanding principle that there are no 'second class' constitutional rights for purposes of federal habeas jurisdiction; it is nothing less than an attempt to provide a veneer of respectability for an obvious usurpation of Congress' Art. III power to delineate the jurisdiction of the federal courts.").

262. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (weighing "the private interest that will be affected by the official action" against the government's asserted interest).

263. *Id.* at 529 (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

264. *Id.*

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

after *Fay v. Noia* was dismantled in piecemeal fashion.[266] Rather, *Mathews* displaced *Stone*.[267] In *Hamdi*, a *Mathews* approach reversed the ancient use of habeas corpus to disband inquisitorial tribunals and became a new basis for the rise of Star Chambers in America.[268]

As the whimsical Alexander Pope once quipped, "For forms of government let fools contest / Whate'er is administered best is best."[269] Congruent with this sentiment, *Mathews* did not require more administrative process; it was a rubber stamp to exempt meaningful review of administrative process.[270] *Mathews* said that as long as a process results in more benefits to society than costs, then the process is constitutionally due, i.e., the ends justify the means.[271]

By great contrast, the American revolutionaries contested the English administration of government forms and separated from England in the conflict.[272] It is a testament to *Mathews'* propagandistic success that it bears repeating the founders' old disagreement with Pope about the importance of government forms here.[273] Specifically, in 1776 John Adams quipped back that Pope "flattered tyrants too much."[274]

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266. Stone v. Powell, 428 U.S. 465, 477 (1976) ("This final barrier to broad collateral reexamination of state criminal convictions in federal habeas corpus proceedings was removed in *Fay v. Noia*, 372 U.S. 391 (1963)."); Coleman v. Thompson, 501 U.S. 722, 750 (1991) (overruling the last vestiges of *Fay*, without mentioning *Stone*).

267. *See, e.g.*, *Hamdi*, 542 U.S. at 529 (plurality opinion) (determining the *Mathews* test was applicable); Metzger, *supra* note 189.

268. *See, e.g.*, *Hamdi*, 542 U.S. at 529 (plurality opinion). *But see* Boumediene v. Bush, 553 U.S. 723, 745 (2008) (correcting course after *Hamdi* by establishing common law habeas precedent rather than applying an *ad hoc* balancing test).

269. ALEXANDER POPE, POPE'S ESSAY ON MAN AND ESSAY ON CRITICISM 46 (Joseph B. Seabury ed., 1900).

270. Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (deciding that "an evidentiary hearing is not required prior to the termination" of a property right).

271. *Id.* at 349; HEGEL, *supra* note 246; *cf.* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (naming the legal doctrine that "the end justifies the means" a "pernicious doctrine" and ironically citing to *Buck v. Bell* in the process).

272. THE DECLARATION OF INDEPENDENCE paras. 1–32 (U.S. 1776); *see* U.S. CONST. pmbl. (establishing the Constitution in order "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity").

273. *See* Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 894–95 (2015) (attesting to the "Mathewsization" of large swathes of American law).

274. *See* JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 287 (C. Bradley Thompson ed., 2000) [hereinafter ADAMS, THE REVOLUTIONARY] (arguing against tyrannical government).

Since it was decided, *Mathews* normalized judicial contempt of the Article III judicial independence established by John Adams.[275] Instead of reviewing constitutional violations on a case-by-case basis, a grab bag of administrative state tribunals sprang forth.[276] Constitutionally sound agencies grew up alongside constitutionally questionable ones, until the Roberts Court cited Privy Council and Star Chamber decisions to rule them all.[277]

Even with the Court's apparent inability to see constitutional gradients between different tribunals, a few constitutional issues still loom large.[278] Immigration Court ("Executive Office for Immigration Review" or "EOIR"),[279] Grand Jury Presentment,[280] and the Foreign Intelligence

275. *Id.* at 292 (in order to keep judges independent from politics, "their commissions should be during good behavior, and their salaries ascertained and established by law"), *ratified by* U.S. CONST. art. III, § 1; *Mathews*, 424 U.S. at 349 (deciding that the court can dispose of fundamental rights without ensuring an evidentiary hearing on an *ad hoc* basis), *extended by* Torres v. Madrid, 141 S. Ct. 989, 997 (2021) (endorsing an ad hoc Star Chamber decision to answer a Fourth Amendment question), United States v. Arthrex, Inc., 141 S. Ct. 1970, 1977 (2021) (allowing PTAB, a politically controlled tribunal, to determine the validity of patents), *and* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1376–77 (2018) (citing to ad hoc Privy Council decisions to justify its decision that PTAB is constitutional).

276. Laura K. Donohue & Jeremy M. McCabe, *Federal Courts: Art. III(1), Art. I(8), Art. IV(3)(2), Art. II(2)/I(8)(3), and Art. II(1) Adjudication*, CATHOLIC U. L. REV. 1, 3 (forthcoming 2021); *see, e.g.*, Stern v. Marshall, 564 U.S. 462, 489–90 (2011) (justifying, generally, the apparently unreviewable constitutionality of bankruptcy courts under the public rights ideology of *Murray's Lessee*). *But see* Crowell v. Benson, 285 U.S. 22, 57–59 (1932) (asserting broad Article III jurisdiction to review the decisions of administrative tribunals of every stripe for their constitutionality when fundamental rights are at stake).

277. *Torres*, 141 S. Ct. at 997 (citing Countess of Rutland's Case [1605] 6 Co. Rep. 52b (Eng.) (Star Chamber)); *Arthrex, Inc.*, 141 S. Ct. at 1970, 1982 (demonstrating constitutional ambiguity of the Administrative Patent Judges' positions), *extending Oil States*, 138 S. Ct. at 1377 ("But there was another means of canceling a patent in 18th-century England, which more closely resembles inter partes review: a petition to the Privy Council to vacate a patent."); *cf.* Riebli, *supra* note 204, at 810–11 (noting that the Court formerly used the Star Chamber as a symbol of injustice and unconstitutionality).

278. For example, an inquiry that continues to rankle the Court is what it means for the U.S. federal government to be a *limited* government. NFIB v. Sebelius, 567 U.S. 519, 533 (2012).

279. Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 14 N.Y.U. REV. L. & SOC. CHANGE 433, 496 (1992) (properly likening EOIR to an inquisition).

280. U.S. CONST. amend. V; *see* Kaley v. United States, 571 U.S. 320, 340–41 (2014) ("Even under Mathews, they have no right to revisit the grand jury's finding.").

Surveillance Court ("FISC")[281] are all structurally problematic.[282] *Mathews* cannot paper over the ways these tribunals constitutionally breach the idea of due process without causing blatant irony.[283]

First, recent review of EOIR demonstrated how *Mathews* opened the way back up to American feudal and canon law through the virtual destruction of *Mathews* itself.[284] For most, the adoption of *Mathews* is premised upon a belief that a lasting balancing test structure can be maintained without endorsing an inquisition.[285] In other words, most lawyers who endorsed *Mathews* believed that a decision like *DHS v. Thuraissigiam* was impossible.[286]

Prior to *Thuraissigiam*, Justice O'Connor's application of a *Mathews* balancing test in *Hamdi v. Rumsfeld* gave us an important clue.[287] O'Connor remanded *Hamdi* to a military tribunal to do a cost/benefit balancing test about whether to keep a United States citizen imprisoned without a trial.[288]

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281. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C.A. §§ 1801–1885c).

282. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1907–08 (2017) ("The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees.").

283. *Compare Kaley*, 571 U.S. at 340–41 (using *Mathews* to make grand jury decisions unreviewable in federal court even if they effectively abridge thoroughly established Sixth Amendment rights), *with* Lauren-Brooke Eisen, *Kaley v. United States: A 'Frightening' Ruling*, BRENNAN CTR. JUSTICE (Mar. 4, 2014), https://www.brennancenter.org/our-work/analysis-opinion/kaley-v-united-states-frightening-ruling [https://perma.cc/YC3D-LHSQ] ("[D]espite the jokes about grand juries and ham sandwiches, grand jury proceedings are essentially one-sided; grand jurors hear evidence presented by prosecutors, and no judge is present.").

284. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982)).

285. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963 (1987) ("Balancing was a progressive, up-beat, 'can-do' judicial attitude."); *cf. Landon*, 459 U.S. at 32 (applying a *Mathews* balancing test); Metzger, *supra* note 189 (noting that "[i]n the due process realm" the *Mathews* test is "the reining . . . analysis").

286. *Thuraissigiam*, 140 S. Ct. at 1982 (quoting dicta from a cost/benefit balancing test administered in *Landon v. Plasencia* as if it were a common law holding deserving of the honored status of *stare decisis*).

287. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) ("*Mathews* dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process.").

288. *Id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.").

The military ignored *Hamdi*, stripped Hamdi of his citizenship, deported him to Saudi Arabia, and put him on a no-fly list.[289]

The first lesson from *Hamdi* was that direct equitable orders are preferable to remands of cost/benefit balancing tests.[290] The second *Hamdi* lesson was that keeping a false hope that the military would respond favorably to balancing tests could destroy a party's rights and undermine judicial legitimacy.[291] Remanding a *Mathews* cost/benefit balancing test on the military, or similarly situated executive tribunal, is tantamount to abdicating judicial authority.[292]

Now it is easy to expose *Mathews* as fundamentally self-destructive. In *Thuraissigiam*, the Court asserted dicta from *Landon v. Plasencia*[293] (a *Mathews* balancing test case) and dispensed with the *Mathews* balancing test itself.[294] It also uprooted the original case law that developed plenary power doctrine during the eugenic era, emphasizing its reliance on *Landon* alone.[295] In this way, *Thuraissigiam* simultaneously asserted dicta stated in a *Mathews* test as a holding and demolished the *Mathews* test to deny immigrants the basic protections of habeas corpus.[296]

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289. Dahlia Lithwick, *Nevermind: Hamdi Wasn't So Bad After All*, SLATE (Sept. 23, 2004), https://slate.com/news-and-politics/2004/09/hamdi-wasn-t-so-bad-after-all.html [https://perma.cc/R5TZ-9TUA] [hereinafter Lithwick, *Nevermind*].

290. *Cf. id.*; *Hamdi*, 542 U.S. at 529.

291. *Cf. Hamdi*, 542 U.S. at 538 (expressing hope in the adequacy of military tribunals in upholding standards required by the court); Lithwick, *Nevermind*, *supra* note 289.

292. *Cf. Hamdi*, 542 U.S. at 537–38 (demonstrating that by hoping a military tribunal would apply the law the same way an Article III court would, the United States Supreme Court abdicated any chance it had of securing a United States citizen's right to a treason trial *before* being punished). Administrative tribunals seem uninterested in following the Court's controlling interpretations of the law absent direct equitable orders forcing them to comply. *Compare* Niz-Chavez v. Garland, 141 S. Ct. 1474, 1486 (2021) (rejecting cost/benefit balancing tests and deciding: "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."), *with* Matter of Bermudez-Cota, 27 I&N Dec. 441, 442–45 (BIA 2018) (deciding the U.S. Supreme Court's interpretation of the law is limited to its facts rather than applicable in all cases, i.e., if the Court wanted to ensure that the Board of Immigration Appeals (BIA) adopt its interpretation of unambiguous statutory text it seems it must apparently issue an order); Matter of LaParra, 28 I&N Dec. 425, 436 (B.I.A 2022) (citing Rodriguez v. Garland, 15 F.4th 351, 354–56 (5th Cir. 2021)) (ignoring *Niz-Chavez* even when the Fifth Circuit "recently issued a decision reaching a contrary conclusion").

293. Landon v. Plasencia, 459 U.S. 21 (1982).

294. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (citing *Landon*, 459 U.S. at 32).

295. *Id.* at 1982 (recognizing *Nishimura Ekiu* and other eugenics era case law were superseded by law).

296. *Id.* (citing *Landon*, 459 U.S. at 32).

In *Kaley v. United States*,[297] the self-destructive nature of *Mathews* gave rise to grand juries that can strip suspects of their express constitutional rights before trial.[298] In the Kaleys' secret, ex parte grand jury proceeding, only the prosecutor's evidence was presented.[299] The grand jury system affirmed in *Kaley* was unfathomed by those who wrote the Fifth Amendment grand jury requirement.[300]

At the founding of the United States, grand juries were believed to be rooted in common law as presented by Sir William Blackstone.[301] Thus, the grand jury is defended staunchly in founding texts and required by the Fifth Amendment before anyone "shall be held to answer for a capital, or otherwise infamous crime[.]"[302] Grand juries were also adopted by many states, though there is no federal requirement upon the states to keep them.[303]

However, after the American Revolution, grand juries in England were abolished as "a species of the Star Chamber, which served the purpose of screening the magistracy."[304] In other words, the grand jury was abolished in England because its only real purpose was to provide a democratic cover

297. Kaley v. United States, 571 U.S. 320 (2014).

298. *Id.* at 340–41; *see* Eisen, *supra* note 283 (discussing how freezing assets based on a grand jury indictment "could greatly impact the ability of defendants to exercise their sixth amendment right to counsel, and can cause undue hardship to those who have yet to be found guilty of a crime").

299. Eisen, *supra* note 283.

300. *Compare id.* (examining recent abuses of civil forfeiture to steal private property from ordinary Americans), *with* Letter from Thomas Jefferson to James Monroe (Aug. 11, 1786) (imagining that civil forfeiture would never be used "on any other element but the water" writing: "A naval force can never endanger our liberties, nor occasion bloodshed; a land force would do both.").

301. 4 WILLIAM BLACKSTONE, COMMENTARIES *301; *cf.* Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1211–14 (2014) (explaining Blackstone's strong influence over grand jury proceedings in the United States).

302. U.S. CONST. amend. V; *cf.* Richard D. Younger, *Grand Juries and the American Revolution*, 63 VA. MAG. HIST. & BIO. 257, 268 (1955) ("[T]he grand jury emerged from the American Revolution with the added prestige and public support which attached to all institutions which had assisted in the struggle for independence.").

303. Hurtado v. California, 110 U.S. 516, 534–38 (1884) ("The natural and obvious inference is that, in the sense of the constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case."); *see, e.g.*, CAL. PENAL CODE §§ 914–924.6 (West 2021) (providing the "Powers and Duties of Grand Juries").

304. Nathan T. Elliff, *Notes on the Abolition of the English Grand Jury*, 29 AM INST. CRIM. L. & CRIMINOLOGY 3, 9 (1938) (quoting 39 HANSARD'S PARLIAMENTARY DEBATES 364 (1838)) (internal quotation marks omitted).

for law enforcement's choice not to indict a criminal.[305] This is exactly how grand juries operated in several recent failures to indict police officers in the United States.[306]

If one looks to the historical origin of grand juries, one finds a problematic mixture of feudal, canon, and common laws.[307] All the way back to its beginnings, the grand jury appeared only to screen the king and his minions from criticism for the choice of indictment.[308] The origin of this problematic system in the *Assize of Clarendon* confusingly engrained the common law with the feudal monarchy prior to the Magna Carta.[309]

John Adams demonstrated how Americans should question the common law claims of England in his disputes with Mr. Brattle.[310] Adams corrected Brattle by identifying the English judiciary's feudal dependency on the

305. *Id.*

306. Erik Ortiz, *Decision Not to Charge NYPD Officer in Eric Garner Case Exposes DOJ Divide*, NBC NEWS (July 17, 2019, 10:47 AM), https://www.nbcnews.com/news/us-news/decision-not-charge-nypd-officer-eric-garner-case-exposes-doj-n1030821 [https://perma.cc/A3Q3-2AYJ] ("In 2014, a Staten Island grand jury declined to indict [Officer Daniel Pantaleo] on criminal charges."); Bill Hutchinson, *Breonna Taylor Case Sparks Renewed Scrutiny of Grand Juries in Police Misconduct Cases*, ABC NEWS (Oct. 9, 2020, 5:09 AM), https://abcnews.go.com/US/breonna-taylor-case-sparks-renewed-scrutiny-grand-juries/story?id=73438566 [https://perma.cc/YPP6-LDY6]; Salvador Hernandez, *A Grand Juror in the Breonna Taylor Case Said They Were Never Asked to Consider Charges Directly Linked to Her Death*, BUZZFEED NEWS (Oct. 20, 2020, 5:00 PM), https://www.buzzfeednews.com/article/salvadorhernandez/breonna-taylor-case-grand-juror-speaks [https://perma.cc/B26V-AE9Q]; *cf.* Nicholas Quah & Laura E. Davis, *Here's a Timeline of Unarmed Black People Killed By Police Over Past Year*, BUZZFEED NEWS (May 1, 2015, 3:46 PM), https://www.buzzfeednews.com/article/nicholasquah/heres-a-timeline-of-unarmed-black-men-killed-by-police-over [https://perma.cc/6WTV-25Z9] (noting that several unarmed black men are killed by the police every year without charges being brought against the police officers responsible). *But see* Emma Bowman, *Minneapolis Reacts to Chauvin Sentence with Fury And Hope*, NPR (June 25, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/ [https://perma.cc/Z89C-9V4T] (demonstrating that it is possible, though exceptional, for a police officer to be charged from crimes involving the deaths they cause).

307. Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury*, *in* RANDY J. HOLLAND, MAGNA CARTA: MUSE & MENTOR 139, 139–40 (2014); *see Hurtado*, 110 U.S. at 534–38 (recounting the history of the right to trial by jury as integral to self-governance); *cf.* Elliff, *supra* note 304, at 3, 9, 15 (describing defendant protections that made a grand jury "less and less a vital safeguard against wrongful conviction").

308. Elliff, *supra* note 304, at 9.

309. *Assize of Clarendon* [1166], *cited in Hurtado*, 110 U.S. at 529.

310. ADAMS, THE REVOLUTIONARY, *supra* note 274, at 75.

crown and lack of independence generally.[311] The grand jury's similar lack of independence, as a species of trial controlled and administered by an executive officer, was unfortunately not corrected by the founders.[312]

Some bright lines can be drawn to help us find our bearings to analyze the common law constitutionality of grand juries.[313] The common law of England arose from the common people of England and did not come from foreign domination of any kind.[314] By great contrast, the combination of canon and feudal law that underpinned the divine right of kings did not originate in the common law, and instead, was the direct result of the Norman Conquest.[315]

King Henry II invented the grand jury in the *Assize of Clarendon* after the Norman Conquest and prior to the Magna Carta.[316] The *Assize of Clarendon* abolished the trial by compurgation,[317] the direct predecessor of the

311. *Id.* at 76 ("The common law of England is so far from determining that the judges have an estate for life in their offices, that it has determined the direct contrary; the proofs of this are innumerable and irresistible.").

312. Younger, *supra* note 302, at 268; *see* U.S. CONST. amend. V (specifically requiring "presentment or indictment of a Grand Jury" before any person "shall be held to answer for a capital, or otherwise infamous crime").

313. *Cf. Hurtado*, 110 U.S. at 534–38 (discussing the nature of grand jury proceedings); ADAMS, THE REVOLUTIONARY, *supra* note 274, at 55 (explaining the role of grand juries at the time); *id.* at 199–200 (defending the revolutionary use of grand juries).

314. 2 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 750 (Kermit L. Hall & Mark David Hall eds., 2007) (noting the common law preceded and survived both Roman rule and the Norman Conquest); *cf. Hurtado*, 110 U.S. at 531 (discussing the ancient common law bases of due process and the grand jury requirement).

315. The topic of the Norman Conquest was covered in *The Darks Side of Due Process: Part I*, which referred to these sources for support: Sir Henry Vane [the Younger], *A Healing Question* 4–5 [1660] (noting that the root of the tree of liberty in England preceded "the evil of that Government which rose in and with the Norman conquest"); H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 12 (4th ed., 2002) (describing the Norman Conquest as "a catastrophe that determined the whole future of English law"); *cf.* ADAMS, THE REVOLUTIONARY, *supra* note 274, at 55–56 ("That constitution which has been for so long a time the envy and admiration of surrounding nations; which has been no less than five and fifty times since the Norman conquest, attacked in parliament, and attempted to be altered, but without success; . . . has never failed to work the ruin of the authors of all settled attempts to destroy it.").

316. McSweeney, *supra* note 307; *Assize of Clarendon* [1166], *cited in Hurtado*, 110 U.S. at 529; Richard H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983) ("The modern grand jury traces its origins to the Assize of Clarendon, an enactment of King Henry II in 1166.").

317. Josh Perldeiner, *Juror Purgators: The Evolution of Compurgation and Jury Nullification*, 48 CONN. L. REV. 1641, 1653 (2016).

common law petit jury trial,[318] and replaced it with the grand jury.[319] Through compurgation a sufficient number of an accused's peers could acquit a criminal of their crimes,[320] while grand juries were gathered for the purpose of accusation.[321]

Finally, the original grand jury proceeding *was* the trial.[322] Anyone successfully accused by a grand jury was punished by death, lopping off body parts, or banishment.[323] The only form of complete acquittal could be administered by the grand jury,[324] but as noted, the grand jury was not convened like trials by compurgation to decide whether to acquit,[325] nor were grand juries called by criminal suspects to assist them in avoiding accusation; rather, they were called forth by the crown or sheriff instead.[326]

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318. *Id.* at 1644.

319. *Id.*; Helmholz, *supra* note 316, at 613–14.

320. *See, e.g.*, Perldeiner, *supra* note 317, at 1650–51 (discussing the different forms of compurgation).

321. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 175 (1973); *see* Robert M. Paule, *The Perversion of the Historic Function of the Grand Jury in Minnesota*, 7 LAW & INEQ. 299, 301–02 (1989) ("The accusatory body gradually became known as 'Le Grande Inqueste,' which provides a logical explanation for the modern title of grand jury."). *But see* McSweeney, *supra* note 307, at 145 (presenting the grand jury's purpose as one of acquittal, which is ironic since it obviously was invented to accuse, and its accusations inevitably resulted in some form of extreme punishment).

322. Hurtado v. California, 110 U.S. 516, 530 (1884) (quoting 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 252 (1883)) ("'[A grand jury] accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is nevertheless to be banished. Accusation, therefore, was equivalent to banishment, at least.'"), *quoted in* Theodore M. Kranitz, *The Grand Jury: Past—Present—No Future*, 24 MO. L. REV. 318, 319 (1959); *see also* Campbell, *supra* note 321, at 175 ("Having no independence from the Crown, these early inquests became potent weapons for enforcing the royal authority.").

323. *Hurtado*, 110 U.S. at 530; 1 STEPHEN, *supra* note 322, at 254 ("When trial by ordeal was abolished and the system of accusation by grand juries was established, absolutely no mode of ascertaining the truth of an accusation made by a grand jury remained . . . . [T]hus an accusation by a grand jury became practically equivalent to a conviction.").

324. McSweeney, *supra* note 307, at 145.

325. *Cf.* Perldeiner, *supra* note 317, at 1653 (offering a perspective on the ending of the trial of compurgation in Great Britain).

326. *See Hurtado*, 110 U.S. at 530 ("The body of the country are the accusers."); Campbell, *supra* note 321, at 175 (pointing out that grand juries were originally called by the king, for the crown's purposes); 1 STEPHEN, *supra* note 322, at 254–55 (noting that grand juries "were convened by the representative of the royal authority"); *cf.* Kranitz, *supra* note 322, at 318 ("'Grand jury in session.' No more fearsome words can echo through the circuit courthouses of this state.").

Trial by ordeal, from the former English laws, was preserved by the *Assize of Clarendon*, but this sort of trial was also of foreign invention.[327] The trial by ordeal was a growth of the Catholic canon law of Rome rather than English common law.[328] Further, the trial by ordeal was displaced by the grand jury as the final determiner of punishment and the trial by ordeal, after the *Assize of Clarendon*, was only used to modify the severity of punishment applied.[329]

The insinuation of the crown and church with the common laws of England continued for centuries until the English Civil War.[330] During that time, before the Puritans' rise to absolute power upon the wings of Hobbesian madness,[331] Lord Coke became the first widely known advocate of the English common law and constitution.[332] Coke was the first to use the Magna Carta to make the constitutionality of the laws relevant in English Court.[333]

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327. *Hurtado*, 110 U.S. at 530; *see* Peter T. Leeson, *Ordeals*, 55 J.L. & ECON. 691, 711–12 (2012) (explaining England was influenced by the Church of Rome, and the foreign Church's ministers presided over ordeals in England while they existed).

328. Leeson, *supra* note 327, at 711–12.

329. *Hurtado*, 110 U.S. at 530 (quoting 1 STEPHEN, *supra* note 322, at 252) (explaining if an accused person passed an ordeal after being accused by a grand jury they would only be banished and would hopefully avoid being executed or having body parts removed).

330. *See* ADAMS, THE REVOLUTIONARY, *supra* note 274, at 61 (referring to Cromwell and Vane's dangerous mixtures of religion, politics, and hypocrisy); *id.* at 241 (discussing the past English kings, which were "a feudal sovereign and supreme head of the church together"); *cf.* Henry Vane [the Younger], *A Healing Question* 4–5 [1660] (describing Vane's rejection of feudal law, explaining its source in the Norman Conquest, and hoping that the Puritan political movement led by Cromwell might vindicate the preexisting common law).

331. HOBBES, *supra* note 13, at 46–48; *see generally* THOMAS HOBBES, BEHEMOTH (Ferdinand Tönnies ed., 1990) (following up Hobbes's *Leviathan* in which he likened the Puritan revolution to *Behemoth*, another Old Testament monster).

332. 1 JOHN LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 282–86 (1849) [hereinafter 1 CAMPBELL; *see also* 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] ("Edward Coke, the person most responsible for reviving interest in Magna Carta in England, described it as his country's 'ancient constitution.'").

333. Lepore, *supra* note 332 ("American lawyers see Magna Carta through Coke's spectacles, as the legal scholar Roscoe Pound once pointed out."); 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, 6 (2021) [hereinafter Schroeder, *Leviathan*]; *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) (recounting the history of Lord Coke's use of the constitution in English courts).

Coke was eventually removed from the King's Bench for authoring his views,[334] his *Institutes* were officially censored,[335] and he was actually tried and acquitted in the Star Chamber where he once sat as a judge.[336] Like a Saint Paul, the Lord and Noble Edward Coke reversed his former attacks on English rights and risked his life by joining the Commons.[337] The King's attacks on Coke and his allies resulted in an English Civil War.[338]

The Americans used Coke to distinguish common law from illegitimate feudal and canon laws.[339] From Coke's example,[340] the Americans adopted patent and copyright laws,[341] precluded the suspension of habeas corpus,[342] and established independent courts that they hoped would be the antithesis of feudal Star Chambers.[343] The difference between independent United States courts and Star Chambers, as defined by Coke, is the adversarial process as practiced before the petit jury.[344]

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334. 1 CAMPBELL, *supra* note 332, at 339–45.

335. *Id.* at 394–98 (discussing the crown's censorship of Coke's *Institutes*, which were "seized by the Government when he was on his death-bed.").

336. *Id.* at 346 (noting that though his enemies conspired vengeance on behalf of the crown, but "Coke's energy and integrity triumphed"); 1 EDWARD COKE, THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE lvii (Steve Sheppard ed., 2003) (noting that Lord Coke was "assigned a series of Star Chamber prosecutions"); *cf.* Millar v. Taylor (1769) 4 Burr. 2302, 2373 (Eng.) (Yates, J., dissenting) ("[T]he Star Chamber [is] a Court the very name whereof is sufficient to blast all precedents brought from it.").

337. 1 CAMPBELL, *supra* note 332, at 383–408 (discussing Coke's role in bringing about the Statute of Monopolies, the Habeas Corpus Act, and the Petition of Right from the House of Commons).

338. *Compare id.* at 393–94 (noting taxations without permission of Parliament, resulting in general warrants to search and seize Coke's home on his death-bed and to censor his writings), *with* JOHN MILTON, EIKONOKLASTES 13 (2d ed. 1650) (referring to the monarch's stealing of the property of "every author" as an illegitimate taxation saying "any king heretofore that made a levy upon their wit, and seized it as his own legitimate" is an illegitimate taxation that was "a trespass also more than usual against human right").

339. *See, e.g.*, Letter from Thomas Jefferson to Horatio G. Spafford (Mar. 17, 1814) (labeling Coke's *Institutes* "as an elementary work" and warning Americans not to replace Coke with "the wily sophistries of a Hume or a Blackstone").

340. *Supra* note 337.

341. U.S. CONST. art. I, § 8, cl. 8.

342. U.S. CONST. art. I, § 9, cl. 2.

343. U.S. CONST. art. III; Judiciary Act of 1789, 1 Stat. 73, § 14.

344. 1 CAMPBELL, *supra* note 332, at 383 (Coke's resolutions were eventually "made the foundation of the *Habeas Corpus* Act"); *see* Habeas Corpus Act 1640, 16 Car. I c. 10 (Eng.) (commemorating the English Parliament's first attempt to secure the common law writ of habeas corpus from feudal abuse), *cited by* Chambers v. Florida, 309 U.S. 227, 237 n.10 (1940) (noting the long title of Coke's Habeas Corpus Act 1640 was "[a]n Act for [the Regulating] [] Privie Councell and for

During the American Revolution grand juries were extolled by the founders as a useful way for the people to resist English domination.[345] The founders were quick to endorse grand jury presentment as a vital part of the common law, without reliable historical evidence.[346] They found little resistance by English Royalists, broadly represented by the *Commentaries* of Blackstone, and only a few individuals at the time seemed to denounce them.[347]

However, the apparent usefulness of grand juries in the blocking of English officers from bringing suits against American agitators did not indicate a common law origin.[348] Feudal and canon laws often self-destructed.[349] As symbolized by the Plantagenet Wars of Roses that stemmed from the root of the Bastard Crown of Normandy,[350] not of

taking away the Court commonly called the Star Chamber"); *cf.* 3 EDWARD COKE, INSTITUTES *181–83 (noting Coke's opposition to the Star Chamber as anti-common law, and his advocacy of the adoption of positive laws that secure common law adversarial process rather than an inquisition).

345. Younger, *supra* note 302, at 268.

346. *Id.*

347. *Id. But see* Letter from Thomas Hutchinson to ———— (Oct. 4, 1768) (representing the American loyalists, who had obvious reasons to dislike the grand jury).

348. *See* Hurtado v. California, 110 U.S. 516, 530 (1884) (noting that "the peculiar boast and excellence of the common law" consisted in the "flexibility and capacity for growth and adaptation"); *id.* at 538 (applying the common law spirit of flexibility to decide that judicial proceedings without a grand jury are consistent with "an ancient proceeding at common law"); 1 STEPHEN, *supra* note 322, at 254–55 (describing the development of the grand jury out of the feudal laws of Normandy). Even the best critics of grand juries over the past century seemed to skip over this question, even as they observed the feudal and canon laws that first established the grand jury in contradiction to the common law. *See, e.g.*, Kranitz, *supra* note 322, at 318–19 (labeling the grand jury a "common law relic" even while quoting *Hurtado*, which beheld that the grand jury originated in English feudal law, not English common law).

349. ADAMS, THE REVOLUTIONARY, *supra* note 274, at 23 (describing the precepts of feudal slavery and the "wicked confederacy" of feudal and canon law). The Americans observed that by expressing these wicked systems of canon and feudal laws in America, the English Empire imploded; the Americans disclaimed any credit for bringing about the end of that empire, which they intended to extend in perpetuity. Samuel Cooper, *Sermon on the Commencement of the Constitution*, T. & J. FLEET, & J. GILL, Oct. 25, 1780, at 9 [1780] ("Upon our present independence, sweet and valuable as the blessing is, we may read the inscription, *I am found of them that sought me not*. Be it to our praise or blame, we cannot deny, that when we were not searching for it, it happily found us. . . . [I]t is equally certain that Britain, though she meant to oppose [American independence] with all her power, has by a strange infatuation, taken the most direct, and perhaps the only methods that could have established it.").

350. *See* DAN JONES, THE WARS OF THE ROSES: THE FALL OF THE PLANTAGENETS AND THE RISE OF THE TUDORS 45 (2015) ("A heavy garrison policy in Normandy had entrenched English rule across the duchy."); DAN JONES, THE PLANTAGENETS: THE WARRIOR KINGS AND QUEENS WHO MADE ENGLAND 16 (2014) (noting how King Henry I attempted an "intermingling of an Anglo-

English soil,[351] it was commonplace for feudal and canon laws to conflict internally without logical reason.[352]

Domestically, it is commonplace for the accused in American courts to waive the grand jury "right" as a threat to their other rights.[353] Grand juries conduct secret investigations premised on mere relevance, and by waiving their right to them, an accused may avoid a prosecutor's fishing expedition.[354] A grand jury can subpoena an accused's loved ones, business partners, religious community, and colleagues under penalty of perjury, and further, such witnesses are usually gagged by orders that can preclude them from even telling the subject of the grand jury inquest about the existence of the proceeding against them.[355]

Norman aristocracy, whose culture and land-holdings straddled the Channel. Meanwhile, in Queen Matilda he chose a wife who would bring the Norman and Saxon bloodlines together, to heal the wounds of the Conquest.").

351. Henry Vane [the Younger], *A Healing Question* 4–5 [1660]; 1 STEPHEN, *supra* note 322, at 254–55 (describing the development of the grand jury out of the feudal laws of Normandy: "[T]he usual mode of determining questions of fact known to and practised by the Normans was the inquest. An inquest was a body of persons representing a certain number of townships or other districts . . . . They were convened by the representative of the royal authority, such as a justice, a sheriff, or a coroner, as the case might be, and answered upon oath the particular matters proposed to them.").

352. *The White Queen: The Bad Queen* (Starz/BBC television broadcast Sept. 1, 2013) (based on PHILIPPA GREGORY, THE WHITE QUEEN 132 (2013) and PHILIPPA GREGORY, THE LADY OF RIVERS 135–36 (2008)). This dramatized version of Jacquetta of Luxembourg, Countess of Rivers' trial for witchcraft demonstrated the circular, ouroboros that feudal and canon law was in England—at once these fabrics of law created and destroyed many of England's most celebrated royals and aristocrats. *Id.*

353. Grand Jury, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/grand-jury [https://perma.cc/4RWK-57Q4] ("Waivers are frequent, and most prosecutions of even serious offenses in the federal courts are thus initiated by prosecutors.").

354. *Id.*; Chris Eskridge, *Thoughts on Grand Juries*, UNIV. NEBRASKA-LINCOLN, https://www.unl.edu/eskridge/grandjur211.htm [https://perma.cc/4R87-SHXS] (explaining that a "[g]rand jury can literally go on a fishing expedition and without any cause subpoena witnesses and basically: a. force them to testify or be held in contempt [and] b. force them to bring in evidence or be held in contempt").

355. Eskridge, *supra* note 354.

The similarities of modern grand juries with that of feudal grand juries are many,[356] and their similarities with common law practices are few.[357] The grand jury proceeding itself is a trial to determine probable cause according to which anyone accused is punished.[358] Grand jury trials are ex parte, the proceedings are sealed, hearsay and illegally obtained evidence is allowed, and the prosecutor can misrepresent the evidence to the witnesses and grand jurors.[359]

The situation in *Kaley* revealed the common use of the grand jury as a tool to soften up the accused before they even set foot into court.[360] Suspects, even before they are officially accused, are often treated as military targets and their lives may be dismantled with systematic precision by a militarized police force.[361] If they are not eliminated through the system, then they can be driven to suicide or killed as symbolized by Aaron Swartz and Michael Hastings.[362]

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356. *Compare id.* (explaining the ways in which the modern "grand jury functions as a crime control mechanism"), *with* Kranitz, *supra* note 322, at 318–19 (quoting Hurtado v. California, 110 U.S. 516, 529–30 (1884)) (explaining how the ancient version of grand juries was used by the king as a crime control mechanism), *and* Campbell, *supra* note 321, at 175 ("[The grand jury was] conceived as a device for enlarging and centralizing the authority of the King and providing his rule with the benefits derived from community accusation of crime.").

357. Hurtado v. California, 110 U.S. 516, 534–38 (1884) (explaining how the common law weighed against a requirement that grand juries be used, refusing to incorporate the Fifth Amendment grand jury requirement against the states).

358. *Id.* at 530 (explaining that a person accused under the *Assize of Clarendon* would be banished at least, and at most he would have body parts chopped off or be executed—there was not a chance of full clemency and acquittal after a grand jury accused someone); 1 STEPHEN, *supra* note 322, at 252–55.

359. *See* Eskridge, *supra* note 354 ("[G]rand jury functions . . . meet in secret and seal their work."); Eisen, *supra* note 283.

360. Kaley v. United States, 571 U.S. 320, 327–28 (2014).

361. *See, e.g.*, *id.* at 327–28 ("[E]ven prior to conviction . . . the Government c[an] constitutionally . . . freeze assets of an indicted defendant based on a finding of probable cause to believe that the property will ultimately be proved forfeitable.").

362. *See* THE INTERNET'S OWN BOY: THE STORY OF AARON SWARTZ 1:30:50 (Participant Media 2014) (discussing the ways Aaron Swartz was abused by the government as a presumptively innocent person before facing trial); Benjamin Wallace, *Who Killed Michael Hastings?*, N.Y. MAG. (Nov. 8, 2013), https://nymag.com/news/features/michael-hastings-2013-11/ [https://perma.cc/DVG3-QTJ3] (discussing the strange circumstances of Michael Hastings' death after successfully ousting General Stanley A. McChrystal through his reporting at *Rolling Stone*).

Civil forfeiture itself, as reported in the groundbreaking long-form journalism of Sarah Stillman, is as corrupt as it is widespread in America.[363] Once forfeited property is taken, including cars, houses, cash, and jewelry, it is auctioned.[364] Then there is a fee sharing arrangement between the federal and state governments for the payout of the stolen goods, and it is highly difficult, if not impossible, to regain the property once it is wrongfully seized.[365]

Kaley ended any prospective chance at challenging the constitutionality of civil forfeiture through a review of the grand jury process with an unfortunate choice of words: "If the question in a pre-trial forfeiture case is whether there is probable cause to think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides."[366] Then and there, by closing federal review of grand juries where their operations appear to conflict with the Constitution, an official American Star Chamber was born.[367] Prior proceedings in federal court to review grand jury proceedings under the common law were ended, and whatever basis grand juries might have had under the common law, as presumed by the drafters of the Fifth Amendment, was besmirched and degraded.[368]

Short of amending the Fifth Amendment grand jury requirement,[369] the common law states that if the purpose of a law changes, the law itself has changed.[370] Joseph Story explicitly applied this principle to constitutional

363. Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken [https://perma.cc/3UDZ-SZWP].

364. *Id.*

365. *Id.*

366. Kaley v. United States, 571 U.S. 320, 340–41 (2014).

367. *Id.* at 340–41; Eisen, *supra* note 283. Once the adversarial Article III Courts departed from *Crowell v. Benson* by abdicating power to review the factual determinations made by non-adversarial, inquisitorial processes like the grand jury, such tribunals became the very definition of a Star Chamber, because the Star Chamber was an unreviewable, inquisitorial tribunal. Crowell v. Benson, 285 U.S. 22, 57 (1932) (warning the courts not "to establish a government of a bureaucratic character alien to our system" by shirking the Article III tribunals' ultimate power to review the facts, because "finality as to facts becomes in effect finality in law").

368. *Kaley*, 571 U.S. at 340–41 (ending Article III inquiry into the propriety of grand jury decisions).

369. *Cf.* Campbell, *supra* note 321, at 182 ("A constitutional amendment is necessary to effect such a change on the federal level. The enormity of the task must not deter us. Let us begin—now!").

370. Milborn's Case [1572] 7 Co. Rep. 6b, 7a (Eng.), *extended by* Funk v. United States, 290 U.S. 371, 385 (1933) (reasoning the maxim that *cessante ratione legis, cessat ipsa lex* "means that no law can survive the reasons on which it was founded. It needs no statute; it abrogates itself."); *see also* Harford v. United States, 12 U.S. 109, 109–10 (1814) ("[A] repeal by implication ought not to be presumed

interpretation.[371] It may follow that *Kaley* grand jury presentment is not "due" under the Fifth Amendment, because the founding purpose of grand juries was to protect the accused, not to subject them to civil forfeiture.[372]

It appears that the government is learning that *Mathews* is actually beneficial to their interests, judging from a recent brief filed in *FBI v. Fazaga*.[373] In *Fazaga*, government officials argued that *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[374] may be abrogated by *Mathews'* due process requirement of an "opportunity to be heard at a meaningful time and in a meaningful manner."[375] They are hoping to sideline *Bivens* using the *Mathews* framework in conjunction with the state secrets doctrine.[376]

The pro-government *Mathews* argument raised in *Fazaga* seems to suggest that dismissal of potentially all FISC-connected tort suits under the state secrets doctrine is mandated by the Due Process Clause.[377] The officer-defendants argued that FISC regulations requiring ex parte and in camera review of evidence violates due process *with respect to them*.[378] They also

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unless from the repugnance of the provisions the inference be necessary and unavoidable"); Cope v. Cope, 137 U.S. 682, 686 (1891) (stating that a statute will only be repealed if a subsequent statute's construction does not allow for its survival); Case v. Humphrey, 6 Conn. 130, 131 (1826) ("The common law must be negative, by the statute, or the matter must be so clearly repugnant, as to imply a negative, in order to effect a repeal of it.").

371. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–60 (citing 1 EDWARD COKE, INSTITUTES *79); Chisholm v. Georgia 2 U.S. 419, 474–75 (1793) (Opinion of Jay, C.J.) (expounding the purposes of the U.S. Constitution by analyzing its preamble).

372. *Compare supra* note 363 and accompanying text, *with* U.S. CONST. amend. V (proscribing the forfeiture of private property absent due process).

373. Brief of Respondents J. Stephen Tidwell and Barbara Walls Supporting Petitioners at 23–24 n.4, FBI v. Fazaga, No. 28-828, 2021 WL 2301971 (June 7, 2021) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)), request for pro-government balancing test granted by Egbert v. Boule, No. 21-147, slip op. at 11 (2022).

374. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

375. Brief of Respondents J. Stephen Tidwell and Barbara Walls Supporting Petitioners at 23–24 n.4, FBI v. Fazaga, No. 28-828, 2021 WL 2301971 (June 7, 2021) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)), request for pro-government balancing test granted by Egbert v. Boule, No. 21-147, slip op. at 11 (2022).

376. *Id.* at 23–24 n.4 (citing Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1070 (9th Cir. 1995) (citing *Mathews* to hold "that use of undisclosed information in adjudications should be presumptively unconstitutional" and finding that using "undisclosed classified information under these circumstances violates due process")).

377. *Id.*

378. *Id.*

strongly suggested that the same procedures do not violate due process when they are applied against the plaintiffs.[379]

In order to justify the existence of FISC in the United States, FISC was initially limited to an exclusively foreign jurisdiction.[380] To create this jurisdiction, a regulatory "wall" was built between the FBI's foreign and domestic surveillance.[381] However, the United States of America Patriot Act subtly "changed the gathering of foreign intelligence from 'the' sole reason for surveillance, to merely a 'significant' purpose."[382]

In May 2002, in response to this shift in statutory language, FISC spoke out for the first time since its inception, alerting the public to its existence.[383] At first, FISC took a stand to defend a logically necessary regulatory wall.[384] For the first time in known United States history the government appealed a FISC decision, arguing "that Congress's intent in changing the wording from 'the' to 'a significant' purpose was, precisely, to eliminate the wall between intelligence and surveillance."[385]

The government won its appeal,[386] justifying the expansion of suspicion less searches on potentially all United States citizens by breaking down the wall William Binney physically implemented in his ThinThread program.[387] A three-judge panel appointed by Chief Justice Rehnquist decided that FISC was never meant to have treated foreign surveillance differently from domestic criminal investigations.[388] If this decision is law (its legitimacy remains extremely doubtful),[389] it could transform the purpose of criminal

379. *Id.* at 32.

380. Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 524 (2012) [hereinafter Donohue, *Technological*] ("Prior to the 9/11 attacks, a wall had been erected between intelligence and law enforcement.").

381. *Id.*

382. *Id.* at 524–25 (citing USA PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001)).

383. *Id.* at 525 (citing *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 621 (FISA Ct. 2002)).

384. *Id.* at 524–25 (*In re All Matters Submitted* "required that the wall be rebuilt").

385. *Id.* at 525–26 (citing *In re* Sealed Case, 310 F.3d 717, 732 (FISA Ct. Rev. 2002)).

386. *Id.* at 526 (citing *Sealed Case*, 310 F.3d at 746).

387. A GOOD AMERICAN 1:18:15 (Slingshot Films 2015).

388. Donohue, *Technological*, *supra* note 380, at 526.

389. *See* Amy H. Kastely, *Cicero's* De Legibus*: Law and Talking Justly Toward a Just Community*, 3 YALE J. L. & HUMANS. 1, 3 (1991) (expounding the Ciceronian definition of "law as public discourse about justice"); *id.* at 16 (contrasting Cicero's ideas about public discourse being the foundation of legitimate law with Plato's "secret 'Nocturnal Council'", which does not allow the public access to

investigations from addressing past crimes, to the elimination of future-threats-as-crime, as in the movie *Minority Report*.[390]

information needed to justify laws, i.e., to make them legitimate law). The American Revolutionaries broadly followed Cicero, and during the revolution John Adams firmly advocated for the public's right to know as the primary opposition to feudal and canon law. ADAMS, THE REVOLUTIONARY, *supra* note 274, at 27 (arguing that "knowledge diffused generally through the whole body of the people" protected America from feudal and canon law); *id.* at 28 ("[L]iberty 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. And the preservation of the means of knowledge among the lowest ranks, is of more importance to the public than all the property of all the rich men in the country."), *expounding* Cicero, *De Officiis* 1.13 ("Above all, the search after truth and its eager pursuit are peculiar to man . . . we esteem a desire to know the secrets or wonders of creation as indispensable to a happy life. . . . To this passion for discovering truth there is added a hungering, as it were, for independence, so that a mind well-moulded by Nature is unwilling to be subject to anybody save one who gives rules of conduct or is a teacher of truth or who, for the general good, rules according to justice and law.").

390. Fazaga v. FBI, 965 F.3d 1015, 1065–67 (9th Cir. 2020), *rev'd*, FBI v. Fazaga, 142 S. Ct. 1051 (2022) (refusing to assert a state secrets defense on behalf of the government, and the government may still assert this defense, which may then be granted, i.e., we may already be in the *Minority Report* world where pre-crime is enough to justify suspicionless searches and seizures); *compare Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002), FISA, 92 Stat. 1783, 1784, § 101(b)(2)(B) (allowing investigations of individuals whose activities are "about to involve a violation of the criminal statutes of the United States"), *and* THE UNKNOWN KNOWN 12:03–12:55, 1:32:42–1:33:45 (Participant Media 2014) (statements of Secretary of Defense Donald Rumsfeld: "Everything seems amazing in retrospect. Pearl Harbor seems amazing in retrospect. It's a failure of imagination. It's not as though you aren't aware of possibilities. But you tend to favor some possibilities more than others. And it's enormously important to have priorities . . . you have to pick and choose. Well to the extent you pick and choose and you're wrong, the penalty can be enormous . . . . February 4, 2004, SUBJECT: What You Know. There are known knowns. There are known unknowns. There are unknown unknowns. But there are also unknown knowns. That is to say, things that you think you know that it turns out you did not. If you take those words and try to connect them in each way that is possible, there was at least one more combination that wasn't there, the unknown knowns: things that you possibly may know that you don't know you know."), *with* MINORITY REPORT (20th Century Fox 2002) (displaying a dystopian future where the police investigate and punish United States citizens for "pre-crime"), *and* Elizabeth Goitein & Faiza Patel, *What Went Wrong with the FISA Court*, BRENNAN CTR. FOR JUSTICE 16 n.79 (2015) ("Legislators also were concerned [that FISA] . . . would permit indefinite surveillance based on a vague suspicion of an unspecified, and possibly minor future crime" including crimes with a mere possibility of occurring ten or more years in the future.); *cf.* THE MAURITANIAN (Topic Studios 2021) (arguably, when *Minority Report* hit the box office the year after 9/11, the United States was already beginning a transition to investigating and punishing individuals for pre-crime). *But see* Kyllo v. United

After 9/11, William Binney sounded the alarm that even with a physical wall in place, ThinThread worked; it *did* pick up on the 9/11 threat, and the intelligence it gathered without impinging on the privacy of ordinary Americans might have been used to stop the attacks.[391] However, prior to 9/11, no one seemed to fathom that commercial jets could be used as weapons.[392] Nevertheless, public relations advocates often blame 9/11 on the former regulatory FISA "wall" between criminal investigations and foreign surveillance.[393]

This is a very powerful, loaded argument; something like a Hitler analogy.[394] Such arguments always seem to contain enough bluster to hide weaknesses in logic.[395] As such, nobody ever seems to blame the existence of FISC or the Bush Administration itself for regulatory shortfall during

States, 533 U.S. 27, 40 (2001) (explaining why the Fourth Amendment should preclude FISC suspicionless surveillance warrants).

391. A GOOD AMERICAN 1:15:15, 1:20:23–1:22:10 (Slingshot Films 2015) (arguing that "9/11 would have been avoided" if the U.S. government didn't decide to shut down ThinThread right before the 9/11 attacks); *id.* at 1:18:15 (noting that Binney's ThinThread program was used to spy on all U.S. citizens after 9/11, by physically removing the wall that protected U.S. communications from U.S. spy programs).

392. *Id.* at 1:15:15 (showing the Bush administration retained plausible deniability that it did all it could have done to avoid the 9/11 attacks despite Binney's whistleblowing). A symbol of the world that existed prior to 9/11 in U.S. film culture was the movie Home Alone, which had a story plot that depended upon a time in U.S. history where people could go right from the parking lot to the plane without a serious security check. *See* HOME ALONE (20th Century Fox 1990) (depicting a hassle-free flight to Paris for the McCallister family).

393. *See* Devin Nunes, *Don't Shackle the NSA Now*, NATIONAL REVIEW (July 22, 2014, 8:00 AM), https://www.nationalreview.com/2014/07/dont-shackle-nsa-now-devin-nunes/ [https://perma.cc/R6AL-LCPS] (blaming the regulatory wall as a cause of the 9/11 attacks); *see also* LAURA K. DONOHUE, THE FUTURE OF FOREIGN INTELLIGENCE: PRIVACY AND SURVEILLANCE IN A DIGITAL AGE 27–28 (2016) (quoting Senator Dianne Feinstein's public relations spiel for the wall's breach). *But see* A GOOD AMERICAN 1:15:15–1:22:10 (Slingshot Films 2015) (noting that ThinThread had enough information to have helped the Bush administration avoid the 9/11 attacks with a physical, digital wall in place to protect the communications of U.S. citizens from non-suspicious surveillance, and that the Bush administration intentionally *did not* use the intel).

394. *Compare* Nunes, *supra* note 393 ("Similar to the situation today, in the decade leading up to the 9/11 attacks, concerns about civil liberties spawned problematic restrictions on intelligence gathering."), *with* Katie Bo Williams, *Trump Compares Intel Leaks to Nazi Germany*, THE HILL (Jan. 11, 2017, 1:14 PM), https://thehill.com/policy/national-security/313796-trump-compares-intel-leaks-to-nazi-germany [https://perma.cc/M3DH-MMX9] ("Donald Trump . . . suggested intelligence officials were behind the leak of an unverified dossier full of damaging allegations about him, invoking Nazi Germany.").

395. *Supra* notes 393–94.

9/11; a logic that more closely complies with Occam's razor than blaming an obscure regulatory wall between foreign and domestic surveillance.[396]

Another possibility is that the Bush administration had ThinThread's information somewhere, but that it was dismissed as one of Secretary of Defense Donald Rumsfeld's "unknown knowns."[397] Bush's public relations strategists could have made a decision to downplay the intelligence as untrustworthy, or it may have been overlooked according to a hopeful misunderstanding of the newfangled technology.[398] William Binney's central point in coming forward about ThinThread was to say that the problem that caused 9/11 was not a lack of intelligence, but the breakdown of trust in the intelligence gathered by Binney's program—a breakdown that was *not* solved by amending FISA to remove the regulatory wall.[399]

The government's failure to address its breakdown of inter-agency trust became ever more concerning as Trump practically declared war on the

396. *Transcript of Rice's 9/11 Commission Statement*, CNN (May 19, 2004, 12:25 AM), https://www.cnn.com/2004/ALLPOLITICS/04/08/rice.transcript/ [https://perma.cc/24BD-WRP4] (showing national security advisor Condoleeza Rice blamed a lack of "information about threats inside the United States, something made difficult by structural and legal impediments that prevented the collection and sharing of information by our law enforcement and intelligence agencies," and Rice successfully avoided the insinuation that the Bush Administration effectively had this intelligence and failed to use it, even after admitting that Bush received a pre-9/11 daily brief entitled "Bin Laden Determined to Attack Inside the United States"); Bin Ladin Determined to Strike in US, President's Daily Brief of Aug. 6, 2001 (Declassified and Approved for Release, Apr. 10, 2004), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB116/pdb8-6-2001.pdf [https://perma.cc/6EYE-VX6Q] ("We have not been able to corroborate some of the more sensational threat reporting, such as that . . . Bin Ladin wanted to hijack a US aircraft . . . . Nevertheless, FBI information since that time indicates patterns of suspicious activity in this country consistent with preparations for hijackings or other types of attacks, including recent surveillance of federal buildings in New York."); *cf.* A GOOD AMERICAN 1:15:15–1:22:10 (Slingshot Films 2015).

397. *See supra* note 389; Herb Lin, *The Fourth Quadrant—the Unknown Knowns*, LAWFARE (July 9, 2021, 4:05 PM), https://www.lawfareblog.com/fourth-quadrant-unknown-knowns [https://perma.cc/B2WT-R7RK].

398. *See* A GOOD AMERICAN 1:15:15–1:22:10 (Slingshot Films 2015); Chris Whipple, *What the CIA Knew Before 9/11: New Details*, POLITICO (Nov. 13, 2015, 7:29 AM), https://www.politico.eu/article/attacks-will-be-spectacular-cia-war-on-terror-bush-bin-laden/ [https://perma.cc/GF9N-VACR].

399. *William Binney*, PBS: FRONTLINE (Dec. 13, 2013), https://www.pbs.org/wgbh/pages/frontline/government-elections-politics/united-states-of-secrets/the-frontline-interview-william-binney/ [https://perma.cc/J228-BEG6] (noting that "[w]e do not, do not, do not spy on Americans").

Intelligence Community as part of a political ploy to satisfy his base.[400] Trump's role in fanning the flames of strange conspiracy theories about Central Intelligence Agency (CIA) Director Gina Haspel to explain his defeat in the 2020 election indicates that the trust Binney attempted to flag has not been rebuilt.[401] The Bush Administration's efforts to repair the public's trust in FISC by knocking down FISC's regulatory wall, did not address the inter-agency mistrust that William Binney tried to address by becoming a whistleblower on the issue.[402]

In *Fazaga*, government officials spying on United States citizens emphasized their mistrust in the United States judicial system when they claimed that *the spies* deserve *Mathews'* due process protection against the citizens who sued them.[403] *Mathews* is being invoked by government personnel to protect American Star Chambers from judicial scrutiny.[404] Now, in cases like *Fazaga*, government officials are asking the Supreme

400. James Bamford, *Anti-Intelligence: What Happens When the President Goes to War with His Own Spies?*, THE NEW REPUBLIC (Mar. 19, 2018), https://newrepublic.com/article/147366/anti-intelligence [https://perma.cc/663B-9Q5B].

401. *Id.*; Jonathan Landay & Mark Hosenball, *Biden faces repair job at U.S. spy agencies after tumult under Trump*, REUTERS (Nov. 13, 2020, 5:12 AM), https://www.reuters.com/article/us-usa-biden-intelligence/biden-faces-repair-job-at-u-s-spy-agencies-after-tumult-under-trump-idUSKBN27T1C9 [https://perma.cc/J5Y5-2DCY]; Will Steakin, *Trump Allies pressed Defense Department to Help Overturn Election, New Book Says*, ABC NEWS (Nov. 16, 2021, 4:09 AM), https://abcnews.go.com/US/trump-allies-pressed-defense-department-overturn-election-book/story?id=81182008 [https://perma.cc/H472-QW7K]; *Fact Check: CIA Director Gina Haspel Was Not Arrested, Injured or Found Dead*, REUTERS (Dec. 4, 2020, 8:40 AM), https://www.reuters.com/article/uk-factcheck-cia-director-gina-haspel-ar/fact-checkcia-director-gina-haspel-was-not-arrested-injured-or-found-dead-idUSKBN28E215 [https://perma.cc/5DZB-U63S].

402. Matt Castelli, *CIA Is Losing Its Best and Brightest and Not Just Because of Trump*, JUST SECURITY (Dec. 2, 2020), https://www.justsecurity.org/73641/cia-is-losing-its-best-and-brightest-and-not-just-because-of-trump/ [https://perma.cc/87G2-2GX6] (noting the need to "restor[e] trust between the institution and the White House"—and that a big part of this broken trust is the erosion of basic principles of intelligence gathering that Binney became a whistleblower to defend, including that the CIA is not supposed to investigate United States citizens); *cf.* Asha Rangappa, *The Legacy of 9/11: Counterintelligence and Counterterrorism Spotlights and Blindspots*, JUST SECURITY (Sept. 8, 2021), https://www.justsecurity.org/78139/the-legacy-of-9-11-counterintelligence-and-counterterrorism-spotlights-and-blind-spots/ [https://perma.cc/MU3R-ZT4X] (focusing on the breakdown of the regulatory wall between FBI's "intelligence function" and "its law enforcement" function without addressing how the breakdown of FISC's regulatory wall might stoke the same kind of mistrust experienced by William Binney and other whistleblowers that keep coming forward).

403. Brief of Respondents J. Stephen Tidwell and Barbara Walls Supporting Petitioners at 13, 22–24, FBI v. Fazaga, No. 28-828 2021 WL 4976068 at 13, 22–24 (June 7, 2021) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)), *unaddressed by* FBI v. Fazaga, 142 S. Ct. 1051, 1058 n.4 (2022).

404. *Id.*

Court to weigh and balance their clear violations of the Fourth Amendment under *Mathews* to grant FISC-warranted FBI investigations impunity.[405]

The law that FISC relies upon, that the government is vigorously defending in *Fazaga*, is known as sovereign and qualified immunity.[406] These doctrines are directly drawn from the feudal law in *The Bankers Case* that was originally rejected in *Chisholm v. Georgia*.[407] This immunity was again drawn into doubt in recent cases, such as *Trump v. Vance*[408] and *Trump v. Mazars*[409] under *Nixon v. Administrator of General Services*[410] involving former President Donald Trump's tax returns.[411]

The way qualified and sovereign immunity worked in feudal England prior to *Chisolm* was through two layers.[412] First, as a matter of sovereign immunity, virtually adopted in *Nixon v. Fitzgerald*,[413] was that "the king

405. *Id.*

406. *See* Fazaga v. FBI, 965 F.3d 1015, 1031 (9th Cir. 2020), *rev'd*, FBI v. Fazaga, 142 S. Ct. 1051 (2022) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))); *cf.* Joshua J. Schroeder, *The Body Snatchers: How the Writ of Habeas Corpus Was Taken From the People of the United States*, 35 QUINNIPIAC L. REV. 1, 18 (2016) [hereinafter Schroeder, *The Body*] (explaining the feudal origin of the *Fitzgerald* cases, which resurrected the modern version of sovereign and qualified immunity in the United States after it was previously disbanded under *Chisholm*).

407. The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.) (stating the king can do no wrong, and explaining how, through the king's grace, his wicked ministers could be granted qualified immunity—qualified because it is subject to the will of the king who has absolute immunity), *distinguished and delegitimized by* Chisholm v. Georgia, 2 U.S. 419, 470 (1793) (Opinion of Jay, C.J.) (*The Bankers Case* is not valid law in the United States, nor is any sort of feudalism).

408. Trump v. Vance, 140 S. Ct. 2412 (2020).

409. Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

410. Nixon v. Adm'r Gen. Servs., 433 U.S. 425 (1977).

411. *Id.* at 472 (noting that the president is "a legitimate class of one" that can be regulated and sued for violating the law without regard to supposed immunity judicially granted in the *Fitzgerald Cases*), *implicitly extended by Vance*, 140 S. Ct. at 2424 (citing Clinton v. Jones, 520 U.S. 681, 701 (1997) (basing the decision upon the *Nixon v. Adm'r Gen. Servs.* holding)), *and Mazars USA, LLP*, 140 S. Ct. at 2032–35 (citing *Jones*, 520 U.S. at 701 (relying upon the *Nixon v. Adm'r Gen. Servs.* holding)). Given the amount of litigation involving the Nixon tapes, it is worth noting here that most of the big constitutional questions arising from preserving and removing presidential materials from the president's control and ability to destroy them were answered in *Nixon v. Administrator of General Services* and that most other cases, before and after, rely in some respect upon this case. *Nixon v. Adm'r Gen. Servs.*, 433 U.S. at 472; *see also* Stern v. Marshall, 564 U.S. 462, 483 (2011) (relying on *Nixon v. Adm'r Gen. Servs.* regarding the separation of powers and the limit of protections each branch has from the other).

412. *See* Schroeder, *The Body*, *supra* note 406, at 18–19 (examining and comparing the *Fitzgerald Cases* and *The Bankers Case*).

413. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

could do no wrong."[414] Things tend to go wrong in imperfect human systems, but in feudal monarchies those wrongs were always blamed on the king's "wicked ministers," which is where qualified immunity comes in.[415]

The king would blusterously blame his wicked ministers for all the wrongs of the kingdom, but he would stop just before beheading his ministers.[416] Rather, the king usually protected his wayward vassals with an act of grace.[417] This is qualified immunity; it worked doubly for the king by creating loyal vassals, who were grateful to keep their heads, and covering up any involvement the king actually had in the wrongs committed by his government.[418]

This whole framework usually falls apart in republics like the United States, where the people are sovereign.[419] When the police become wicked and murder somebody, as happened to Eric Garner, the police murdered somebody with a share of the sovereignty of the whole.[420] There is no perceivable, legitimacy-enhancing benefit to a republic for shielding such wickedness, so it was illogical for the Court to extend qualified immunity in the *Fitzgerald Cases* and beyond.[421]

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414. Schroeder, *The Body*, *supra* note 406, at 18–19; *Nixon v. Fitzgerald*, 457 U.S. at 765 (White, J., dissenting).

415. 1 WILLIAM BLACKSTONE, COMMENTARIES *244–46 (since "the king himself can do no wrong" the theory of absolute or sovereign immunity, requires a theory that when something does go wrong it is with "the advice of evil counsellors, and the assistance of wicked ministers" who may either be punished for the king's wrongs or granted clemency, which is the same things as qualified immunity); *see* The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.).

416. 1 WILLIAM BLACKSTONE, COMMENTARIES *244–46; *see* The Bankers Case [1696] 14 How. St. Tr. 1, 32 (Eng.).

417. *Supra* note 415.

418. *Id.*

419. *See* Chisholm v. Georgia, 2 U.S. 419, 473 (1793) (Opinion of Jay, C.J.) (invalidating *The Bankers Case*, in order to profess "that popular sovereignty in which every citizen partakes").

420. *Compare id.* ("But why it should be more incompatible, that all the people of a State should be sued by one citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequence of a judgment alike."), *with* Daily News Editorial Board, *In Eric's Name: The Inquiry Into Eric Garner's Death Is Putting Infuriating Facts on the Record*, N.Y. DAILY NEWS (Oct. 28, 2021, 4:10 AM), https://www.nydailynews.com/opinion/ny-edit-in-erics-name-20211028-dizbaprbfjfsvglagiq4ekthym-story.html [https://perma.cc/3VEQ-Q4S4] ("[T]he extraordinary judicial inquiry into the Police Department's killing of Eric Granger . . . yielded painful revelations about the crime and the NYPD's all-too-common penchant to sweep officers' misconduct, even when fatal, under the rug.").

421. U.S. CONST. pmbl (noting that the United States government's legitimacy is situated upon the people's sovereignty and that it depends upon its capacity to establish a working justice system), *quoted and cited in Chisholm*, 2 U.S. at 479 (Opinion of Jay, C.J.) (quoting U.S. CONST. art. III, § 2, cl. 1)

Despite all this, Justice Stevens's brilliant refutation of feudalism in *Nevada v. Hall* was summarily overruled without explanation in *Franchise Tax Board of California v. Hyatt*.[422] The *Hyatt* Court did not address the nature of sovereignty, nor did it overrule *Chisholm*.[423] Nor did the *Hyatt* Court seem to imply an adoption of feudalism by its overruling of *Hall*, but some American anglophiles may disagree, because *Hyatt* did speak of *Chisholm* in extremely derogatory terms.[424]

Mathews' cost/benefit balancing proved, through the experience of Kelli Dillon and the several structurally problematic tribunals discussed above, that the only thing needed for feudal Star Chamber courts to proliferate in America is a lack of effective prohibition.[425] The *Bivens* suit against the

(explaining that the United States Constitution's "words 'controversies between States and citizens of another State,' . . . recognizes and strongly rests on this great moral truth that, justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every [one] of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action, and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined.").

422. Nevada v. Hall, 440 U.S. 410, 415 (1979) ("The King's immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong. We must, of course, reject the fiction. It was rejected by the colonists when they declared their independence from the Crown, and the record in this case discloses an actual wrong committed by Nevada."), *overruled on other grounds by* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492, 1499 (2019).

423. *Hall*, 440 U.S. at 415, *overruled on other grounds by Hyatt*, 139 S. Ct. at 1492, 1499; *cf.* Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1750 (2007) (examining the "blithe" way Scalia disparaged *Chisholm* by his "identification of the legislature with the people themselves, an equation that was widely rejected at the founding and expressly denied by the Supreme Court in *Chisholm*."); Schroeder, *We Will*, *supra* note 16, at 28–33 (explaining why *Hyatt* was erroneously decided and that *Hyatt* did nothing and could do nothing to overrule Justice Stevens' admirable analysis of republican sovereignty in *Nevada v. Hall*).

424. *Compare Hyatt*, 139 S. Ct. at 1492, 1498 (implying that the Eleventh Amendment was a kind of commemoration that *Chisholm v. Georgia* was incorrectly decided; however, the actual evidence of this claim is extremely scant and belied by the text of the Eleventh Amendment itself), *with* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 459–60 (citing *Chisholm*, 2 U.S. at 474–75 (Opinion of Jay, C.J.)) (highlighting *Chisholm v. Georgia* for support of several of points in Story's *Commentaries*, while never suggesting that the Eleventh Amendment was intended to displace *Chisholm*).

425. *Compare Brief of Respondents J. Stephen Tidwell and Barbara Walls Supporting Petitioners at 13, 22–24, FBI v. Fazaga, No. 28-828, 2021 WL 2301971 (June 7, 2021) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)), request for pro-government balancing test granted by Egbert v. Boule, No. 21-147, slip op. at 11 (2022), with Kyllo v. United States, 533 U.S. 27, 40 (2001) (ineffectively prohibiting the behavior of the officers sued in Fazaga).*

government in *Fazaga*, appears to be a last ditch effort to save America from the reemergence of feudal law.[426] Unless something fundamentally shifts, the government may begin using FISC warrants to treat all United States citizens like the children in *Hernandez v. Mesa*,[427] and in response to any subsequent legal challenges the court may quote *Mathews* to hold that administrative murder is itself "due" process.[428]

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426. Schroeder, *The Body*, *supra* note 406, at 21–24 (describing how *Bivens* exists, in part, to preclude feudal law from reemerging in United States Courts, as well as examining the broader category of ad hoc rulemaking that supports feudal law in America of which *Mathews* is merely a part). *Fazaga* and cases like it appear to be last ditch efforts on three fronts because: (1) *Bivens* seems likely to be on its way out: Cassandra Robertson, *SCOTUS Sharply Limits Bivens Claims—and Hints at Further Retrenchment*, ABA (Apr. 14, 2020), https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2020/scotus-sharply-limits-bivens-claims-and-hints-at-further-retrenchment/ [https://perma.cc/LVU7-SA3Y] (noting in a section entitled "Life after *Bivens*" that in *Hernandez v. Mesa*: "A concurrence joined by Justices Thomas and Gorsuch recognizes that the Court has already largely gutted *Bivens*, writing that the Court has 'cabined the doctrine's scope, undermined its foundation, and limited its precedential value.' The concurring Justices would therefore go a step further and 'abandon the doctrine altogether.' With two justices willing to eliminate *Bivens* claims and three who would largely limit it to its facts, it seems clear that plaintiffs can no longer rely on *Bivens* to offer a remedy for violations of constitutional rights."); (2) because the state secrets doctrine makes such cases almost impossible to raise: *Fazaga*, 142 S. Ct. at 1056 (reversing the Ninth Circuit's exception to state secret doctrine making this case much more difficult to sustain); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 157–66, 172–84 (2010) (examining *Horn v. Huddle* as a case study for how the government either gets cases dismissed through the state secrets doctrine or settles in exchange for not changing the law); and (3) even where a litigant successfully contracts in their settlement to preserve a case under the United States Constitution, the Court is likely to dismiss for lack of standing: Mayfield v. United States, 504 F.Supp.2d 1023, 1042–43 (Dist. Or. 2007) ("I conclude that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, are unconstitutional because they violate the Fourth Amendment of the United States Constitution."), *rev'd*, 599 F.3d 964, 973 (9th Cir. 2010) ("Given the limited remedy left open by the Settlement Agreement and the absence of any authority on which the district court could rely to insist *sua sponte* that the derivative materials be returned or destroyed, we must conclude that Mayfield lacks standing to pursue his Fourth Amendment claim. We therefore vacate the judgment of the district court without reaching the merits of Mayfield's Fourth Amendment claim, and we remand to the district court with directions to dismiss Mayfield's Amended Complaint.").

427. Hernandez v. Mesa, 140 S. Ct. 735 (2020), extended by Egbert v. Boule, No. 21-147, slip op. at 11–12 (2022) (extending Hernandez to a case involving the violent and warrantless invasion of a U.S. citizen on his own property by a U.S. Customs and Border Patrol agent when there was no illegal immigrant involved and no legitimate basis for the invasion).

428. *Compare* Brief of Respondents J. Stephen Tidwell and Barbara Walls Supporting Petitioners at 13, 22–24, FBI v. Fazaga, No. 28-828, 2021 WL 2301971 (June 7, 2021) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)), *unaddressed by* FBI v. Fazaga, No. 20-828, slip op. at 5 n.4 (2022) ("adjudicating liability through in camera, ex parte procedures is anathema in our system of justice, and not to be tolerated absent some compelling justification"), *with Hernandez*, 140 S. Ct. at 749–50 (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) (administering a cost/benefit balancing test to

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

The Dark Side of Due Process: Part II considered the ideological connection between Justices Holmes and Brandeis to the shadow docket nullification of *Roe v. Wade*. Furthermore, it examined the witness of Kelli Dillon to the shocking reemergence of eugenics in California with the help of the groundbreaking investigative reporting of Corey G. Johnson and legal advocacy of Cynthia Chandler. Finally, it expounded upon the emergence of several modern-day Star Chambers in connection with the dark side of due process and penumbral rights theory.

In *The Dark Side of Due Process: Part III*, this series will consider possible solutions to the legal problems raised in Parts I and II, with special focus on the *Free Kesha* movement as a useful framework for pre-existing common law rights in America.

determine qualified immunity)), *request for pro-government balancing test granted by* Egbert v. Boule, No. 21-147, slip op. at 11 (2022) (quoting *Ziglerfor* the new pro-government balancing test in Bivens cases: "A court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to 'weigh the cost and benefits of allowing a damages action to proceed.'").