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## Why Cost/Benefit Balancing Tests Don't Exist: How to Dispel a Delusion That Delays Justice for Immigrants

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## WHY COST/BENEFIT BALANCING TESTS DON'T EXIST: HOW TO DISPEL A DELUSION THAT DELAYS JUSTICE FOR IMMIGRANTS

JOSHUA J. SCHROEDER\*

### ABSTRACT

*In 2022, the U.S. Supreme Court nullified its earlier presumption that indefinite immigrant detention without bond hearings is unconstitutional under Zadvydas v. Davis. If Zadvydas is a nullity, those who raise due process balancing tests during the post-removal-period in immigrant habeas review may need to find new grounds for review. However, since Boumediene v. Bush was decided in 2008, there are several reasons not to despair Zadvydas's demise.*

*For one, Zadvydas spoke to an extremely narrow subset of cases. It granted a concession under the Due Process Clause to immigrants detained beyond the statutory 90-day removal period. It decided that indefinite immigrant detention is likely unconstitutional, and that therefore the statute must have a judge-made six-month time limit after which the government must present evidence of reasonable cause to continue an indefinite detention.*

*However, in 2018, Jennings v. Rodriguez did not extend Zadvydas's six-month presumption, suggesting it was arbitrary. Jennings went further to rework constitutional avoidance doctrine in such a way that it, and the judicial duty to say what the law is under Marbury v. Madison itself, may no longer exist. Jennings decided that as long as a statute is clear, then it should go into force whether or not it conflicts with the U.S. Constitution.*

*In other words, Jennings limited Zadvydas to its facts and failed to address the constitutional question it was briefed to answer. Nevertheless, several district courts began to answer this constitutional question themselves by extending due process balancing tests to grant Zadvydas-like relief to asylum seekers. If Zadvydas is overturned, these fractured attempts at providing immigrant habeas corpus may be cut off by the Court.*

*This article will explain why there is still hope for detained asylum seekers. The U.S. Supreme Court may unsettle stare decisis, constitutional avoidance, and its duty to say what the law is. It might completely misinterpret*

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*what is actually “due” process. But its imprudent behavior—its disrespect for its own precedent—is causing the Court to lean directly into the Suspension Clause, Boumediene v. Bush, and the pro-immigrant writ of habeas corpus that existed in 1789.*

Self, the sole point in which [Caesar and Brutus] both agreed,  
By this Romes shackled, or by this shes Free’d,  
Self Love, that stimulous to Noblest aim,  
Bids Nero Light the Capital in Flame  
— Mercy Otis Warren, *To John Adams*, Oct. 11, 1773

*Cassius* Tell me, good Brutus, can you see your face?  
*Brutus* No, Cassius; for the eye sees not itself  
But by reflection, by some other things.  
*Cassius* ‘Tis just:  
And it is very much lamented, Brutus,  
That you have no such mirrors as will turn  
Your hidden worthiness into your eye,  
That you might see your shadow.  
— WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2, ls. 51–58

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INTRODUCTION: THE PROBLEM WITH THE U.S. SUPREME COURT'S  
CRYSTAL BALL

In his famed Harvard Law Review article, *The Path of the Law*, Justice Oliver Wendell Holmes, Jr. defined the law as prophecy.<sup>1</sup> He defined the lawyer's job as one of prophesying future costs and benefits for clients, for judges, and for themselves.<sup>2</sup> Mere words on a page were as nothing to Justice Holmes—they were nothing unless or until they actualized themselves in robust, manly consequences, which may allegedly be observed in the court's crystal ball.<sup>3</sup>

Obsessed with helping good triumph over evil, Justice Holmes made a dangerous ruling in *Buck v. Bell*.<sup>4</sup> After staring deeply into his crystal ball, Holmes believed that eugenics would create progress, reduce crime, and spur innovation; so, he papered over an injustice with a cost/benefit balancing test.<sup>5</sup> Following Holmes's decision in *Buck*, the Nazis papered over several injustices in an attempt to create the *übermensch* by annihilating the Jews.<sup>6</sup>

Holmes perceived disaster for U.S. society if he let unfit women like Carrie Buck keep their genitals intact.<sup>7</sup> He genuinely thought that genetic atrophy

<sup>1</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457–59 (1897) [hereinafter Holmes, Jr., *The Path*] (“I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn . . .”).

<sup>2</sup> *Id.*

<sup>3</sup> See *id.*; John M. Kang, *Prove Yourselves: Oliver Wendell Holmes and the Obsessions of Manliness*, 118 W. VA. L. REV. 1067, 1078–79 (2016); cf. Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1200–01 (1999) (demonstrating the accepted and ordinary use of “gazing into the crystal ball” by the legal community that was inspired by Holmes).

<sup>4</sup> 274 U.S. 200, 206–08 (1927).

<sup>5</sup> *Id.* at 207 (agreeing that the welfare “of society will be promoted by her sterilization,” without proof, and finding that the cost/benefit balancing test “that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes”), extending *Jacobson v. Massachusetts*, 197 U.S. 11, 24 (1905) (weighing the risk of injury “against the benefits coming from the discreet and proper use of the preventive”).

<sup>6</sup> Rodney A. Smolla, *The Trial of Oliver Wendell Holmes*, 36 WM. & MARY L. REV. 173, 214 (1994) (“The Nazi’s simply carried [Holmesian] philosophy to its natural conclusions.”); see LULU MILLER, *WHY FISH DON’T EXIST* 132 (2020). Even the idea of the *übermensch* seems to have originated in the writings of one of Holmes’s mentors in America. See Beniamino Soressi, *6.1 Europe in Emerson and Emerson in Europe*, in MR. EMERSON’S REVOLUTION 325, 326 (Jean McClure Mudge ed., 2015) (“[I]n Germany, Nietzsche misused central Emersonian ideas, which Hitler and the Nazis then further perverted.”); see Adam H. Hines, *Ralph Waldo Emerson and Oliver Wendell Holmes, Jr.: The Subtle Rapture of Postponed Power*, 44 J. SUPREME CT. HIST. 39, 42, 46–47 (2019) (“Holmes’ decision in *Buck v. Bell* (1927) embodied an Emersonian premium on self-reliance.”).

<sup>7</sup> *Buck*, 274 U.S. at 207 (perceiving that the fertility of female “degenerate offspring” like Carrie Buck “sap the strength of the State” and that forced, nonconsensual sterilization of unfit

or “degeneration” would be imminent if sub-par genes were allowed to keep fostering life in America.<sup>8</sup> Holmes prided himself as a man of science in the law, on keeping religion out of it, and he believed this sharpened his perception of reality, making him an ideal judge.<sup>9</sup>

But eugenics was not scientific,<sup>10</sup> nor atheist.<sup>11</sup> Both eugenics, and the Bernaysian propaganda that advertised it, had stronger ties with Puritanism than science.<sup>12</sup> In fact, the eugenicists refashioned Puritan cost/benefit balancing tests in Benthamite style to justify their austerity drives as rational science.<sup>13</sup> They prophesied doom and expected everyone to adopt their plans for surviving an apocalypse of foreigners, non-white people, and disabled persons.<sup>14</sup>

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women like Buck would effectively “prevent our being swamped with incompetence”); MILLER, *supra* note 6, at 128 (explaining how eugenicists like Jordan and Agassiz were concerned about the “degeneration” of the human race, and thus “alert[ed] the public to the dangers of charity, causing, as [they] believed it did, ‘the survival of the unfittest’” (quoting DAVID STARR JORDAN, *THE HUMAN HARVEST* 54 (1907))).

<sup>8</sup> *Buck*, 274 U.S. at 207; MILLER, *supra* note 6, at 128.

<sup>9</sup> *See, e.g.*, Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 462–63 (1899) [hereinafter Holmes, Jr., *Law*] (longing for “a commonwealth in which science is everywhere supreme”).

<sup>10</sup> *Id.* at 444 (touting “science,” Holmes often simultaneously cited to “dogma,” which is problematic because dogmatic claims to the truth are absolute, of the religious sort—they are held or abandoned regardless of the scientific discourse and are thus usually considered unscientific); MILLER, *supra* note 6, at 133 (“To rid a species of its mutants and outliers is to make that species dangerously vulnerable to the elements.”); ADAM RUTHERFORD, *A BRIEF HISTORY OF EVERYONE WHO EVER LIVED: THE HUMAN STORY RETOLD THROUGH OUR GENES* 219 (2017) (“It is frequently stated that, for the average geneticist, race simply does not exist. This chapter will explore how true that is . . . . The great irony is this: The science of genetics was founded specifically on the study of racial inequality, by a racist.”).

<sup>11</sup> Graham J. Baker, *Christianity and Eugenics: The Place of Religion in the British Eugenics Education Society and the American Eugenics Society, c. 1907–1940*, 27 SOC. HIST. MED. 281, 288 (2014) (“[E]ugenic religion was not always viewed as a replacement for Christian faith.”); *see* Holmes, Jr., *Law, supra* note 9, at 463 (quoting GEORGE HERBERT, *The Elixer, in THE TEMPLE: SACRED POEMS AND PRIVATE EJACULATIONS* 222 (George Sampson, ed., George Bell & Sons 1904) (1633)).

<sup>12</sup> MILLER, *supra* note 6, at 25–28; EDWARD L. BERNAYS, *THE BIOGRAPHY OF AN IDEA* 206 (1965) (giving PR advice to assist “the eugenics movement”); *id.* at 652 (noting that Goebbels used Bernaysian strategies to push the eugenic agenda in Nazi Germany); *id.* at epigraph (“The grounded maxim / So rife and celebrated in the mouths / Of wisest men; that to the public good / Private respects must yield.” (quoting JOHN MILTON, *SAMSON AGONISTES* ls. 865–68)).

<sup>13</sup> *See, e.g.*, HARRY HAMILTON LAUGHLIN, *EUGENICAL STERILIZATION IN THE UNITED STATES* 454 (1922) (appending a balancing test to the beginning of Laughlin’s model eugenical sterilization law); Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 111 (2011) [hereinafter Nourse, *Buck*] (“Justice Holmes was a balancer through and through.”); *cf.* PHILIP SCHOFIELD, *UTILITY & DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM* 241 (2006) (noting that Bentham’s philosophy boiled down to balancing costs and benefits).

<sup>14</sup> *See* MILLER, *supra* note 6, at 128; *see also* *Buck v. Bell*, 274 U.S. 200, 206–08 (1927).

Eugenicists were eager to study Charles Darwin's inbred family tree as proof of concept.<sup>15</sup> But, nature gradually corrected the hubris of American eugenicists about perfecting humanity through inbreeding and violence when genetic disease appeared among the Darwin family.<sup>16</sup> We are painfully aware that what Holmes thought was good science, was not *good* for anyone; a fact only confirmed after millions were sterilized, repatriated, or murdered in the name of eugenics.<sup>17</sup>

Science cannot, however, correct the delusion that an uncertain future can be secured through brittle human reason.<sup>18</sup> Americans remain as susceptible to this trick as we were when Carrie Buck's fallopian tubes were snipped.<sup>19</sup> Ever since Justice Powell resuscitated rational cost/benefit balancing tests in *Stone v. Powell*<sup>20</sup> and *Mathews v. Eldridge*<sup>21</sup> to manifest the future, progressive liberals became the most loyal votaries of the Holmesian crystal ball.<sup>22</sup>

The Court's majority opinion in *Zadvydas v. Davis* demonstrated this reality.<sup>23</sup> Justice Breyer led the liberal wing of the Court to "construe the statute [8 U.S.C. § 1231(a)(6)] to contain an implicit 'reasonable time' limitation" rather than overruling the statute as a suspension of the writ.<sup>24</sup> The Court set a six-month presumption at which time the government should bring evidence for cause and tasked Immigration Judges ("IJs") to decide what "reasonable" should mean on a case-by-case basis.<sup>25</sup>

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<sup>15</sup> See Tim M. Berra, Gonzalo Alvarez & Kate Shannon, *The Galton–Darwin–Wedgwood Pedigree of H. H. Laughlin*, 101 *BIO. J. LINNEAN SOC.* 228, 228–30 (2010).

<sup>16</sup> Tim M. Berra, Gonzalo Alvarez & Francisco C. Ceballos, *Was the Darwin/Wedgewood Dynasty Adversely Affected by Consanguinity?*, 60 *BIO SCIENCE* 376, 382 (2010) ("Our answer . . . is yes.").

<sup>17</sup> Apology Act for the 1930's Mexican Repatriation Program, Cal. Gov't Code §§ 8720–23 (West 2022); MILLER, *supra* note 6, at 138–39; JAMES Q. WHITMAN, *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 35 (2017).

<sup>18</sup> See MILLER, *supra* note 6, at 98–99.

<sup>19</sup> *Id.* at 102–03; MARY TRUMP, *TOO MUCH AND NEVER ENOUGH* 211 (2020).

<sup>20</sup> 428 U.S. 465, 494–95 (1976).

<sup>21</sup> 424 U.S. 319, 335 (1976).

<sup>22</sup> T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943, 963 (1987) [hereinafter Aleinikoff, *Constitutional*] ("Balancing was a progressive, up-beat, 'can-do' judicial attitude."); Nourse, Buck, *supra* note 13, at 114 (noting that Holmes "believed that the Constitution could be reduced to ad hoc balancing").

<sup>23</sup> *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *cf.* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 *GEO. IMMIGR. L.J.* 365, 378–79 (2002) [hereinafter Aleinikoff, *Detaining*] (predicting that *Zadvydas* could create grounds for cost/benefit balancing tests).

<sup>24</sup> *Zadvydas*, 533 U.S. at 682.

<sup>25</sup> *Id.* at 699–701.

In 2018, *Jennings v. Rodriguez* limited *Zadvydas*'s "6-month time limit" to its facts, without ruling upon the statute's constitutionality.<sup>26</sup> After *Jennings*, well-meaning district judges began to assert rational cost/benefit balancing tests to determine the constitutionality of asylum seeker detentions on an *ad hoc* basis under *Zadvydas*.<sup>27</sup> However, this *ad hoc* strategy may now be unworkable as a result of *Johnson v. Arteaga-Martinez*<sup>28</sup> and *Garland v. Aleman Gonzalez*.<sup>29</sup>

This article will respond in six parts: Part I will explain how cost/benefit balancing tests grew up under *Zadvydas* after *Jennings*; Part II will demonstrate why a Suspension Clause approach is preferable for asylum seekers; Part III will examine why cost/benefit balancing tests don't really exist; Part IV will describe what was lost in the age of balancing; Part V will reveal what is actually going on when a cost/benefit balancing test is applied; and finally, Part VI will present the common law as the proper empirical alternative to cost/benefit balancing tests.

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<sup>26</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018), *extended by* *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1833–34 (2022) (applying *Jennings* to the same statutory provision that *Zadvydas* construed, and distinguishing *Zadvydas* as incorrectly decided); *Rodriguez v. Marin*, 909 F.3d 252, 255 (9th Cir. 2018). Paradoxically, in *Dobbs*, Justice Alito wrote for the Court to imply that the judiciary should not "flout[] . . . the rule that statutes should be read where possible to avoid unconstitutionality"—which is exactly what he did in *Jennings*. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2276 (2022).

<sup>27</sup> *See, e.g., Singh v. Barr*, 400 F. Supp. 3d 1005, 1020–21 (S.D. Cal. 2019) (citing both *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Zadvydas*, 533 U.S. at 690); *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1106 (W.D. Wash. 2019) (developing the six-factor *Jamal* balancing test under *Zadvydas*, inspired by *Mathews*), *extending* *Jamal A. v. Whitaker*, 358 F. Supp. 3d 853, 858–60 (D. Minn. 2019); *Alexandre v. Decker*, No. 17-5706, 2018 WL 5619975 at \*7 (S.D.N.Y. 2018) (developing another new five-prong balancing test under *Zadvydas* despite *Jennings*). *But see* *Soto v. Sessions*, No. 18-cv-02891-EMC, 2018 WL 3619727 at \*3–5 (N.D. Cal. 2018) (denying habeas relief under *Zadvydas* by using a *Mathews* balancing test).

<sup>28</sup> *Arteaga-Martinez*, 142 S. Ct. at 1834–35 (refusing to decide whether a statute is constitutional after deciding that it was impossible to construe the statute in a way that avoids a serious conflict with the constitution), *extending* *Jennings*, 138 S. Ct. at 846. *Arteaga-Martinez* appears to be a complete nullification of *Zadvydas*'s statutory construction; however, there is an extremely slight possibility that the Court could effectively resurrect *Zadvydas* after the lower courts decide the Due Process Clause issue, but this is unlikely and difficult to imagine. *But see* *Arteaga-Martinez*, 142 S. Ct. at 1838 (Breyer, J., concurring in part and dissenting in part) ("[I]n my view, *Zadvydas* applies (the Court does not hold to the contrary), and the parties are free to argue about the proper way to implement *Zadvydas*' standard in this context, and, if necessary, to consider the underlying constitutional question, a matter that this Court has not yet decided.").

<sup>29</sup> *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2074 (2022) (appearing to paradoxically gut classwide injunctions in the immigrant habeas context even where the court enjoins unlawful agency action as the statute appears to require).

PART I: THE GOOD, THE BAD, AND THE UGLY IN *ZADVYDAS V. DAVIS*

Over the centuries, the American judiciary imbibed both medicines and poisons under the name of due process.<sup>30</sup> The spectral evidence, hearsay, and coerced confessions that helped the Puritan judiciary secure death sentences for the witches of Salem, Massachusetts, remain standard misapplications of due process.<sup>31</sup> But there are several other American miscarriages of due process that stand out including, *Dred Scott v. Sandford*,<sup>32</sup> *Buck v. Bell*,<sup>33</sup> and *Lochner v. New York*.<sup>34</sup>

Against a backdrop of America's due process blunders, the decision in *Zadvydas v. Davis* can appear as a ray of light.<sup>35</sup> It can be valorized as something like a star reaching through the vast abyss to give us hope.<sup>36</sup> *Zadvydas* decided that, under the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), the U.S. government could not detain immigrants on an indefinite basis without showing reasonable cause.<sup>37</sup>

The idea that the Due Process Clause applies to immigrants, and is not cut off by national borders or plenary powers as the government argued, seems

<sup>30</sup> See Victoria Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 752–53 (2009) [hereinafter Nourse, *A Tale*].

<sup>31</sup> Len Niehoff, *Proof at the Salem Witch Trials*, ABA (Oct. 8, 2020), [https://www.americanbar.org/groups/litigation/publications/litigation\\_journal/2020-21/fall/proof-salem-witch-trials/](https://www.americanbar.org/groups/litigation/publications/litigation_journal/2020-21/fall/proof-salem-witch-trials/) (“[I]t was a bad time for justice and due process.”); see Wendel D. Craker, *Spectral Evidence, Non-Spectral Acts of Witchcraft, and Confession at Salem in 1692*, 40 HIST. J. 331, 332–33, 336 (1997); cf. Bradley Chapin, *Written Rights: Puritan and Quaker Procedural Guarantees*, 114 PENN. MAG. 323, 324, 334 (1990) (explaining the pre-revolutionary version of due process developed by the Puritans and Quakers in the 1600s).

<sup>32</sup> 60 U.S. 393, 450 (1857) (enslaved party), analyzed by Blanche Bong Cook, *Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the “WHP”) or Johnny and the WHP*, 31 YALE J.L. & FEMINISM 57, 64 n.27 (2019); cf. Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMM. 253, 271 (2016) (explaining the due process blunders made in *Dred Scott*).

<sup>33</sup> 274 U.S. 200, 207 (1927); cf. Nourse, *Buck*, *supra* note 13, at 110 (noting that though *Buck* “insist[ed] that procedural due process had not been violated[,] . . . the procedural due process to which Carrie Buck was entitled was largely illusory”).

<sup>34</sup> 198 U.S. 45, 63–64 (1905), *validity questioned* by *Ferguson v. Skrupa*, 372 U.S. 726 (1963); cf. Greene, *supra* note 32, at 271 (explaining the due process blunders made in *Lochner*).

<sup>35</sup> See, e.g., Aleinikoff, *Detaining*, *supra* note 23, at 386 (explaining the *Zadvydas* “conundrum,” that “it will be seen as an important monument to human rights,” but that “it will have little generative power”; *Zadvydas* is like “the sun [positioned] directly overhead, it will shine brightly but cast almost no shadow”).

<sup>36</sup> See *id.*

<sup>37</sup> *Zadvydas v. Davis*, 533 U.S. 678, 699–701 (2001) (“[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.”).



to be a good thing for immigrants.<sup>38</sup> In comparison with the prospect of *no* legal process, *Zadvydas* moved in a positive direction.<sup>39</sup> But if we take Justice Holmes's definition of the "law" as prophecy seriously, then the idea of legal due process may not be so straight forward.<sup>40</sup>

Behind its liberal tone, *Zadvydas* has several problems.<sup>41</sup> For one, *Zadvydas* limited its decision to those who already "entered" the United States.<sup>42</sup> In so doing, *Zadvydas* was unclear about how it meant to distinguish *Shaughnessy v. Mezei*,<sup>43</sup> and appeared to suggest that habeas jurisdiction could be limited according to certain classes of prisoner.<sup>44</sup> This is a fundamental problem because habeas corpus does not run to the prisoner, but the custodian.<sup>45</sup>

*Zadvydas* never mentioned that *Mezei* was a World War II decision,<sup>46</sup> nor that *Mezei* arose under officially declared World War II war powers.<sup>47</sup>

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<sup>38</sup> *Id.*; cf. Aleinikoff, *Detaining*, *supra* note 23, at 386 (comparing the pros and cons of *Zadvydas* from the immigrant perspective).

<sup>39</sup> Aleinikoff, *Detaining*, *supra* note 23, at 366 (noting that *Zadvydas* "may represent a radical shift, a turning point for immigration law no less important than *Miranda v. Arizona* and *Mapp v. Ohio* for criminal procedure, *Baker v. Carr* for equal protection, and *Goldberg v. Kelly* for due process"). *But see id.* at 374 (noting the *Zadvydas* Court's "unwillingness to reconsider *Mezei* preserves a foundational case in the plenary power edifice"); *id.* at 388 ("[A] better *Zadvydas* opinion would have held that due process applies to all immigration proceedings in the United States.").

<sup>40</sup> Compare Holmes, Jr., *The Path*, *supra* note 1, at 457–59, with *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>41</sup> See Aleinikoff, *Detaining*, *supra* note 23, at 366, 374, 388.

<sup>42</sup> *Zadvydas*, 533 U.S. at 693–94.

<sup>43</sup> *Id.*, *distinguishing* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); cf. Aleinikoff, *Detaining*, *supra* note 23, at 374 (describing *Zadvydas*'s "unwillingness to reconsider *Mezei*" as an error that "preserves a foundational case in the plenary power edifice").

<sup>44</sup> *Zadvydas*, 533 U.S. at 693–94 (appearing to divide immigrants between those who "have once passed through our gates" and those who have not), *extending a distinction made by Mezei*, 345 U.S. at 212, *corrected by Rasul v. Bush*, 542 U.S. 466, 474 (2004) (quoting *Mezei*, 345 U.S. at 218–19 (Jackson, J., dissenting)).

<sup>45</sup> See *Braden v. 30th Jud. Cir. Ct. Ky.*, 410 U.S. 484, 494–95 (1973) ("The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody."), *extended by Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004), *refined by Boumediene v. Bush*, 553 U.S. 723, 796 (2008).

<sup>46</sup> *Zadvydas*, 533 U.S. at 692–93.

<sup>47</sup> *Shaughnessy v. Mezei*, 345 U.S. 206, 210 n.7 (1953) (citing Act of June 21, 1941, 55 Stat. 252, Presidential Proclamation No. 2523, 6 Fed. Reg. 5821, and Franklin D. Roosevelt, Radio Address Announcing an Unlimited National Emergency, May 27, 1941, <https://www.presidency.ucsb.edu/documents/radio-address-announcing-unlimited-national-emergency>). The issue of whether a declaration of war is required before the executive department is constitutionally allowed to access legitimate war powers is *still* an open question. *Holmes v. United States*, 391 U.S. 936, 949 (1968) (Douglas, J., dissenting) ("I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for conscription an answer to this important undecided constitutional question."); cf. Joshua J. Schroeder, *Leviathan*

*Zadvydas* failed to explain how *Ahrens v. Clark*,<sup>48</sup> a World War II case similar to *Mezei*, was overruled in *Braden v. 30th Jud. Cir. Ky.*<sup>49</sup> *Zadvydas* did not anticipate *Boumediene v. Bush*,<sup>50</sup> which extended the writ to release prisoners from Guantanamo Bay (“GTMO”), a black site prison run by the United States in a foreign country.<sup>51</sup>

Furthermore, *Zadvydas* rests on an absurdity.<sup>52</sup> The words “limited” and “plenary” are antonyms;<sup>53</sup> thus, *Zadvydas*’s statement that “Congress has ‘plenary power’ to create immigration law . . . subject to important constitutional limitations” is a clear oxymoron.<sup>54</sup> The paradoxical idea that limited-plenary power can exist is a Hegelianism that originated in *Prigg v. Pennsylvania*<sup>55</sup> to

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*Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations*, 15 FLA. A&M U. L. REV. 1, 67 n.402 (2021) [hereinafter Schroeder, *Leviathan*] (providing context regarding the Court’s decision not to decide the issue of whether the president can constitutionally access war powers without an official declaration of war).

<sup>48</sup> 335 U.S. 188 (1948).

<sup>49</sup> 10 U.S. at 499–500; *id.* at 502 (Rehnquist, J., dissenting) (“Today the Court overrules *Ahrens v. Clark* . . .”), *not mentioned by Zadvydas*, 533 U.S. at 693–94.

<sup>50</sup> Compare *Boumediene*, 553 U.S. with *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), *extended by Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (plurality opinion), *failing to inspire further litigation as acknowledged by Al-Alwi v. Trump*, 139 S. Ct. 1893, 1894 (2019) (citing *Hussain v. Obama*, 572 U.S. 1079) (2014) (Statement of Breyer, J., respecting denial of certiorari)) (arguing that “it is past time to confront the difficult question left open by *Hamdi*”); *cf.* Mark Joseph Stern, *Stephen Breyer Is Worried About the Forever War’s Permanent Prisoners. He’s 15 Years Too Late*, SLATE (June 10, 2019), <https://slate.com/news-and-politics/2019/06/stephen-breyer-aumf-dissent-gitmo-scotus.html> (connecting Breyer’s vote to apply a balancing test in *Hamdi* to recent cases of indefinite immigrant detention).

<sup>51</sup> See *Boumediene*, 553 U.S. at 753 (“Guantanamo Bay is not formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains ‘ultimate sovereignty’ over the territory while the United States exercises ‘complete jurisdiction and control.’”) (citation omitted); *id.* at 755 (noting that the United States “retains *de jure* sovereignty over Guantanamo Bay”).

<sup>52</sup> *Zadvydas*, 533 U.S. at 695 (“Congress has ‘plenary power’ to create immigration law . . . but that power is subject to important constitutional limitations.”).

<sup>53</sup> *Plenary*, THESAURUS.COM, <https://www.thesaurus.com/browse/plenary> (last visited Aug. 19, 2022) (showing an antonym for “plenary” is “limited”); see also *Plenary*, DICTIONARY.COM, <https://www.dictionary.com/browse/plenary> (last visited Aug. 26, 2022).

<sup>54</sup> *Zadvydas*, 533 U.S. at 695; Aleinikoff, *Detaining*, *supra* note 23, at 366 (calling the statement discussed here a “laconic, astonishingly casual phrase [that] may represent a radical shift, a turning point for immigration law”); *cf.* *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065–66 (2022) (arguably extending *Zadvydas*’s embrace of paradox by deciding that the Court’s equitable prohibition of illegal acts is itself unlawful); *id.* at 11 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (emphasizing this paradoxical writing: “Officials may implement a statute unlawfully, but a statute does not operate in conflict with itself.”).

<sup>55</sup> *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

destroy the rights of immigrant, former slaves escaping to Pennsylvania from the South.<sup>56</sup>

*Zadvydas*'s paradoxical concessions to the government, especially by not overruling *Mezei*, played out in *DHS v. Thuraissigiam*.<sup>57</sup> Over Justice Sotomayor's ringing dissent, *Thuraissigiam* implied that immigrants held in detention centers *within* the United States somehow did not physically enter the country, as if prisoner location were relevant to habeas jurisdiction.<sup>58</sup> Shortly thereafter, *Thuraissigiam* was cited to vacate the habeas writ of a lawful permanent resident.<sup>59</sup>

*Thuraissigiam* also made broad statements regarding federal plenary powers and sovereign prerogatives to detain and deport immigrants with or without due process.<sup>60</sup> *Thuraissigiam*'s statements about the limitations of immigrant due process were dicta, and therefore not binding law.<sup>61</sup> However, *Thuraissigiam* revealed the sole basis of its findings was the dicta it took from

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<sup>56</sup> *Id.* at 611; *id.* at 654 (Daniel, J., concurring) (quoting *Houston v. Moore*, 18 U.S. 1, 48–50 (1820) (Story, J., dissenting)); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, THE TANNER LECTURES ON HUM. VALUES 79, 119 (Mar. 8 & 9, 1995) [hereinafter Scalia, *Common*] (doctrines that come from slave cases are suspect); 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, 24, 37, 59 (2021) [hereinafter Schroeder, *We Will*] (“the idea of absolute *and* limited powers is an oxymoron” that “manifest[ed] a horror in *Prigg*,” in which the Court “overrule[d] a state sanctuary law” for runaway slaves); Alan Brudner, *Constitutional Monarchy as the Divine Regime: Hegel's Theory of the Just State*, 2 HIST. POL. THOUGHT 119, 128–30 (1981) (“[T]his self-contradictoriness of the isolated Crown is precisely the fulcrum on which hinges the key affirmation of Hegel's political philosophy.”); cf. BERTRAND RUSSELL, UNPOPULAR ESSAYS 19–20 (1921) [hereinafter RUSSELL, UNPOPULAR] (explaining why Hegel is absurd).

<sup>57</sup> *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020) (“[A]n alien who is detained shortly after unlawful entry cannot be said to have ‘effected an entry.’ Like an alien detained after arriving at a port of entry, an alien like respondent is ‘on the threshold.’ The rule advocated by respondent and adopted by the Ninth Circuit would undermine the ‘sovereign prerogative’ of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location.” (quoting *Zadvydas*, 533 U.S. at 693, *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953), and *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)) (citations omitted)).

<sup>58</sup> See cases cited *supra* note 57; *Thuraissigiam*, 140 S. Ct. at 2012 (Sotomayor, J., dissenting) (“[T]he Fifth Amendment, which of course long predated any admissions program, does not contain limits based on immigration status or duration in the country: It applies to ‘persons’ without qualification.”).

<sup>59</sup> *Ragbir v. Homan*, 923 F.3d 53, 78 (2d Cir. 2019), *vac'd sub nom.* *Pham v. Ragbir*, 141 S. Ct. 227 (2020) (exclusively citing *Thuraissigiam* to vacate *Ragbir* on a writ of certiorari).

<sup>60</sup> *Thuraissigiam*, 140 S. Ct. at 1982.

<sup>61</sup> *Id.* at 1975 (dismissing under Rule 12(b)(1) for failure to draft the habeas petition correctly, not based on a new interpretation of the Due Process Clause); *Al Otro Lado v. Mayorkas*, No. 17-cv-02366, 2021 WL 3931890, at \*13 (S.D. Cal. 2021) (citing *Thuraissigiam*, 140 S. Ct. at 1982–83).

*Landon v. Plasencia*,<sup>62</sup> a cost/benefit balancing case, which it cited as if it were the law.<sup>63</sup>

Finally, *Zadvydas* suggested that IIRIRA “liberalizes” the immigration system,<sup>64</sup> and it is true that there are at least two changes wrought by IIRIRA that may be touted as beneficial to immigrants.<sup>65</sup> But on the whole, this was an unjust mischaracterization.<sup>66</sup> The more pressing question after *Niz-Chavez* and *Pereira* is whether any of IIRIRA’s mandates on the government are enforceable at all, as the government routinely flouts them.<sup>67</sup>

*Zadvydas* was decided three days after *INS v. St. Cyr* confirmed the constitutionality of IIRIRA under the Suspension Clause.<sup>68</sup> In 2001, when *St. Cyr* and *Zadvydas* were decided, the Court believed that it could regulate DHS and the Executive Office for Immigration Review (“EOIR” or “Immigration Court”) through its appellate rulings on bond hearings.<sup>69</sup> But this belief predated DHS

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<sup>62</sup> *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

<sup>63</sup> See *Thuraissigiam*, 140 S. Ct. at 1980 (setting aside *Nishimura Ekiu*, *Knauff*, and *Mezei*, among other decisions from the eugenics and WWII eras, as superseded by law, and leaving only *Landon*’s dicta from the 1980s as a basis for its plenary power ideology); *id.* at 1982 (quoting *Landon*, 459 U.S. at 32).

<sup>64</sup> *Zadvydas v. Davis*, 533 U.S. 678, 698 (2001).

<sup>65</sup> The first change IIRIRA made that is touted as beneficial to immigrants was “shortening the removal period from six months to 90 days,” as stated in *Zadvydas*. *Id.* The second change that is touted as beneficial to immigrants is IIRIRA’s requirement that DHS include both time and location information on *all* Notices to Appear, which was recently upheld in *Pereira* and *Niz-Chavez*. Oral Argument at 00:10, *Niz-Chavez v. Barr*, 141 S. Ct. 84 (2020) (No. 19-863), <https://www.courtlistener.com/audio/72822/niz-chavez-v-barr/>; *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1478–79 (2021), *extended by* *Rodriguez v. Garland*, 15 F. 4th 351, 355–56 (5th Cir. 2021); *see* *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018), *extended by* *Lopez v. Barr*, 925 F.3d 396, 401 (9th Cir. 2019) (“[T]he clear statutory command [is] that time and place information be included in *all* Notices to Appear.”) (emphasis in original); *cf.* *Singh v. Garland*, 24 F.4th 1215, 1320 (9th Cir. 2022) (prescribing “rescission pursuant to 8 U.S.C. § 1229a(b)(5)(C)(ii)” wherever a defective NTA is used to justify an order of removal *in absentia*).

<sup>66</sup> See *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *see* Lucas Guttentag, “*Court-Stripping*” in the 1996 Immigration Laws: A Dangerous Precedent, 20 IN DEFENSE OF THE ALIEN 213, 218–19 (1997).

<sup>67</sup> See, e.g., *Matter of LaParra*, 28 I&N Dec. 425, 436 (BIA 2022), *disagreeing with Rodriguez*, 15 F.4th at 354–56; *cf.* *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022) (interpreting the provisions of IIRIRA as a prohibition on the court from enjoining unlawful violations of IIRIRA).

<sup>68</sup> *St. Cyr*, 533 U.S. at 312–14 n.36 (“[W]e conclude that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA,” because “[a]t no point . . . does IIRIRA make express reference to § 2241. Given the historic use of § 2241 jurisdiction as a means of reviewing deportation and exclusion orders, Congress’ failure to refer specifically to § 2241 is particularly significant.”).

<sup>69</sup> See *Zadvydas*, 533 U.S. at 683 (using habeas corpus to only decide whether EOIR should release immigrants “on bond or paroled,” rather than applying the traditional form of relief, which is release pending legitimate process).

and EOIR's decades-long refusal to comply with the clear statutory text of IIRIRA.<sup>70</sup>

As DHS and EOIR do not follow controlling U.S. Supreme Court precedent, attempting to regulate EOIR through appellate process cannot be a functional equivalent for habeas corpus.<sup>71</sup> *St. Cyr* may have been decided differently if the Court foresaw that *Matter of LaParra* would be the eventual result.<sup>72</sup> *Boumediene* confirmed that an express repeal of § 2241 was an unconstitutional suspension of the writ,<sup>73</sup> but the Court has not yet decided how to resolve an inquisitorial, Star Chamber system that grows increasingly bold in its decisions to separate from the control of both the U.S. Supreme Court and Congress.<sup>74</sup>

Something analogous happened when the *Hamdi v. Rumsfeld*<sup>75</sup> plurality attempted to extend *Zadvydas* and *Mathews v. Eldridge* to protect a U.S. citizen.<sup>76</sup> In the end, the U.S. military embarrassed the court by ignoring *Hamdi*, stripping a U.S. citizen of his citizenship, deporting him to Saudi Arabia, and putting him on a no-fly list.<sup>77</sup> The eminent American jurist Dahlia Lithwick identified the military's response to *Hamdi* as an attempt to "eras[e] the episode from our national memory."<sup>78</sup>

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<sup>70</sup> See cases cited *supra* notes 65, 67.

<sup>71</sup> See cases cited *supra* notes 65, 67; *Zadvydas*, 533 U.S. at 683; *cf.* *Boumediene v. Bush*, 553 U.S. 723, 764, 780 (2008) (applying a functional approach to habeas jurisdiction that allows the direct review of "exculpatory evidence that was either unknown or previously unavailable to the prisoner").

<sup>72</sup> *St. Cyr*, 533 U.S. at 313–14; *Matter of LaParra*, 28 I&N at 436 (refusing to follow the U.S. Supreme Court's recitation of clear statutory law).

<sup>73</sup> *Boumediene*, 553 U.S. at 733 ("Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e), operates as an unconstitutional suspension of the writ.").

<sup>74</sup> *Matter of LaParra*, 28 I&N at 436 (flouting the plain meaning of IIRIRA as recognized in *Pereira and Niz-Chavez*); *cf.* DANIEL KAHNEMAN, OLIVIER SIBONY & CASS R. SUNSTEIN, NOISE: A FLAW IN HUMAN JUDGMENT 6–7, 91, 174 (2021) [hereinafter KAHNEMAN, NOISE] (citing JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION 90 (2007)) (explaining the arbitrary nature of Immigration Court); Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 496–501 (1992) (explaining the inquisitorial nature of EOIR).

<sup>75</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>76</sup> *Id.* at 528–29 (plurality opinion) ("The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' U.S. Const. Amdt. 5, is the test we articulated in *Mathews v. Eldridge* . . ." (citing *Zadvydas*, 533 U.S. at 683, 690, and *Mathews v. Eldridge*, 424 U.S. 319 (1976))).

<sup>77</sup> 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> [hereinafter Lithwick, *Nevermind*].

<sup>78</sup> *Id.*

Now the Court sometimes cites Justice Scalia's *Hamdi* dissent as the correct exposition of habeas law.<sup>79</sup> Luckily, *Hamdi*'s sister case, *Rasul v. Bush*,<sup>80</sup> was eventually extended in *Boumediene v. Bush*, along the lines of *Felker* and *St. Cyr*, to overrule express suspensions of habeas corpus by Congress.<sup>81</sup> The reality, finally affirmed by *Boumediene*, was that habeas jurisdiction does not necessarily depend upon the scope or even the existence of the due process rights of the prisoner.<sup>82</sup>

Thus, the habeas attorney should not despair if *Zadvydas* is affirmatively overruled by the Court.<sup>83</sup> If petitioners claimed due process as the origin of habeas corpus jurisdiction, their petitions may now be dismissed according to the dicta strongly stated in *Thuraissigiam*.<sup>84</sup> But none of this would upset or disturb the long line of common law precedents affirming Suspension Clause jurisdiction over the jailer that pinnacled in *Boumediene*.<sup>85</sup>

When taken out of the context of *St. Cyr*'s Suspension Clause analysis, *Zadvydas* might appear to justify jurisdiction directly under the Due Process

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<sup>79</sup> *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1978 (2020) (citing *Hamdi*, 542 U.S. at 563 (Scalia, J., dissenting)); *Boumediene*, 553 U.S. at 771 (citing *Hamdi*, 542 U.S. at 564 (Scalia, J., dissenting)); cf. Stern, *supra* note 50 (“Scalia was right in *Hamdi*, and his dissent grew more prescient with time.”).

<sup>80</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>81</sup> *Boumediene*, 553 U.S. at 734, extending *Rasul*, 542 U.S. at 473 (2004); cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 619–20 (2006) (explaining how “partially in response to subsequent criticism of General Yamashita’s trial,” the Geneva Convention effectively stripped *Yamashita* “of its precedential value”); *id.* at 593 (construing *Ex parte Quirin*, 317 U.S. 1 (1942), narrowly under the Geneva Convention as it was later amended to protect prisoners of war).

<sup>82</sup> *Boumediene*, 553 U.S. at 770 (citing *Reid v. Covert*, 354 U.S. 1, 74 (1956) (Harlan, J., concurring in result)) (applying a functional approach to the Court’s jurisdiction over a U.S. military base in a foreign country, in which the petitioner’s U.S. citizenship or lack thereof was not dispositive of the Court’s jurisdiction); *id.* at 762–63 (clarifying the critical factors in *Johnson v. Eisentrager*, 339 U.S. 763 (1950)); cf. *Braden v. 30th Jud. Cir. Ct. Ky.*, 410 U.S. 484, 494–95 (1973) (“The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.”).

<sup>83</sup> Cf. David Gauvey Herbert, *There is an Unlikely Legal Loophole That Lets Stateless Undocumented Immigrants Stay in the US*, QUARTZ (Feb. 22, 2017), <https://qz.com/916027/undocumented-immigrants-hoping-to-stay-in-the-us-have-two-legal-loopholes-but-theyre-longshots-at-best/> (exemplifying the way some conservatives like to bait liberals by ranting about *Zadvydas* as if it were the bane of Trump’s immigration policies, when in actuality *Zadvydas* is the exact minimum the court could do for detained immigrants).

<sup>84</sup> See cases cited *supra* note 59.

<sup>85</sup> *Boumediene*, 553 U.S. at 746 (citing *INS v. St. Cyr* and *Felker v. Turpin*, as the most recent exemplars of the rule that habeas corpus “analysis may begin with precedents as of 1789, for the Court has said that ‘at the absolute minimum’ the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified” (quoting *St. Cyr*, 533 U.S. at 301 (2001))); see also *Thuraissigiam*, 140 S. Ct. at 1969 (“[T]he [Suspension] Clause, at a minimum, ‘protects the writ as it existed in 1789.’” (quoting *St. Cyr*, 533 U.S. at 301)).

Clause.<sup>86</sup> *Zadvydas* suggested that due process alone secured the constitutionality of immigration law under the Suspension Clause.<sup>87</sup> Indeed, the idea that due process is either above or separate from a proper Suspension Clause analysis seems to be an error with which the U.S. Supreme Court continues to struggle.<sup>88</sup>

In 2018, the Court was briefed to determine the due process rights of immigrants according to *Zadvydas* in *Jennings v. Rodriguez*.<sup>89</sup> But *Jennings* refused to determine the constitutionality of immigrant detention, while also limiting the implied correctives of *Zadvydas* that were intended to make the statute constitutional.<sup>90</sup> We are now living through the errors caused by the *Jennings* Court that took *Zadvydas* out of context by unduly ignoring both *St. Cyr* and *Boumediene*.<sup>91</sup>

After *Jennings*'s failure to either confirm or deny the constitutionality of IIRIRA under the Due Process Clause, several district court judges began asserting the Due Process Clause to give immigrants *Zadvydas*-like relief on an *ad hoc* basis.<sup>92</sup> They drew inspiration from *Mathews* cost/benefit balancing tests to see if habeas corpus required more process in EOIR, such as bond hearings.<sup>93</sup> This short-lived strategy seems to have run into trouble, however, as *Zadvydas*'s balancing-test-based presumption of the unconstitutionality of indefinite immigrant detention was nullified by *Johnson v. Arteaga-Martinez* and equitably gutted by *Garland v. Aleman Gonzalez*.<sup>94</sup>

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<sup>86</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *cf.* *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018) (failing to consider a Suspension Clause analysis in lieu of *Zadvydas*'s due process precedent).

<sup>87</sup> *Zadvydas*, 533 U.S. at 699.

<sup>88</sup> *Id.*; *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (plurality opinion); *Jennings*, 138 S. Ct. at 846.

<sup>89</sup> *Jennings*, 138 S. Ct. at 875 (Breyer, J., dissenting) (“Were the majority’s suggestion correct as to this jurisdictional question, it would have shown, at most, that we should decide the constitutional question here and now. We have already asked for and received briefs on that question.”).

<sup>90</sup> *Id.* at 846; *Rodriguez v. Marin*, 909 F.3d 252, 255 (9th Cir. 2018).

<sup>91</sup> *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1838 (2022) (Breyer, J., concurring in part and dissenting in part) (offering a slim, likely false, hope that in future proceedings “*Zadvydas* [still] applies,” because the Court distinguished *Zadvydas* here by nullifying its statutory construction); *Jennings*, 138 S. Ct. at 875 (Breyer, J., dissenting).

<sup>92</sup> See cases cited *supra* note 27.

<sup>93</sup> See cases cited *supra* note 27.

<sup>94</sup> See *supra* notes 28–29, 63 and accompanying text; *Arteaga-Martinez*, 142 S. Ct. at 1834 (nullifying *Zadvydas*'s presumption of unconstitutionality); *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065–66 (2022) (appearing to paradoxically gut class-wide injunctions in the immigrant habeas context, in a way that potentially extends to all immigration law, even where the court enjoins unlawful agency action), *extended by* *Biden v. Texas*, 142 S. Ct. 2528, 2538–39 (2022).

*Arteaga-Martinez* and *Aleman Gonzalez* directly preceded several decisions in which the Court embraced cost/benefit balancing tests in an exceedingly paradoxical way.<sup>95</sup> These paradoxical decisions were perhaps most visible when *Dobbs* overruled *Casey*'s "undue burden" balancing test,<sup>96</sup> with a *Janus* five factor balancing test<sup>97</sup>:

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: [I] the nature of their error, [II] the quality of their reasoning, [III] the "workability" of the rules they imposed on the country, [IV] their disruptive effect on other areas of the law, and [V] the absence of concrete reliance.<sup>98</sup>

The Court used this *Janus* balancing test to "return the power to weigh those arguments" regarding the costs and benefits of allowing abortions to the states,<sup>99</sup> after *Bruen* overruled an over century-old state law regulating gun purchases by referring to the Second Amendment as "the very *product* of an interest balancing

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<sup>95</sup> *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504–05 (2022) (balancing away Native American sovereignty that was finally reaffirmed only two years prior in *McGirt v. Oklahoma* and appearing to contradict both *Torres v. Dep't Pub. Safety* and *Denezpi* also decided in the same term); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (supplanting the *Lemon* test with a practical balancing test in a way that seems to contradict *Shurtleff v. Boston*); *id.* at 2434 (Sotomayor, J., dissenting) (noting that the majority "overrules *Lemon*"); *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2236, 2257, 2264–65, 2278 (2022) (overruling *Roe* and *Casey*'s interest-balancing test with *Janus*'s anti-*stare decisis* balancing test, stating: "Ordered liberty sets limits and defines the boundary between competing interests. . . . Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated." Furthermore, this decision extended *Janus*'s five factor balancing test to apply to potentially all existing precedent about fundamental human rights, in which the Court further reduced *Roe v. Wade* to a simple cost/benefit balancing exercise, which it preserved for the states to apply rather than the federal judiciary—i.e., this decision contains balancing tests within balancing tests, wheels within wheels.); *NYSRPA v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (rejecting "interest balancing" tests, by asserting the superior interest balancing test embodied the Second Amendment according to *Heller*); *Vega v. Tekoh*, 142 S. Ct. 2095, 2106–07 (2022) (holding that *Miranda* warnings are not an actual "law" under the constitution, rather, it "should apply 'only where its benefits outweigh its costs'"); *Egbert v. Boule*, 142 S. Ct. 1793, 1805 (2022) (applying a one-step, pro-government cost/benefit balancing test); *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732, 1736 (2022) ((justifying prudential bars to habeas jurisdiction by weighing "the many benefits . . . and the substantial costs" in order to deny habeas review for "actual-innocence"), *extended by* *Shoop v. Twyford*, 142 S. Ct. 2037, 2044–45 (2022); *cf.* *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (applying a *Mathews v. Eldridge* balancing test)) (demonstrating how the Court used a balancing test case to extend plenary power doctrine).

<sup>96</sup> *Dobbs*, 142 S. Ct. at 2242, 2249, 2259, *overruling* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

<sup>97</sup> *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

<sup>98</sup> *Dobbs*, 142 S. Ct. at 2265.

<sup>99</sup> *Id.* at 2259.



by the people.”<sup>100</sup> As exemplified by *Dobbs* and *Bruen*, the Court frequently claimed similar populist justifications for contradictory results, closely resembling the French *l’appel au peuple* that infamously ended in a reign of terror.<sup>101</sup>

The 2021 term pinnacled in a cluster of contradictory logic when *Biden v. Texas* affirmed Secretary Mayorkas’s application of a cost/benefit balancing test to rescind the Migrant Protection Protocols (“MPP”).<sup>102</sup> Paradoxically, in an opinion issued on the same day, *West Virginia v. EPA* decided that the EPA’s application of a statutorily required balancing test was constitutionally wrong.<sup>103</sup> In direct contradiction with *West Virginia v. EPA*’s newly fashioned “major question doctrine,”<sup>104</sup> *Biden v. Texas* extended *Aleman Gonzalez*’s abdication of the Court’s emphatic *Marbury*-duty to consider whether the Migrant Protection Protocols (“MPP”) were illegal,<sup>105</sup> and *Jennings*’ similar abdication of the Court’s “emphatic province and duty” to decide whether the MPP was unconstitutional.<sup>106</sup>

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<sup>100</sup> *Bruen*, 142 S. Ct. at 2131 (internal quotation marks omitted); cf. Joshua J. Schroeder, *America’s Written Constitution: Remembering the Judicial Duty to Say What the Law Is*, 43 CAP. U. L. REV. 833, 860–62 (2015) [hereinafter Schroeder, *America’s*] (explaining the pre-*Janus* case law that abandoned *stare decisis* prior to Justice Alito’s development of his *Janus* balancing test in 2018).

<sup>101</sup> See cases cited *supra* notes 94–98; Alexandre Deleyre, *Opinion D’Alexandre Deleyre, Député par le Département de la Gironde, Contre l’appel au peuple, sur le jugement de Louis XVI 1* (1793); Letter from George Washington to Thomas Jefferson (July 11, 1793), <https://founders.archives.gov/documents/Washington/05-13-02-0140> (“Is the Minister of the French Republic to set the Acts of this Government at defiance—with impunity? and then threaten the Executive with an appeal to the People.”).

<sup>102</sup> *Biden v. Texas*, 142 S. Ct. 2528, 2537, 2543 (2022) (quoting the cost/benefit analysis Secretary Mayorkas used to justify rescission of the Migrant Protection Protocols (“MPP”), but failing to rule the MPP unconstitutional in such a way that immigrants on the border will benefit because Biden’s Title 42 replacement for the MPP remains in force).

<sup>103</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2629 (2022) (Kagan, J., dissenting) (explaining the cost/benefit balancing tests that the EPA is statutorily empowered to engage in to determine “the ‘best system of emission reduction which . . . has been adequately demonstrated’” (quoting 42 U.S.C. § 7411(a)(1))); *id.* at 2601 (majority opinion) (ignoring *Chevron* and the plain meaning of statutory text by precluding EPA from reaching a regulatory conclusion by balancing impacts of EPA regulation in the way the statute requires—basically deciding that EPA did its balancing test wrong).

<sup>104</sup> *West Virginia v. EPA*, 142 S. Ct. at 2605.

<sup>105</sup> *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2063 (2022) (interpreting a law stripping the courts of the authority to “enjoin or restrain the operation of the provisions” of the Immigration & Nationality Act (“INA”) so broadly that the courts may no longer enjoin contraventions and violations of that law by the government), followed by *Biden v. Texas*, 142 S. Ct. at 2538.

<sup>106</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 843, 851 (2018) (“Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.”), followed by *Aleman Gonzalez*, 142 S. Ct. at 2065, and *Biden v. Texas*, 142 S. Ct. at 2538.

As disappointing as *Biden v. Texas* was for failing to affirmatively invalidate the MPP under the law of nonrefoulement,<sup>107</sup> the Hobbs Act,<sup>108</sup> and the separation of powers,<sup>109</sup> the Court still managed to repudiate two of Justice

<sup>107</sup> U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at art. 3 (Dec. 10, 1984), S. Treaty Doc. 100–20 (1988) (“For the purpose of determining whether there are such grounds [to require releasing immigrants into the United States as refugees protected by CAT], the competent authorities [of the signatories including the United States government] shall take into account all relevant considerations.”), *not followed by Biden v. Texas*, 142 S. Ct. at 2543 (noting that “section 1225(b)(2)(C) [did not] authorize[] the District Court to force the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate, and to supervise its continuing negotiations with Mexico to ensure that they are conducted ‘in good faith’”—seeming to treat the existing treaties mandating nonrefoulement that both Mexico and the United States are signatories of as optional, and as if Congress could simply break or repeal our treaties with foreign countries at will, even though treaties in conjunction with the president’s foreign affairs power (i.e., *not* Congress) govern whether the United State can legally deport, remove, or extradite immigrants to foreign countries); *cf.* U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”); *Ex parte Holmes*, 12 Vt. 631, 641–42 (Vt. 1840), *extending Holmes v. Jennison*, 39 U.S. 540, 561 (1840) (Opinion of Taney, C.J.) (releasing an immigrant suspected of committing murder in Canada into the United States for lack of an extradition treaty with Canada or England).

<sup>108</sup> Hobbs Act, 18 U.S.C.A. § 1951 (West 2022). Violating the Convention Against Torture and other treaties by establishing the MPP in an attempt to use Mexico as a dumping ground for immigrants as a deterrent to immigration in exchange for the political and financial support of the Trump’s base is an actual or attempted extortion affecting foreign commerce, and political and financial support of Trump’s base is a tangible or intangible thing of value. *Id.*, *not considered by Biden v. Texas*, 142 S. Ct. at 2538 (legitimizing the MPP as something a president may enforce or rescind at will under current law); *cf.* *United States v. Staszczuk*, 517 F.2d 53, 59–60 (7th Cir. 1975) (“[T]he commerce element of a Hobbs Act violation—the federal jurisdictional fact—may be satisfied even if the record demonstrates that the extortion had no actual effect on commerce.”); *United States v. Pranno*, 385 F.2d 387, 389 (7th Cir. 1967) (extending Hobbs Act violations to failures to act, like withholding a building permit); Ishaan Tharoor, *Mexican Lawmaker Proposes Revoking Treaties with U.S. if Trump Gets His Way*, WASH. POST (Sept. 6, 2016, 1:44 PM), <https://www.washingtonpost.com/news/worldviews/wp/2016/09/06/mexican-lawmaker-proposes-revoking-treaties-with-u-s-if-trump-gets-his-way/> (noting that a bill was proposed in Mexico that would empower the Mexican government to “retaliate against Trump’s potentially hostile policies . . . includ[ing] giving the Mexican Senate the power to review dozens of existing bilateral treaties with the United States, including the 1848 Treaty of Guadalupe Hidalgo, where Mexico ceded more than half a million square miles of its territory to the United States”).

<sup>109</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609 (citing “separation of powers principles” to preclude the EPA from coming to a certain cost/benefit balancing test conclusion), *not followed by Biden v. Texas*, 142 S. Ct. at 2537, 2543 (endorsing Secretary Mayorkas’s conclusion that “the [MPP] program’s ‘benefits do not justify the costs’” while ultimately falling short of answering more important questions about whether such policies as the MPP or the newer Title 42 exclusion policy comport with U.S. treaty obligations and the separation of powers issues broached in cases like *Curtiss-Wright* about Congress’s limited role in checking the president’s foreign affairs power), *citing and following Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014)), to justify *not* answering important constitutional questions, and rather

Alito's most radical and insane theories.<sup>110</sup> First, Alito unequivocally lost his argument that *Jennings* should be the final say about the law, regardless of its constitutionality, i.e., Alito failed to wipe *Marbury v. Madison*<sup>111</sup> off the map.<sup>112</sup> Second, Alito lost his argument that *Jennings* should mean that immigrants can be ordered deported to Mexico by the courts pending their asylum applications without due process and against the will of the sitting president,<sup>113</sup> an argument he previously attempted to solidify through soul-crushing *Thuraissigiam* dicta purporting to reverse a Ninth Circuit due process decision that the Ninth Circuit never made.<sup>114</sup> For the time being, this argument was deflated in *Arteaga*-

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deferring to executive practice that the *Noel Canning* Court misappropriated from Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); Schroeder, *America's*, *supra* note 100, at 850 (2015) (describing how *Noel Canning* "cited to the dicta in Justice Frankfurter's concurrence [in *Youngstown Sheet & Tube Co. v. Sawyer*] about a 'gloss' on presidential power without regarding the rule," ultimately supplanting and contradicting Justice Frankfurter's concurrence in *Youngstown*).

<sup>110</sup> *Biden v. Texas*, 142 S. Ct. at 2554 (Alito, J., dissenting).

<sup>111</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>112</sup> *Id.* (Alito, J., dissenting). In *Biden v. Texas*, Justice Alito argued that the Government made an inappropriate "about-face" from *Jennings*, because "the Government argues that 'shall be detained' actually means 'may be detained.'" *Id.* Thereby, Alito failed to consider whether the U.S. Constitution either implicitly or explicitly limits the statutory language Alito relied upon in *Jennings* either by the structure of the U.S. Constitution and/or by and through existing treaties like the U.N. Convention Against Torture. *Id.* The U.S. Constitution and several U.S. multilateral treaties including the U.N. Convention Against Torture appear to directly contradict the statutory construction in *Jennings* by requiring its signatory governments to provide due process to determine whether a prospective refugee is in fact a refugee or not prior to removing them from the country, a question which would also presumably recognize the asylee/refugee legal status that would clearly distinguish the "shall be detained" language from taking any legitimate effect at any time even before the Government has a chance to process asylum claims. *Id.* Another way of saying this is that Justice Alito improperly presumed that the U.S. Government would always act upon an almost ethereal plenary power ideology and without any clear legal, textual support to continue detaining, sometimes for years on end, refugees that have not yet had a chance to prove their refugee status whether or not Trump was voted out of office. *Id.*

<sup>113</sup> *Id.* (Alito, J., dissenting) (citing to the Trump administration's moot arguments in *Jennings*, Alito argued: "The Government was correct in *Jennings* and is wrong here. '[S]hall be detained' means 'shall be detained.'"). This was not a case challenging prolonged immigrant detentions, but the Fifth Circuit's decision to force the Biden administration to keep the MPP program that removed immigrants from the United States prior to receiving any due process to decide whether they, in fact, are in the class of immigrant that the law says "shall" be detained, and thereby in Alito's view, removable without due process of law. *Id.*

<sup>114</sup> Joshua J. Schroeder, *Conservative Progressivism in Immigrant Habeas Court: Why Boumediene v. Bush Is the Baseline Constitutional Minimum*, 45 THE HARBINGER 46, 56 (2021) [hereinafter Schroeder, *Conservative*] ("The U.S. Supreme Court, therefore, overstepped its bounds as a Court of last review, when it foreclosed Mr. Thuraissigiam's due process rights before the lower courts issued a decision about them. Then it compared the common law habeas remedy of release with deportation saying, 'the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka.'" (quoting *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969–71 (2020))); cf. Angelika Albaladejo, *A Drunk Mechanic, Shackled Immigrants, a*

*Martinez*, where Justice Sotomayor, speaking for the Court, followed *Jennings*'s refusal to decide constitutional questions not considered in the courts below and thus repeated the age old principle that the Supreme Court is "'a court of review, not of first view.'"<sup>115</sup>

By the end of the 2021 term, though fractured on political-ideological lines, the entire U.S. Supreme Court appeared to use cost/benefit balancing tests to achieve conflicting political ends. The mercenary nature of cost/benefit balancing tests emphasized the arbitrariness they represent. At the moment, the protean nature of cost/benefit balancing approaches, though beleaguered, appears to be the only baseline the entire U.S. Supreme Court is willing to agree upon.

## PART II: WHY JUSTICE FOR IMMIGRANTS DEPENDS ON THE SUSPENSION CLAUSE

Cost/benefit balancing tests purportedly exist under the Due Process Clauses of the U.S. Constitution and purport to answer what process is "due."<sup>116</sup> Due process is meant to be *of the law*, but there are several examples of due process overruling or modifying the law for violating substantive rights.<sup>117</sup> Theoretically, the law applied in substantive due process cases is the rights and liberties embodied in the U.S. Constitution itself as a paramount law according to the Ninth Amendment.<sup>118</sup>

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*Crash Landing: the Dangers of ICE Flights*, CAPITAL & MAIN (Nov. 4, 2021), <https://capitalandmain.com/a-drunk-mechanic-shackled-immigrants-a-crash-landing-the-dangers-of-ice-flights> (describing the ICE flights that Justice Alito wantonly described as an adequate substitute for traditional habeas release in *Thuraissigiam*).

<sup>115</sup> *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022). *Arteaga-Martinez* followed *Jennings* to make this decision, which ultimately upset Alito's *Jennings*-based arguments in *Biden v. Texas*, where he was finally revealed as making too much of that decision because it left legal and constitutional questions about the statutory and constitutional construction for future courts to decide. *Id.*; *Biden v. Texas*, 142 S. Ct. at 2554 (Alito, J., dissenting) (quoting to brief written by the Trump administration in *Jennings* as if *Jennings* required the Biden administration to make the same arguments).

<sup>116</sup> U.S. CONST. amends. V, XIV; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>117</sup> *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 565 (2003); *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965); *id.* at 486–87 (Goldberg, J., concurring).

<sup>118</sup> *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring) (citing U.S. CONST. amend IX). *But see* *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (contradicting the legality of his own marriage with Ginni Thomas under *Loving v. Virginia*, 388 U.S. 1 (1967), Thomas boldly stated his opinion: "The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.").

However, conservative jurists usually reject this theory, because it requires, in their view, an overbroad reading of “life, liberty, and property.”<sup>119</sup> Their skepticism is premised on links they perceive between a rights-centered due process jurisprudence and cases like *Dred Scott* and *Lochner*.<sup>120</sup> In 2020, they reasserted their opposition to due process–based relief for detained immigrants in *DHS v. Thuraissigiam*, which signaled the narrowing of *Zadvydas v. Davis*.<sup>121</sup>

However, habeas corpus law exists under the Suspension Clause, which defines the scope of law that must be administered.<sup>122</sup> If the habeas statute gives anything less than what the Suspension Clause requires, the law is void.<sup>123</sup> Unlike due process, the Suspension Clause avoids critiques of substantive due process and satisfies the Court’s general, prudential desire to analyze the positive law rather than the constitution, wherever possible.<sup>124</sup>

These preferences and desires of the Court were fully expressed in *Thuraissigiam*, which dismissed a habeas corpus petition for failing to request the common law habeas remedy of release.<sup>125</sup> The Court emphasized that it would not remand any further required process, implicitly including cost/benefit

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<sup>119</sup> See, e.g., *Dobbs*, 142 S. Ct. at 2247 (“In interpreting what is meant by the Fourteenth Amendment’s reference to ‘liberty,’ we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy.”); cf. *Griswold*, 381 U.S. at 486 n.1 (Goldberg, J., concurring) (explaining Justice Stewart’s dissent as “requir[ing] a more explicit guarantee than the one which the Court derives from several constitutional amendments”).

<sup>120</sup> See, e.g., *Dobbs*, 142 S. Ct. at 2248 (“The Court must not fall prey to such an unprincipled approach.” (citing *Lochner v. New York*, 198 U.S. 45 (1905))); *id.* at 2303 (Thomas, J., concurring) (citing *Dred Scott v. Sandford*, 19 How. 393 (1857)); *Obergefell v. Hodges*, 576 U.S. 644, 694–96 (2015) (Roberts, C.J., dissenting) (first citing *Lochner*, 198 U.S. at 61–62, and then citing *Dred Scott*, 60 U.S. 393).

<sup>121</sup> See cases cited *supra* note 57. *But see* *Biden v. Texas*, 142 S. Ct. 2528, 2535 (2022) (disagreeing with dicta in *Thuraissigiam* that suggested immigrants must be detained and deported without due process).

<sup>122</sup> U.S. CONST. art. I, § 9, cl. 2; *Boumediene v. Bush*, 553 U.S. 723, 746 (2008), *extending* *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“[A]t the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”).

<sup>123</sup> See, e.g., *Boumediene*, 553 U.S. at 733 (“Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e), operates as an unconstitutional suspension of the writ.”); see generally Schroeder, *Conservative*, *supra* note 114.

<sup>124</sup> See, e.g., *Boumediene*, 553 U.S. at 732–33; cf. *Crowell v. Benson*, 285 U.S. 22, 58 (1932) (applying the constitutional avoidance doctrine).

<sup>125</sup> *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969–71 (2020) (failing to assert basic release in a habeas petition causes it to “fall[] outside the scope of the common law habeas writ”).

balancing tests, upon EOIR to administer.<sup>126</sup> *Thuraissigiam* held that requesting more process in EOIR as the sole habeas remedy results in dismissal.<sup>127</sup>

In the past, the Suspension Clause's requirement that Congress's law include a substantive privilege of habeas corpus became the source of several other lines of common law.<sup>128</sup> For example, in *Ex parte Young*, after the federal government jailed Minnesota AG Young forcing him to file habeas corpus, the Court denied his writ, requiring Minnesota to comply with supreme federal law.<sup>129</sup> This was the ideological beginning of Supremacy Clause jurisprudence.<sup>130</sup>

*Ex parte Young* was unquestioned federal law until the U.S. Supreme Court nullified *Roe v. Wade* in *Whole Woman's Health v. Jackson* in 2021.<sup>131</sup> The *Whole Woman's Health* Court did not, at first, overrule *Roe v. Wade* or *Ex parte Young*, but *Whole Woman's Health* drew *Young's* validity into question for the first time.<sup>132</sup> *Young* was construed narrowly, and in the future the federal government may need to jail state officials in order to trigger *Young's* holding.<sup>133</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* But see *Boumediene*, 553 U.S. at 779–80 (“Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances.”); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (noting that habeas corpus is not “a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose”).

<sup>128</sup> The list of common law precedents that habeas corpus inspired, includes Supremacy Clause jurisprudence: *Green v. Mansour*, 474 U.S. 64, 68 (1985) (“*Ex parte Young* gives life to the Supremacy Clause.” (citing *Ex parte Young*, 209 U.S. 123 (1908))); administrative law: *Crowell*, 285 U.S. at 58 (stating in the context of an employment law dispute that “[w]hen proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined de novo upon habeas corpus”); and independent judicial review of immigration law under the Due Process Clause: *Yamata v. Fisher*, 189 U.S. 86, 100 (1903) (requiring Article III review of due process of the law in immigrant habeas cases) (commonly referred to as the Japanese Immigrant Cases).

<sup>129</sup> *Ex parte Young*, 209 U.S. at 168.

<sup>130</sup> See *Green*, 474 U.S. at 68.

<sup>131</sup> 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”).

<sup>132</sup> See *id.* at 2495 (construing *Ex parte Young* narrowly and not extending it to cover a case involving a flagrantly unconstitutional state law); *cf.* *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022) (“We hold that *Roe* and *Casey* must be overruled.”). The order in which this occurred stands for the paradoxical idea that courts and legislatures may disrespect constitutional holdings prior to the holding becoming overruled, which may threaten to turn the entire government structure of the United States on its head. *Id.* (overruling *Roe* and *Casey* after the Court already allowed a Texas law that directly violated *Roe* and *Casey* to go into force); *cf.* *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2492–93 (2022) (expressing disagreement with *McGirt v. Oklahoma*, which was decided only two years earlier when Justice Ginsburg was alive).

<sup>133</sup> This may include the bounty hunters Texas deputized to outlaw abortion. Texas Heartbeat Act, TEX. HEALTH & SAFETY CODE ANN. § 171.207 (West 2022); *cf.* *Young*, 209 U.S. at 126 (noting that the Attorney General for the State of Minnesota Edward T. Young refused to comply with

If *Young* was ever affirmatively overruled, the federal courts might be required to stop enjoining state laws that conflict with federal standards, including state sanctuary laws.<sup>134</sup> The end of *Young* may signal an era of chaos for the U.S. federal system.<sup>135</sup> But from an immigrant's perspective, in a field of law where DHS and EOIR regularly flout supreme federal law,<sup>136</sup> overruling *Young* might clear up alternative state grounds an immigrant may cite for relief.<sup>137</sup>

In a time when legal grounds for immigrant freedom suits could shift drastically, choosing a legal basis to file immigrant habeas corpus can be a confusing task.<sup>138</sup> However, there are several reasons why the Suspension Clause remains a promising avenue for immigrant relief.<sup>139</sup> First, *Boumediene v. Bush*

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federal railroad standards and was therefore committed to the custody of the "United States marshal for the district of Minnesota" to be held until he complied with federal law).

<sup>134</sup> See, e.g., California Values Act, CAL. GOV'T CODE § 7284.2 (West 2017), upheld in *United States v. California*, 921 F.3d 865, 877 (9th Cir. 2019) ("refusing to help is not the same as impeding"); *id.* at 888 (citing *Printz v. United States*, 521 U.S. 898, 925 (1997)), cert. denied, 141 S. Ct. 124 (2020).

<sup>135</sup> See, e.g., Mary Ziegler, *The Court Invites an Era of Constitutional Chaos*, THE ATLANTIC (Dec. 10, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/supreme-court-texas-abortion/620972/>; cf. Second Amendment Preservation Act, 2021 MO. ANN. STAT. § 1.430 (West 2021) (enacted) ("All federal acts, laws, executive orders, administrative orders, rules, and regulations, regardless of whether they were enacted before or after the provisions of sections 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."); 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/>.

<sup>136</sup> See cases cited *supra* notes 67, 71–74 and accompanying text.

<sup>137</sup> See cases cited *supra* note 134; cf. *National Federation Independent Business v. Sebelius*, 567 U.S. 519, 557 (2012) ("Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States."); *New York v. Miln*, 36 U.S. 102, 139–41 (1837) (finding state head taxes on immigrants constitutional), overruled by *Edwards v. California*, 314 U.S. 160, 177 (1941) (extending a fundamental right to immigrate between the states); cf. CAL. CONST. art. I, § 11 ("Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion.").

<sup>138</sup> Compare *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969–71 (2020), with *Jennings v. Rodriguez*, 138 S. Ct. 830, 850 (2018), and *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

<sup>139</sup> See *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (overruling an express repeal of § 2241 as a suspension of the writ of habeas corpus), extending *INS v. St. Cyr*, 533 U.S. 289, 305 n.25 (2001) ("In fact, § 2241 descends directly from § 14 of the Judiciary Act of 1789 and the 1867 Act. Its text remained undisturbed by either AEDPA or IIRIRA.") (citation omitted).

overruled a law that violated the Suspension Clause resulting in orders that several foreign nationals held in a foreign country must be released.<sup>140</sup>

Furthermore, recent habeas decisions on the topic of immigration habeas corpus arose under *Zadvydas*' due process grounds, and distinguished *Boumediene*.<sup>141</sup> The *Thuraissigiam* Court limited its decision such that it does not cover future petitions that assert actual or qualified release under *Boumediene*.<sup>142</sup> Indeed, the consternation expressed in *Thuraissigiam* seemed to derive from a feeling that Article III Courts were not equipped to oversee administrative proceedings.<sup>143</sup>

Asking for review of jurisdiction-stripping legislation under the Suspension Clause totally avoids these concerns.<sup>144</sup> If the Court reaches a determination that a statute acts as a suspension of the writ, then it must overrule the statute under *Boumediene* and allow the writ to run under preexisting law.<sup>145</sup> If this occurred, the Judiciary Act of 1789, which is still a good law and was

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<sup>140</sup> *Boumediene*, 553 U.S. at 787 (“We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner’s release.”), followed by *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198–99 (D.D.C. 2008) (“ORDERED that Respondents are directed to take all necessary and appropriate diplomatic steps to facilitate the release of Petitioners Lakhdar Boumediene, Mohamed Hechla, Hadj Boudella, Mustafa Ait Idir, and Saber Lahmar forthwith.”), *rev’d in part by Bensayah v. Obama*, 610 F.3d 718, 727 (D.C. Cir. 2010) (remanding to the district court to reconsider also releasing the sixth petitioner); *Bensayah v. Obama*, No. 1:04–1166, 2014 WL 395693, at \*1 (D.D.C. Feb. 3, 2014) (“On December 5, 2013, Bensayah was transferred from Guantanamo to the custody of the Government of Algeria, effectively mooting his habeas request. . . . ORDERED that petitioner’s case is DISMISSED as moot.”).

<sup>141</sup> See, e.g., *Thuraissigiam*, 140 S. Ct. at 1982–83 (citing *Zadvydas*, 533 U.S. at 693); *Jennings*, 138 S. Ct. at 850; see cases at *supra* note 26.

<sup>142</sup> *Thuraissigiam*, 140 S. Ct. at 1975 (distinguishing *Boumediene* based on the fact that Mr. *Thuraissigiam* did not “seek[] release from custody”) (emphasis in original).

<sup>143</sup> *Id.* at 1963, 1969, 1971, 1977 (“Habeas has traditionally been a means to secure *release* from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country.”) (emphasis in original).

<sup>144</sup> *Id.* at 1975 (citing *Boumediene*, 553 U.S. at 779 (emphasizing the adaptability of the writ)); compare *Zadvydas*, 533 U.S. at 693 (limiting due process review for immigrants who physically enter the United States by maintaining a fiction that they did not somehow enter the United States), with *Boumediene*, 553 U.S. at 771 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.” (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 564 (2004) (Scalia, J., dissenting))).

<sup>145</sup> *Boumediene*, 553 U.S. at 732–33; cf. *St. Cyr*, 533 U.S. at 305 (noting the reasons why the Suspension Clause required *Boumediene*'s eventual holding).



never repealed, could prove useful under *Boumediene*'s "constitutional minimum."<sup>146</sup>

Furthermore, the constitutional minimum mandated by *Boumediene* under the force of *Marbury v. Madison*,<sup>147</sup> was already asserted in the seminal decision *Ex parte Bollman* to release immigrants into the United States.<sup>148</sup> Eric Bollman was world famous for assisting Lafayette's escape from a German prison prior to immigrating to the United States.<sup>149</sup> Thus, Chief Justice Marshall likely found it particularly fitting when he established Bollman's name as synonymous with habeas corpus in America.<sup>150</sup>

The *Bollman* Court did not consider Bollman's immigrant status or his fundamental right to enter the United States as relevant when it quashed deportation orders issued by President Jefferson against Bollman and his compatriots.<sup>151</sup> Rather, the Court acted swiftly to release Bollman into the country.<sup>152</sup> In so doing, the Court also signaled the illegality of Jefferson's attempt to hold the Louisiana Territory under martial law.<sup>153</sup>

As in *Young*, if the Court decided to extend *Bollman* to release immigrants held in federal detention facilities, the new holding may be repeated in short form across the gamut.<sup>154</sup> The consternation felt in making *Young* was

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<sup>146</sup> *Boumediene*, 553 U.S. at 746 (quoting *St. Cyr*, 533 U.S. at 300–01); see, e.g., Dimitri D. Portnoi, *Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. REV. 293, 296 (2008).

<sup>147</sup> *Boumediene*, 553 U.S. at 765 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

<sup>148</sup> *Ex parte Bollman*, 8 U.S. 75, 105 (1807) (quoting Judiciary Act of 1789, 1 Stat. 73, § 14); see *Boumediene*, 553 U.S. at 787 ("We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.").

<sup>149</sup> See James Wesley Baker, *The Imprisonment of Lafayette*, AM. HERITAGE (June 1977), <https://www.americanheritage.com/imprisonment-lafayette>.

<sup>150</sup> See, e.g., *Ex parte Milligan*, 71 U.S. 2, 110 (1866) (citing *Bollman*, 8 U.S. at 75).

<sup>151</sup> *Bollman*, 8 U.S. at 136, quashing Letter from Thomas Jefferson to James Wilkinson (Feb. 3, 1807), <https://founders.archives.gov/documents/Jefferson/99-01-02-5012>, and Letter from Thomas Jefferson to William C.C. Claiborne (Feb. 3, 1807), <https://founders.archives.gov/documents/Jefferson/99-01-02-5008>; cf. *Henfield's Case*, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) ("Emigration is, undoubtedly, one of the natural rights of man."); Paul Sweet, *Erich Bollmann at Vienna in 1815*, 46 AM. HIST. REV. 580, 582, 586 (1941) (explaining how and why "Bollmann cut loose from the United States," and did not return after defeating Jefferson in court).

<sup>152</sup> *Bollman*, 8 U.S. at 136 ("[T]he crime with which the prisoners stand charged has not been committed, the Court can only direct them to be discharged.").

<sup>153</sup> *Id.*; cf. ARTHUR JAMES WEISS, *THE SWARTWOUT CHRONICLES* 325 (1899) ("Martial law was proclaimed.").

<sup>154</sup> See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123 (1908)).

only experienced once for all time's sake.<sup>155</sup> *Thuraissigiam* itself reiterated *Boumediene*'s constitutional minimum and cited to *Bollman* as an example of habeas corpus "as it existed in 1789," so *Thuraissigiam* cannot stand in the way.<sup>156</sup>

Despite *Zadvydas*'s recent nullification, *Boumediene* remains a viable avenue for immigrant relief under 28 U.S.C. § 2241.<sup>157</sup> As long as the Court is dedicated to upholding the long line of precedent requiring a constitutional minimum of habeas review "as it existed in 1789," the Suspension Clause should be an open opportunity for immigrants.<sup>158</sup> It will remain more stable than cost/benefit balancing tests, especially after they were rendered ineffective several times in recent cases like *Thuraissigiam*, *Arteaga-Martinez*, *Aleman Gonzalez*, *Egbert*, *Vega*, *Bruen*, *Dobbs*, *Castro-Huerta*, *Kennedy v. Bremerton School District*, *West Virginia v. EPA*, and *Biden v. Texas*.<sup>159</sup>

In summation, liberal cost/benefit balancing tests are being overruled or set aside by conservative cost/benefit balancing tests. The Court appears satisfied to "us[e] liberal-progressive tactics against liberalism," rather than opposing balancing tests on apolitical principles.<sup>160</sup> This strategy can only reverse previous interpretations of the Due Process Clause, leaving Suspension Clause jurisprudence wholly distinguishable, and fair game in future habeas suits.

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<sup>155</sup> *Id.*

<sup>156</sup> *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969 n.12 (2020) (citing U.S. CONST. art. I, § 9, cl. 2; *Boumediene v. Bush*, 553 U.S. 723, 746-47 (2008); *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *Bollman*, 8 U.S. at 95) ("[T]he [Suspension] Clause, at a minimum, 'protects the writ as it existed in 1789.'").

<sup>157</sup> *Boumediene*, 553 U.S. at 732-33 (overruling an express repeal of § 2241 habeas jurisdiction under the Suspension Clause); *cf.* *St. Cyr*, 533 U.S. at 305 (refusing to imply a repeal of § 2241 habeas jurisdiction); *Hamdan v. Rumsfeld*, 548 U.S. 557, 573-76 (2006) (refusing to imply a repeal of § 2241 habeas jurisdiction); *Rasul v. Bush*, 542 U.S. 466, 473-74 (2004) (refusing to imply a repeal of § 2241 habeas jurisdiction).

<sup>158</sup> See U.S. CONST. art. I, § 9, cl. 2; *Boumediene*, 553 U.S. at 746, extending *St. Cyr*, 533 U.S. at 307 ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"); *Boumediene*, 553 U.S. at 732-33 (overruling an express repeal of § 2241 as a suspension of the writ of habeas corpus), extending *St. Cyr*, 533 U.S. at 305 ("In fact, § 2241 descends directly from § 14 of the Judiciary Act of 1789 and the 1867 Act. . . . [i]ts text remained undisturbed by either AEDPA or IIRIRA."). The basis of this minimum traces back through *Felker v. Turpin* to *Ex parte Yerger*. *Felker v. Turpin*, 518 U.S. 651, 659 (1996) (citing *Ex parte Yerger*, 75 U.S. 85, 87-89, 104 (1868)).

<sup>159</sup> See cases cited *supra* notes 94-96; *cf.* *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2525-26 (2022) (Gorsuch, J. dissenting) ("This Court has no business usurping congressional decisions about the appropriate balance between federal, tribal, and state interests. . . . Additionally, nothing in the 'Braker balancing' test the Court employs foreordains today's grim result for different Tribes in different States.").

<sup>160</sup> Logan Stagg Istre, *Theodore Roosevelt and the Case for a Popular Constitution*, 4 AM. AFFS. 191 (2020), <https://americanaffairsjournal.org/2020/08/theodore-roosevelt-and-the-case-for-a-popular-constitution/>; Schroeder, *Conservative*, *supra* note 114, at 51 n.13.

## PART III: WHY COST/BENEFIT BALANCING TESTS DON'T EXIST

Cost/benefit balancing tests seemed to self-destruct when *DHS v. Thuraissigiam* cited *Landon's* dicta as a holding in order to deny immigrants access to a *Landon* balancing test.<sup>161</sup> The chaotic and unpredictable nature of cost/benefit balancing tests, including their propensity to destroy themselves over time, does not make them cease to exist.<sup>162</sup> But there is an area of burgeoning research that arguably caused cost/benefit balancing tests to slip into a void of nonexistence.<sup>163</sup>

In 2002, Israeli American psychologist Daniel Kahneman won the Nobel Prize for his work with Amos Tversky unsettling rationalism, especially hedonic

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<sup>161</sup> *Thuraissigiam*, 140 S. Ct. at 1982 (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)). Several examples of how balancing tests self-destruct have become apparent after *Thuraissigiam*, including *NYSRPA v. Bruen*, 142 S. Ct. 2111, 2131 (2022), which gutted the state's power to regulate guns under an idea that the Second Amendment itself is the product of interest balancing, and *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2236, 2257, 2264–65, 2278 (2022), which overruled *Roe v. Wade* and *Casey* for balancing interests by nonetheless asserting a newly fashioned five-factor balancing test to decide whether to overrule cases going forward, as well as *Egbert v. Boule*, 142 S. Ct. 1793, 1805 (2022), which rejected a *Ziglar* two-step balancing test based on *Mathews v. Eldridge* to instead assert a new one-step pro-government balancing test in the name of *Ziglar* and *Mathews*, and finally *Vega v. Tekoh*, 142 S. Ct. 2095, 2106–07 (2022), which balanced away the court's jurisdiction to hear suits alleging *Miranda* warning violations under § 1983. Examples of this kind of judicial behavior are presently intensifying and proliferating in an almost whimsical way, cannot easily be tracked with completeness, and are, in short, broadening to an extreme never seen before in America. See, e.g., *Castro-Huerta*, 142 S. Ct. at 2501 (using a balancing test to unsettle over 200 years of precedent symbolized by *Worcester v. Georgia*—a case that expounded the founders' concept of Native American sovereignty in order to decide that Georgia sending the Cherokee down the Trail of Tears was illegal, unjust, and precluded by the federal constitution, as well as treaties with and laws regarding the sovereign Cherokee people—by unsettling *McGirt v. Oklahoma*, which was decided only two years prior); *id.* at 2518 (Gorsuch, J., dissenting) (“[T]he Court makes no effort to grapple with the backdrop rule of tribal sovereignty.”); *id.* at 2521 (Gorsuch, J., dissenting) (lamenting the Court's assertion of “raw power to ‘balance’ away tribal sovereignty”).

<sup>162</sup> *Dobbs*, 142 S. Ct. at 2236, 2257, 2264–65, 2278 (overruling *Roe* and *Casey's* interest-balancing test, and adopting a new five-factor balancing test that could potentially be extended to supplant or ironically overrule common law *stare decisis* as it was understood for the past several centuries); *Bruen*, 142 S. Ct. at 2131 (rejecting “interest balancing” tests by asserting the superior interest balancing test embodied the Second Amendment as “the very *product* of an interest balancing by the people” (internal quotation marks omitted)); *Thuraissigiam*, 140 S. Ct. at 1982 (quoting *Landon*, 459 U.S. at 32); cf. Cass R. Sunstein, *Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 UNIV. CHI. L. REV. 1895, 1908 (2007) [hereinafter Sunstein, *Cost-Benefit*] (complaining about this reality, and yet still advocating for the application of cost/benefit balancing tests).

<sup>163</sup> See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 377–78, 381 (2011) [hereinafter KAHNEMAN, THINKING] (ruining hedonic rationalism); MICHAEL LEWIS, THE UNDOING PROJECT 261, 266, 272–73, 277 (2016) (“[E]xpected utility theory is wrong.”).

rationalism, also known as utilitarianism.<sup>164</sup> Hedonic rationalism or utilitarianism is premised on the idea that human beings inherently understand pain and pleasure.<sup>165</sup> Specifically, it requires that human beings can inherently remember how much pain and/or pleasure past experiences caused so they can correctly order their future choices.<sup>166</sup>

Through years of rigorous study, Kahneman and Tversky demonstrated that human beings do not inherently remember experiences of pain and pleasure accurately.<sup>167</sup> Humans are prone to misremember and inaccurately rank experiences of pain and pleasure.<sup>168</sup> This results in our general inability to know exactly what decision will cause the most pleasure and the least pain, requiring us to engage in secondary strategies to reason what action is most utilitarian.<sup>169</sup>

The founder of modern utilitarianism, Jeremy Bentham, promulgated cost/benefit balancing tests that he lifted from Hobbes and the Puritans.<sup>170</sup> Bentham's system depended on humanity's inherent ability to weigh pain versus pleasure, costs versus benefits, i.e., hedonic rationalism.<sup>171</sup> This should be fatal for Benthamite utilitarianism because Kahneman and Tversky demonstrated that hedonic rationalism is simply not baked into the stuff of humanity and, that any

<sup>164</sup> KAHNEMAN, THINKING, *supra* note 163, at 377–78, 381; LEWIS, *supra* note 163, at 295 (noting Amos Tversky's observation that “the economists felt that we are right and at the same time they wished we weren't because the replacement of utility theory by the model we outlined would cause them no end of problems”); *cf.* Daniel Kahneman, *Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice*, NOBEL PRIZE LECTURE, 459 (Dec. 8, 2002), <https://www.nobelprize.org/uploads/2018/06/kahnemann-lecture.pdf> [hereinafter Kahneman, *Maps*] (“The impossibility of invariance raises significant doubts about the descriptive realism of rational-choice models . . .”).

<sup>165</sup> 1 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1–2 (1823) [hereinafter BENTHAM, AN INTRODUCTION]; *cf.* KAHNEMAN, THINKING, *supra* note 163, at 377–78, 381 (debunking Benthamite rationalism).

<sup>166</sup> 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2; *cf.* KAHNEMAN, THINKING, *supra* note 163, at 377–78, 381 (debunking Benthamite rationalism).

<sup>167</sup> KAHNEMAN, THINKING, *supra* note 163, at 381 (“The remembering self is sometimes wrong, but it is the one that keeps score and governs what we learn from living, and it is the one that makes decisions. What we learn from the past is to maximize the qualities of our future memories, not necessarily of our future experience. This is the tyranny of the remembering self.”).

<sup>168</sup> *Id.* at 378–81.

<sup>169</sup> *Id.*; *cf.* Kahneman, *Maps*, *supra* note 164, at 473 (“Because the intuitive impression comes first, it is likely to serve as an anchor for subsequent adjustments, and corrective adjustments from anchors are normally insufficient.”).

<sup>170</sup> SCHOFIELD, *supra* note 13, at 241; *cf.* 4 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., 1843) [hereinafter BENTHAM, THE WORKS] (explaining his inspiration was the Puritan dictator Oliver Cromwell); James E. Crimmins, *Bentham and Hobbes: An Issue of Influence*, 63 J. HIST. IDEAS 677, 678–79 (2002).

<sup>171</sup> 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2.

system that presupposes that it is, will likely fail to maximize pleasure and minimize pain.<sup>172</sup>

Nevertheless, after Tversky's death, Kahneman developed a close friendship with Cass R. Sunstein, a cost/benefit balancer.<sup>173</sup> Sunstein and Kahneman even wrote a book together that suggested that human beings should continue using cost/benefit balancing tests applied through "noiseless" computer algorithms.<sup>174</sup> Kahneman's alliance with a modified hedonic rationalist demonstrated that even Kahneman is subject to an irrational slant, with a blind eye toward Benthamite, hedonic rationalism.<sup>175</sup>

Sunstein is a bureaucrat, *not* a psychologist.<sup>176</sup> Sunstein served as head of the Office of Information and Regulatory Affairs ("OIRA") for most of President Obama's first term.<sup>177</sup> As the administrator of OIRA, Sunstein made enemies of liberals in the Democratic Party for several reasons including: (1) using cost/benefit analyses to encourage global warming and inhumane

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<sup>172</sup> See KAHNEMAN, THINKING, *supra* note 163, at 411 ("Although Humans are not irrational, they often need help to make more accurate judgments and better decisions, and in some cases polices and institutions can provide that help.").

<sup>173</sup> CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 22–23, 72, 108 (2018) [hereinafter SUNSTEIN, THE COST]; see also RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: THE FINAL EDITION 166–68, 312, 331 (2021); cf. KAHNEMAN, THINKING, *supra* note 163, at 412 (appearing to approve of Sunstein's work).

<sup>174</sup> KAHNEMAN, NOISE, *supra* note 74, at 224 (paradoxically suggesting that costs and benefits should still be measured even though Bentham's premise that utility is an inherent sort of rational knowledge human beings possess is entirely disproven); *id.* at 123–24 ("sophisticated and impenetrable machine algorithms, can outperform human judgment"); *id.* at 377 ("Imagine . . . us[ing] algorithms either to replace human judgment or to supplement it . . . . Our aim in writing this book has been to draw attention to this opportunity. We hope that you will be among those who seize it."). In the immigration system such algorithmic, noiseless "improvements are possible but that some cures would be worse than the disease." RAMJI-NOGALES & SCHRAG, *supra* note 74, at 5–6, 97 ("[T]he cure of a quota system would be worse than the disease of random adjudication.").

<sup>175</sup> KAHNEMAN, NOISE, *supra* note 74, at 224; Daniel Kahneman, Peter P. Wakker & Rakesh Sarin, *Back to Bentham? Explorations of Experienced Utility*, 112 Q.J. ECON. 375, 397 (1997) [hereinafter Kahneman, *Back*] (suggesting that "experienced utility" can be "a measure of outcomes [that] turns utility maximization into an empirical proposition, which will probably be found to provide a good approximation to truth in many situations"); cf. Amanda Perreau-Saussine, *Bentham and the Boot-Strappers of Jurisprudence: The Moral Commitments of a Rationalist Legal Positivist*, 63 CAMBRIDGE L.J. 346, 348 (2004) (noting Bentham was a rationalist, *not* an empiricist).

<sup>176</sup> Helen G. Boutrous, *Regulatory Review in the Obama Administration: Cost-Benefit Analysis for Everyone*, 62 ADMIN. L. REV. 243, 244, 253–54 (2010); cf. KAHNEMAN, THINKING, *supra* note 163, at 412 (calling Sunstein a "jurist").

<sup>177</sup> Mike Allen, *Sunstein Returning to Harvard*, POLITICO (Aug. 3, 2012, 7:40 AM), <https://www.politico.com/story/2012/08/sunstein-returning-to-harvard-079347>.

treatment of the elderly;<sup>178</sup> (2) seriously endorsing a new wave of Bernaysian government propaganda programs;<sup>179</sup> and (3) being a “repetitious bore” that suffers from mental “laziness” and “fogginess” and an acute “refusal to look deeply into the causes of historical change.”<sup>180</sup>

Likely due to these reasons, and perhaps others,<sup>181</sup> Sunstein’s time as the OIRA head was cut short.<sup>182</sup> When Biden won the presidency and overcame the Trump led insurrection of January 6, 2021, progressive warnings from outfits like *The American Prospect* went largely unnoticed.<sup>183</sup> Ignoring these warnings,

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<sup>178</sup> Tom Hamburger & Christi Parsons, *Obama Pick Comes Under Scrutiny*, L.A. TIMES (Jan. 26, 2009), <https://www.latimes.com/archives/la-xpm-2009-jan-26-na-sunstein26-story.html> (“Sunstein . . . reiterated his belief in ‘defending a strong regulatory state.’ . . . But environmental activists say his published views on cost-benefit analysis are more aligned with what they would expect from a George W. Bush or Ronald Reagan appointee.” Sunstein also “embraced a controversial ‘senior death discount’ that calculates the lives of younger people as having a greater value than those of the elderly.”).

<sup>179</sup> Glenn Greenwald, *Obama Confidant’s Spine-Chilling Proposal*, SALON (Jan. 15, 2010, 1:16 PM), [https://www.salon.com/2010/01/15/sunstein\\_2/](https://www.salon.com/2010/01/15/sunstein_2/) (“Covert government propaganda is exactly what Sunstein craves.”), referring to Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202, 224–25 (2009) (“We suggest a role for government efforts, and agents, in introducing cognitive diversity. Government agents (and their allies) might enter chat rooms, online social networks, or even real-space groups and attempt to undermine percolating conspiracy theories by raising doubts about their factual premises, causal logic, or implications for action, political or otherwise.”). Sunstein’s work was also recently cited favorably in the Court’s controversial Second Amendment decision in *NYSRPA v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993) [hereinafter Sunstein, *On Analogical*]).

<sup>180</sup> Aaron Timms, *The Sameness of Cass Sunstein*, NEW REPUBLIC (June 20, 2019), <https://newrepublic.com/article/154236/sameness-cass-sunstein>.

<sup>181</sup> Boutros, *supra* note 176, at 259 (“Justice Sotomayor and Professor Sunstein have sharply contrasting views of the value and meaning of cost-benefit analysis . . . . [Sunstein] holds views closer to those of Justice Scalia than to the views of Justice Sotomayor, President Obama’s first appointee to the Supreme Court.”); *Justice Delayed: The Human Cost of Regulatory Paralysis*, Hearing before the Subcommittee on Oversight, Federal Rights and Agency Action of the Committee on the Judiciary, 113th Cong. 26 (2013) (statement of Peg Seminario, Director of Safety and Health, AFL-CIO); Jonathan Stein, *Cass Sunstein: A Supreme Court Non-Starter?*, MOTHER JONES (Apr. 9, 2009), <https://www.motherjones.com/politics/2009/04/obamas-regulatory-czar-radical-animal-rights-activist/>.

<sup>182</sup> Jeffrey Zients, *A Regulatory Reformer Leaves His Mark*, WHITE HOUSE BLOG (Aug. 3, 2012, 8:29 AM), <https://obamawhitehouse.archives.gov/blog/2012/08/03/regulatory-reformer-leaves-his-mark>.

<sup>183</sup> Robert Kuttner, *Red Alert: The Return of Cass Sunstein*, THE AM. PROSPECT (Jan. 29, 2021), <https://prospect.org/blogs/tap/red-alert-the-return-of-cass-sunstein/>; Miranda Litwak, *Progressives Vehemently Object to Cass Sunstein’s Plans to Return to Government*, REVOLVING DOOR PROJECT PROJ. (Jan. 29, 2021), <https://therevolvingdoorproject.org/progressives-vehemently-object-to-cass-sunsteins-plans-to-return-to-government/>; Celia Wexler, *Who’s Afraid of Cass Sunstein?: Progressives Want to Make Sure that Sunstein Doesn’t Return to Power in the Biden Administration*, BLUE TENT (Feb. 5, 2021, 10:02 AM), <https://bluetent.us/articles/governing/cass-sunstein-biden-white-house-oira/>.

Biden hired Sunstein as senior counselor at DHS, where Sunstein continues to lead Biden's failed efforts to roll back Trump's immigration policies.<sup>184</sup>

Hiring a conservative like Sunstein to do a progressive's job was destined for failure.<sup>185</sup> In fact, it now seems that President Biden tapped Cass R. Sunstein to expand Stephen Miller's Trump-era policies, while only making it *seem* as if they were being rolled back.<sup>186</sup> Sunstein was the perfect pick for this job, because he had already convinced us that he was a liberal progressive inspired by Kahneman and Tversky, when the reality was quite the opposite.<sup>187</sup>

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<sup>184</sup> Rebecca Beitsch, *Biden Relies on Progressive Foe to Lead Immigration Rollbacks*, THE HILL (Apr. 7, 2021, 6:00 AM), <https://thehill.com/policy/national-security/546827-biden-relies-on-progressive-foe-to-lead-immigration-rollbacks>.

<sup>185</sup> *Id.*; Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J.L. STUD. 1059, 1059–60 (2000) [hereinafter Sunstein, *Cognition*] (disagreeing with then Senator Biden's accusation of soon to be Justice Stephen Breyer of presumptuousness and elitism for endorsing cost/benefit analyses); Timms, *supra* note 171; Boutros, *supra* note 176, at 259; Hamburger & Parsons, *supra* note 169; see Cass R. Sunstein, *Five Books to Change Liberals' Minds*, BLOOMBERG OPINION (Oct. 11, 2016, 5:00 AM), <https://www.bloomberg.com/opinion/articles/2016-10-11/five-books-to-change-liberals-minds> [hereinafter Sunstein, *Five*] (presenting his reading list as a conservative Democrat for the express purpose of making Democrats more conservative).

<sup>186</sup> Beitsch, *supra* note 184; *The Reimplementation of MPP is Betrayal of President Biden's Campaign Promises*, AM. IMMIGR. COUNCIL (Oct. 15, 2021), <https://www.americanimmigrationcouncil.org/news/reimplementation-mpp-betrayal-president-biden%E2%80%99s-campaign-promises>; Ryan Bort, *Biden Channels Stephen Miller to Deport Haitian Asylum Seekers*, ROLLING STONE (Sept. 21, 2021, 11:38 AM), <https://www.rollingstone.com/politics/politics-news/biden-administration-title-42-haitian-refugee-expulsions-1229299/>.

<sup>187</sup> Jonathan Blitzer, *Why Biden Refused to Pay Restitution to Families Separated at the Border*, NEW YORKER (Dec. 22, 2021), <https://www.newyorker.com/news/news-desk/why-biden-refused-to-pay-restitution-to-families-separated-at-the-border> (“The worst part is that Biden has said over and over what he thinks is right; then he chooses to do something else entirely.”); Luis Chaparro, *Families Trapped at the Border Say Biden Has Betrayed Them*, DAILY BEAST (Mar. 17, 2021, 12:05 PM), <https://www.thedailybeast.com/families-trapped-at-the-border-say-biden-has-betrayed-them>.

Sunstein maintains a long record of obstinately ignoring Kahneman and Tversky's research, resulting in completely tone-deaf policies based on old information from the long dead New Deal era.<sup>188</sup> Sunstein's successful efforts to charm himself into the good graces of Kahneman and Thaler does not change the fact that Sunstein's claims about cost/benefit balancing tests were undermined by Kahneman and Tversky's research.<sup>189</sup> While swearing he would *never*, Sunstein always defended the status quo by gilding the lily of the researchers that threatened it most.<sup>190</sup>

Kahneman and Tversky's discovery is a tectonic shift in economics, arguably destroying Milton Friedman's *laissez-faire* rationale.<sup>191</sup> However,

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<sup>188</sup> Sunstein, *Cognition*, *supra* note 185, at 1065 was undermined by KAHNEMAN, THINKING, *supra* note 163, at 377–78, 381, even while Sunstein later claimed to base his technocratic cost/benefit balancing systems upon Kahneman and Tversky's research in THALER & SUNSTEIN, *supra* note 173, at 26 (arguing that their system is supported by, rather than subverted by, an insight made “by two of our heroes, the psychologists Daniel Kahneman and Amos Tversky”), which was later lauded by Kahneman in KAHNEMAN, THINKING, *supra* note 163, at 412 after Tversky's death, and without confirming it actually comported with Kahneman and Tversky's research. Cf. Peter L. Strauss, *Sunstein, Statutes, and the Common Law—Reconciling Markets, the Communal Impulse, and the Mammoth State*, 89 MICH. L. REV. 907, 911 (1991) (reviewing a book Sunstein wrote that was premised upon New Deal era ideology).

<sup>189</sup> Cass R. Sunstein, *Governing by Algorithm? No Noise and (Potentially) Less Bias*, 71 DUKE L.J. 1175, 1180 (2022) [hereinafter Sunstein, *Governing*]; KAHNEMAN, NOISE, *supra* note 74, at 123–24, 333–34, 341.

<sup>190</sup> See, e.g., Strauss, *supra* note 188, at 911 (“Sunstein's book presents an argument for the status quo”); compare THALER & SUNSTEIN, *supra* note 173, at 36–38 (explaining status quo bias), with *id.* at 40–45 (gilding Kahneman and Tversky's lily, meaning that this passage decorated that which was already beautiful), and *id.* at 166–68, 312, 331 (defending the status quo of cost/benefit balancing tests virtually unchanged by Kahneman & Tversky's research). Most people, including Michael Lewis, took Sunstein at his word that he was following, rather than contradicting, Kahneman & Tversky's theories. See, e.g., LEWIS, *supra* note 163, at 342–43. Sunstein's timing for adopting a focus on Kahneman and Tversky *after* Tversky's death was impeccable, because as Michael Lewis described, Tversky was the personality who would have vigorously checked Sunstein for his endorsement of the cost/benefit balancing heuristics Tversky and Kahneman disproved, while Kahneman would be much more interested in befriending Sunstein to see if “the man might be in the grip of some mind-warping emotion” and to attempt “a sit down together” to see if Kahneman “might lead him to reason.” *Id.* at 336. Kahneman also famously undervalued and underestimated the value and reach of his own research. *Id.* at 286 (“Danny, for his part, claimed that it wasn't until 1976 that he woke up to the effects their theory might have on a field he knew nothing about. His awakening came when Amos handed him a paper written by an economist. The paper opened, ‘The agent of economic theory is rational, selfish, and his tastes do not change.’ The economists at Hebrew University were in the building next door, but Danny hadn't paid any attention to their assumptions about human nature. ‘To me, the idea that they really believed in it—that this is really their worldview—was incredible.’”).

<sup>191</sup> KAHNEMAN, THINKING, *supra* note 163, at 411–12. Kahneman expressly noted how his studies subverted Milton Friedman's version of *laissez-faire* economics that was earlier asserted in ADAM SMITH, THE WEALTH OF NATIONS 485 (Edwin Cannan ed., 1937) [hereinafter SMITH, THE WEALTH] (asserting the inherent rationality of humankind by positing “an invisible hand” of rational self-interest), and arguably also in JOHN MAYNARD KEYNES, THE END OF LAISSEZ-FAIRE



Kahneman and Tversky's effect is not limited to economics, as the basic presupposition they disproved, i.e., that humans are inherently rational, underlies utilitarian ethics,<sup>192</sup> Puritanical religion,<sup>193</sup> and eugenics.<sup>194</sup> So too, Kahneman and Tversky's studies must be recognized as undoing the very existence of cost/benefit balancing tests in American courts.<sup>195</sup>

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20 (1926) (dismissing “the economic dogma of *laissez-faire*” but preserving and secularizing Smith’s “famous passage about ‘the invisible hand’”).

<sup>192</sup> 3 BENTHAM, THE WORKS, *supra* note 170, at 19 (attempting “to make good the general principle, that *no man of ripe years and of sound mind, ought, out of loving-kindness to him, to be hindered from making such bargain in the way of obtaining money, as, acting with his eyes open, he deems conducive to his interest*”) (emphasis in original), *unsettled by* KAHNEMAN, THINKING, *supra* note 163, at 411–12; *cf.* Jeremy Bentham, *The Book of Fallacies*, in 2 BENTHAM, THE WORKS, *supra* note 170, at 482 (“In every human breast . . . self-regarding interest is predominant over social interest: each person’s own individual interest, over the interests of all other persons taken together.”), *unsettled by* KAHNEMAN, THINKING, *supra* note 163, at 411–12.

<sup>193</sup> MILTON, *supra* note 12, at ls. 865–68. John Milton attempted to warn men from ever having sex with women because, in the end, women (represented by Dalila) will betray men by using a rational cost/benefit balancing test to decide what is in their best interest instead of remaining loyal according to the emotion of love, but this was unsettled by KAHNEMAN, THINKING, *supra* note 163, at 411–12, which shows that human beings are far more compliant with their emotions including love than cold, Machiavellian rationalizations. Similarly, several Puritanical treatises appealed to human reason to justify the hunting and hanging of witches. *See* JOSEPH GLANVIL & HENRY MORE, SADUCISMUS TRIUMPHATUS 78 (1681) (asserting that humans are inherently “rational Creature[s],” and that sin and Satan worked to destroy his inherent, natural access to reason); BENJAMIN COLMAN, GOD DEALS WITH US AS RATIONAL CREATURES: AND IF SINNERS WOULD BUT HEARKEN TO REASON THEY WOULD REPENT 3–4 (1722) (“*HE made us rational creatures.*”); COTTON MATHER, MEMORABLE PROVIDENCES, RELATING TO WITCHCRAFTS AND POSSESSIONS 2, 14 (1689) (calling witches and demons “a *spiritual* and a *rational* substance”). Kahneman appears to suggest that any such appeal to individual reason is disproven, groundless, and irrational. *See* KAHNEMAN, THINKING, *supra* note 163, at 411–12; *cf.* Peter Harrison, *Adam Smith and the History of the Invisible Hand*, 72 J. HIST. IDEAS 29, 37 (2011) (noting that rational self-interest adopted by the economic models of Bentham and Smith were originally developed by the Puritans).

<sup>194</sup> Famed eugenicist Harry Laughlin claimed a “rational purpose behind” eugenic vasectomies and that since they were reasonable, they could not be a cruel and unusual punishment. LAUGHLIN, *supra* note 13, at 123. Furthermore, Laughlin argued that allowing disabled persons to exist freely in society would be “a crime against society” such that imprisoning them and sterilizing them “is the only *rational* course left open.” *Id.* at 294 (emphasis added). He characterized eugenics “as a rational and undoubted protection to society” in order to conclude that it does not “violate our constitutional guarantee.” *Id.* at 327. But Kahneman and Tversky’s research proved that human beings cannot know exactly what course will secure our future interests through individual reason alone. KAHNEMAN, THINKING, *supra* note 163, at 411–12.

<sup>195</sup> Kahneman and Tversky’s research unsettled the use of a cost/benefit balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976), and other sources that attempted to use individual reason to vindicate the *Mathews* cost/benefit balancing approach. *E.g.*, Sunstein, *Cognition*, *supra* note 176, at 1065, 1087–88. Kahneman and Tversky’s research proved that human beings, including judges, cannot automatically perceive the actual costs and benefits of certain courses of action through reason alone. KAHNEMAN, THINKING, *supra* note 163, at 411–12; *cf.* LEWIS, *supra* note 163, at 278 (noting Amos Tversky’s observation that “the economists felt that we are right and at the same time they wished we weren’t because the replacement of utility theory by the model

Individuals cannot measure facts and circumstances accurately in terms of pain or pleasure, and therefore they cannot accurately balance costs and benefits.<sup>196</sup> In so much as Cass R. Sunstein thought weighing costs and benefits would inherently solve legal problems as “a natural corrective,” he was objectively disproven.<sup>197</sup> Sunstein may yet search out the old common law strategies for adhering to “the golden and sacred rule of reason,” since Kahneman and Tversky’s research already confirmed that cost/benefit balancing ideas failed the test of time,

“Sapientissima res tempus,” says the profound Lord Bacon, in one of his aphorisms concerning the augmentation of the sciences—Time is the wisest of things. If the qualities of the parent may, in any instance, be expected in the offspring; the common law, one of the noblest births of time, may be pronounced the wisest of laws.<sup>198</sup>

Unfortunately, Sunstein never accessed this wing of legal precedent and ancient literature, and rather asserted a legal positivist definition for the common law.<sup>199</sup> Legal positivists do not believe in a common law developed through time and community involvement, rather, they believe that when people say “common law” they mean potentially any judge-made law.<sup>200</sup> Cost/benefit balancers like Sunstein consistently supported this outlook, agreeing with problematic figures

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we outlined would cause them no end of problems”); *id.* at 281 (marking how Richard Thaler took a job “teaching cost-benefit analysis to business school students,” and that Thaler later asserted this was irrational).

<sup>196</sup> See Matthew D. Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 37 J.L. STUD. S253, S258–59 (2008) (“[W]ell-being reduces to pains and pleasures—to negative and positive affect.”).

<sup>197</sup> Sunstein, *Cognition*, *supra* note 185, at 1065.

<sup>198</sup> 2 JAMES WILSON, *COLLECTED WORKS OF JAMES WILSON* 749–50 (2007); *cf.* KAHNEMAN, *NOISE*, *supra* note 74, at 367 (“There is a limit to the accuracy of our predictions, and this limit is often quite low. Nevertheless, we are generally comfortable with our judgments. What gives us this satisfying confidence is an *internal signal*, a self-generated reward for fitting the facts of the judgment into a coherent story.”); *id.* at 373 (almost endorsing common law *stare decisis* when he said: “The average of a noisy group may end up being more accurate than a unanimous judgement.”).

<sup>199</sup> Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 956 (1995) [hereinafter Sunstein, *Problems*] (citing GERALD J. POSTEMA, *JEREMY BENTHAM AND THE COMMON LAW TRADITION* 403–13 (1986)); *see also* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 220–21 (1990) [hereinafter SUNSTEIN, *AFTER*].

<sup>200</sup> See, e.g., Scalia, *Common*, *supra* note 56, at 80 (“Holmes’s book is a paean to reason, and to the men who brought that faculty to bear in order to *create* Anglo-American law.” (citing OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881) (emphasis in original) [hereinafter HOLMES, JR., *THE COMMON*])).

like Scalia and Bentham; and Kahneman and Tversky's iconoclasm seems to have only caused these cost/benefit balancers to redouble their efforts.<sup>201</sup>

Meanwhile, 2021 Nobel laureate David Card supplied us with secondary, reliable means to understand the actual costs and benefits of immigration to the United States.<sup>202</sup> Card's counterintuitive research proved that the immigration of unskilled laborers does not create a cost to destination countries,<sup>203</sup> which was reconfirmed by Michael A. Clemens' study finding that Trump's anti-immigration policies cost the United States around \$11.1 billion *each year*.<sup>204</sup> This unsettles over a century of public charge based precedent and propaganda, and it buttresses Kahneman and Tversky's research that U.S. judges, like all humans, are inherently irrational.<sup>205</sup>

<sup>201</sup> LEWIS, *supra* note 163, at 342 (“Old economists never change their minds.” (internal quotation marks omitted)); *see* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (applying cost/benefit balancing), *extended by* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (denying an immigrant's due process rights); Sandra Day O'Connor, *They Often Are Half Obscure: The Rights of the Individual and the Legacy of Oliver W. Holmes*, 29 UNIV. SAN DIEGO L. REV. 385, 385–87 (1992) (quoting HOLMES, JR., *THE COMMON*, *supra* note 200, at 1); *id.* at 390–91 (quoting *Buck v. Bell*, 274 U.S. 200, 207 (1927)) (rehabilitating Holmes despite the injustice of using a cost/benefit balancing test in *Buck* and similar opinions); *see* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2257, 2264–65, 2270–71 (2022); NYSRPA v. Bruen, 142 S. Ct. 2111, 2131 (2022) (calling the Second Amendment “the very *product* of an interest balancing by the people” (internal quotation marks omitted)); *id.* at 2132 (quoting Sunstein, *On Analogical*, *supra* note 179, at 773); Vega v. Tekoh, 142 S. Ct. 2095, 2106–07 (2022); Egbert v. Boule, 142 S. Ct. 1793, 1805 (2022). *See also* Sunstein, *Problems*, *supra* note 199, at 956; Sunstein, *On Analogical*, *supra* note 179, at 765 (“Scalia's response is perhaps the best that can be offered.”); Boutros, *supra* note 176, at 259.

<sup>202</sup> Carlos Vargas-Silva, *David Card, the Academic Who Showed Us How to Estimate Impacts of Immigration, Wins Nobel Prize*, COMPAS (Nov. 10, 2021), <https://www.compas.ox.ac.uk/2021/david-card-the-academic-who-showed-us-how-to-estimate-the-impacts-of-immigration-wins-nobel-prize/>.

<sup>203</sup> David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 INDUST. & LAB. REL. REV. 245, 256 (1990) (“[T]his study shows that the influx of Mariel immigrants had virtually no effect on the wage rates of less-skilled non-Cuban workers . . . there is no evidence of an increase in unemployment.”); *see also* Vargas-Silva, *supra* note 202.

<sup>204</sup> Michael A. Clemens, *The Economic and Fiscal Effects on the United States from Reduced Numbers of Refugees and Asylum Seekers 2* (Ctr. For Glob. Dev., Working Paper No. 610, 2022), <https://www.cgdev.org/publication/economic-and-fiscal-effects-united-states-reduced-numbers-refugees-and-asylum-seekers> (the “missing refugees [caused by Trump's anti-immigration policies] cost the overall U.S. economy over \$9.1 billion *each year* . . . and cost the public coffers at all levels of government over \$2.0 billion *each year* . . .”).

<sup>205</sup> LEWIS, *supra* note 163, at 324–26 (“In overwhelming numbers doctors made the same [fatal error of logic] as undergraduates.”). The classic health and welfare police power based premises for the inherent, plenary power to exclude immigrants asserted in *Chae Chan Ping v. United States*, 130 U.S. 581, 608 (1889) (referring to state laws for “[t]he exclusion of paupers, criminals, and persons afflicted with incurable diseases” to justify the constitutionality of the Chinese Exclusion Act), that was originally drawn from the public charge doctrine established by *New York v. Miln*, 36 U.S. 102, 133 (1837) (affirming state laws that provided for the deportation of immigrants in order “to prevent them from becoming chargeable as paupers”), is unsettled by Card, *supra* note

Another way of putting Kahneman and Tversky's findings is that the future of humanity is inherently uncertain, and that, therefore, Justice Holmes was wrong to define the law as prophecy made discernable by weighing costs and benefits.<sup>206</sup> This is so because any test that purports to secure the future through inherent reason is foiled by Kahneman and Tversky's studies.<sup>207</sup> Possibly in anticipation of this eventual scientific result, Holmes escaped into mystic poetry to defend his prophetic legalism.<sup>208</sup>

Holmes's hard pivot into religion and art to romanticize his loveless logic was nothing new.<sup>209</sup> As commemorated by the Pulitzer Prize winning play *Wit*,<sup>210</sup> the Puritan poet John Donne was known for his ability to make sense of the most irrational behaviors of human beings.<sup>211</sup> And John Milton, who was "of the Devil's party without knowing it,"<sup>212</sup> specifically vindicated cost/benefit balancing tests by appropriating the voices of women like this:

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203, at 256, and KAHNEMAN, THINKING, *supra* note 163, at 411–12. Similarly, Chief Justice Taney's slavery era opinion in *Smith v. Turner*, 48 U.S. 283, 466 (1849) (Taney, C.J., dissenting) (intuiting that governments have a right to "remove from among its citizens any person . . . whom it regards as injurious to their welfare"), is unsettled by Card, *supra* note 203, at 256, and KAHNEMAN, THINKING, *supra* note 163, at 411–12.

<sup>206</sup> Compare RUSSELL, UNPOPULAR, *supra* note 56, at 208 ("Long calculations that certain evil in the present is worth inflicting for the sake of some doubtful benefit in the future are always to be viewed with suspicion, for, as Shakespeare says: 'What's to come is still unsure.'"), *id.* at 27 ("The genuine Liberal does not say 'this is true,' he says 'I am inclined to think that under present circumstances this opinion is probably the best.' And it is only in this limited and undogmatic sense that he will advocate democracy."), *id.* at 74 (making light of Hegel's attempts to lay hold of the future with almost magical calculations), and KAHNEMAN, THINKING, *supra* note 163, at 411–12, with *Buck v. Bell*, 274 U.S. 200, 207 (1927), and sources cited *supra* notes 1–6.

<sup>207</sup> KAHNEMAN, THINKING, *supra* note 163, at 381.

<sup>208</sup> Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 498–502 (1998) ("Holmes's theory of the unconscious reflected a Romantic view of the inability of scientific thought to comprehend the hidden and chaotic depths of subjective life."); *id.* at 436 (Holmes's "relationships with Emerson and his father, his sporadic references to the 'infinite' and the 'universe,' and his notion of heroic greatness have from time to time prompted critics to question the degree of Holmes's commitment to scientific empiricism."); *id.* at 451, 492; *cf.* 12 THE COMPLETE WORKS OF RALPH WALDO EMERSON 275 (1904) (citing MILTON, *supra* note 12); Joshua J. Schroeder, *The Dark Side of Due Process: Part I, A Hard Look at Penumbral Rights and Cost/Benefit Balancing Tests*, 53 ST. MARY'S L.J. 323, 347 n.109 (2022) [hereinafter Schroeder, *The Dark*] (citing MILTON, *supra* note 12, at ls. 865–68) ("In *Buck*, the old Puritan version of due process balancing between private and public interests was applied.")

<sup>209</sup> See Dailey, *supra* note 208, at 498–99.

<sup>210</sup> See generally MARGARET EDSON, *WIT* (1995).

<sup>211</sup> See, e.g., JOHN DONNE, *Holy Sonnet XIV*, reprinted in THE POEMS OF JOHN DONNE: THE DIVINE POEMS 10 (Herbert J.C. Grierson, ed., Oxford Univ. Press 1951) (1633) [hereinafter THE DIVINE] (asking God to batter and rape him into purity, because reason was not sufficient to guide him to right action).

<sup>212</sup> WILLIAM BLAKE, THE MARRIAGE OF HEAVEN AND HELL 6 (1868); *cf.* C.S. LEWIS, THE GREAT DIVORCE vii (2009) ("Blake wrote *The Marriage of Heaven and Hell*. If I have written of their

Only my love of thee held long debate,  
 And combated in silence all these reasons  
 With hard contést: at length that grounded maxim  
 So rife and celebrated in the mouths  
 Of wisest men; that to the public good  
 Private respects must yield, with grave authority  
 Took full possession of me and prevailed<sup>213</sup>

Milton's cost/benefit balancing test became a justification unto itself.<sup>214</sup> His Machiavellian logic for using cost/benefit balancing tests seems to run like this: if you don't use them against your enemies first, your enemies will use them against you, and love is no defense.<sup>215</sup> Milton's loveless logic presaged Justice Holmes's defense of eugenics in *Buck v. Bell* that was considered progressive and pragmatic in its day, but was actually regressive and impractical.<sup>216</sup>

Understanding the problematic nature of Miltonic rationalism, Phillis Wheatley wrote: "But, lo! in him Britannia's prophet dies."<sup>217</sup> The romantic

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Divorce, this is not because I think myself a fit antagonist for so great a genius, nor even because I feel at all sure that I know what he meant.").

<sup>213</sup> MILTON, *supra* note 12, at ls. 863–69; *cf.* Schroeder, *Leviathan*, *supra* note 47, at 158 (noting how "Milton appropriated women as his champions of the freedom of mind"); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (using a balancing test to justify the yielding of private interests to the Government's interest).

<sup>214</sup> MILTON, *supra* note 12, at ls. 863–69.

<sup>215</sup> *Id.*; *cf.* Michael Bryson, *A Poem to the Unknown God: Samson Agonistes and Negative Theology*, 42 MILTON Q. 22, 32 (2008) (quoting NICCOLO MACHIAVELLI, *THE PRINCE* 24 (Robert Maynard Hutchins ed., W. K. Marriott trans., 1955)) ("[T]he Chorus is both so desperate, and so inept in its attempt to 'justify' God that it ends up describing him as a Machiavellian prince . . . . Both the Chorus and Manoa posit a violent God. Thus, each seems to approve of Samson's violence, thinking of it as being undertaken at God's prompting.").

<sup>216</sup> Compare MILTON, *supra* note 12, at ls. 863–69, with *Buck v. Bell*, 274 U.S. 200, 207 (1927), John Kang, *The Soldier and the Imbecile: How Holmes's Manliness Fated Carrie Buck*, 47 AKRON L. REV. 1055, 1057 (2015), and *supra* notes 16–17 and accompanying text.

<sup>217</sup> PHILLIS WHEATLEY, *Phillis's Reply to the Answer* (Dec. 5, 1774), reprinted in *THE COLLECTED WORKS OF PHILLIS WHEATLEY* 143–45 (John C. Shields ed., 1988) [hereinafter *THE COLLECTED*] (referring to Milton as the "British Homer" and "Europa's bard"); *cf.* 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* 170 (John C. Shields & Eric D. Lamore eds., Oxford Univ. Press 2011) ("The trial of Wheatley illustrated this issue. Even the attestation of such eminent men could not convince everyone of Wheatley's literary achievement. Like Hume and Jefferson demonstrated, reason could not answer this question adequately, and further application of reason could not repair the inadequacies of reason. To avoid confronting established beliefs, reason became a vehicle of doubt . . . . In contrast, Wheatley successfully employs a strategy beyond the limitations of reason. For Wheatley wonder is that subjective faculty that can breach the gap between man and the world and help negotiate a new understanding of race and reality after reason fails."); *id.* at 179 ("Whereas Hobbes defied the

poets who followed after Wheatley properly romanticized love,<sup>218</sup> and exposed Justice Holmes's loveless errors.<sup>219</sup> The romantic movement in England and America roundly reaffirmed Wheatley's central assertions that reason is a servant to the emotion of love and the capacity of human imagination.<sup>220</sup>

Human emotion (i.e., the "common sense") and the imagination eventually led England and America to the gradual adoption of the common law.<sup>221</sup> This fabric of law is the foundation of government in England and America, and confirms "the same equal right, law, or justice, due to persons of all degrees."<sup>222</sup> As such, the common law was used in 1772, despite the staunch resistance of the lordly powers, to set an African slave free in *Somerset's Case*.<sup>223</sup>

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ability of men to realize the meaning of a work of wonder, Wheatley recognizes this very power in Ethiopians.").

<sup>218</sup> John Rochfort, *The Answer by the Gentleman of the Navy* (Dec. 2, 1774), reprinted in THE COLLECTED, *supra* note 217, at 141–43 (noting how Wheatley led the poets to "kindle[] friendship and make[] love divine"); see JOHN C. SHIELDS, PHILLIS WHEATLEY AND THE ROMANTICS 62–63 (2010); see also *id.* at 8–9, 57 (discussing Wheatley's treatment of natural human love as a female representation of God); PHILLIS WHEATLEY, *To the Right Honorable William, Earl of Dartmouth, His Majesty's Principal Secretary of State for North America, &c.* (1773), THE COLLECTED, *supra* note 217, at 73–75 (noting that her "wishes for the common good" are "by feeling hearts alone best understood"); Schroeder, *Leviathan*, *supra* note 47, at 159–60; cf. JAMES OTIS, COLLECTED POLITICAL WRITINGS OF JAMES OTIS 63–64 (Richard Samuelson ed., 2015) ("The Love of our Neighbour is an evident Principle of natural as well as revealed Religion."). My view that the romantics are Wheatley's progeny is chronologically sound and supported by the evidence Shields examined. SHIELDS, at 62–63; see PERCY BYSSHE SHELLEY, A DEFENCE OF POETRY 12 (1845) (defending the role of imagination in human thought that Wheatley originally set forth: "Reason is to imagination as the instrument to the agent, as the body to the spirit, as the shadow to the substance."); HENRY WADSWORTH LONGFELLOW, VOICES OF THE NIGHT 9 (1887) (containing several marvelous themes inspired by Wheatley's work: "I heard the trailing garments of the Night / Sweep through her marble halls!"); Letter from John Keats to Benjamin Bailey (Nov. 22, 1817), in THE LETTERS OF JOHN KEATS 53 (H. Buxton Forman ed., 1895) ("The imagination may be compared to Adam's dream—he awoke and found it truth.").

<sup>219</sup> *Buck*, 274 U.S. at 207. Holmes was apparently open to this critique, and it seemed to succeed by influencing his jurisprudence once or twice. Dailey, *supra* note 208, at 458 ("Holmes, unlike others of his generation, never renounced the psychological insights of Romanticism."); see, e.g., *Moore v. Dempsey*, 261 U.S. 86, 91–92 (1923); Note: *Lumley v. Wagner Denied*, 8 HARV. L. REV. 172, 172–73 (1894), examined by Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775, 779, 838 n.335 (1992).

<sup>220</sup> See sources cited *supra* notes 217–218; PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50; PHILLIS WHEATLEY, *On Imagination* (1773), reprinted in THE COLLECTED, *supra* note 217, at 65–68.

<sup>221</sup> 2 WILSON, *supra* note 198, at 749; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 157 ("The whole structure of our present jurisprudence stands upon the original foundations of the common law.").

<sup>222</sup> 2 WILSON, *supra* note 198, at 749–50.

<sup>223</sup> *Somerset v. Stewart* [1772] 20 How. St. Tr. 1, 82 (Eng.).

This common law was real and effective, and its appearance in *Somerset's Case* represents the writ of habeas corpus “as it existed in 1789” that was applied in *Boumediene v. Bush* and mandated in immigrant habeas pleadings by *DHS v. Thuraissigiam*.<sup>224</sup> As a part of the common law, *Somerset's Case* was a product of “common reason—that refined reason, which is generally received by the consent of all.”<sup>225</sup> By great contrast, cost/benefit balancing tests may be correctly recognized as the opposite of the common law, i.e., the product of *individual reason—that unrefined reason, which only received the unaccountable consent of only one person, the judge*.<sup>226</sup>

Just because judges don black robes does not make them more rational than other human beings.<sup>227</sup> Yet, cost/benefit balancing tests presume that, out of a dogmatic belief in individual reason, a court can override the common, discourse-confirmed reason of a whole society and thus render itself unreviewable and absolute.<sup>228</sup> Nevertheless, as Kahneman and Tversky's studies prove, the idea that judges can easily consider their own experienced costs or benefits is a delusion.<sup>229</sup>

It is perhaps humanity's grandest delusion that an individual human could reason out what is best for all humanity.<sup>230</sup> Individuals among us are prone to believe that their own innate senses give them an accurate picture of the whole human experience that should be applied as a natural law, without engaging in a

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<sup>224</sup> *Id.*, extended by *Boumediene v. Bush*, 553 U.S. 723, 747 (2008) (“We know that at common law a petitioner's status as alien was not a categorical bar to habeas corpus relief.”), and distinguished by *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1973 (2020). According to the Court, had Mr. Thuraissigiam requested release, then *Somerset* would have applied, and “a collateral consequence” may be that he could have been “allowed to remain” in the United States. *Id.* The decision in *Thuraissigiam* is worrisome because another case that distinguished *Somerset* was the infamous *Prigg v. Pennsylvania*, 41 U.S. 539, 611–12 (1842) (distinguishing *Somerset v. Stewart*, [1772] 20 How. St. Tr. 1, 82 (Eng.), and interpreting the Slave Trade Clause to implicitly preclude the application of *Somerset*).

<sup>225</sup> 2 WILSON, *supra* note 198, at 750.

<sup>226</sup> *Cf.* Sunstein, *Cognition*, *supra* note 185, at 1065, 1087–88 (exemplifying this sort of individual reason); Sunstein, *Cost-Benefit*, *supra* note 162, at 1908 (also exemplifying the sort of individual reasoning that claims no accountability to the reason of other individuals).

<sup>227</sup> LEWIS, *supra* note 163, at 223, 324–27 (demonstrating that sophisticated people are liable to make the same cognitive errors as unsophisticated people); *cf.* *Martin v. Hunter's Lessee*, 14 U.S. 304, 346 (1804) (“State courts are, and always will be, of as much learning, integrity, and wisdom as those of the courts of the United States (which we very cheerfully admit)”).

<sup>228</sup> Sunstein, *Cognition*, *supra* note 185, at 1065, 1087–88.

<sup>229</sup> KAHNEMAN, THINKING, *supra* note 163, at 381.

<sup>230</sup> *See, e.g.*, Sunstein, *Cognition*, *supra* note 185, at 1065, 1087–88 (dogmatically asserting that a certain rational program for solving societies biggest problems has *no rivals*).

common discourse with others.<sup>231</sup> This wing of law, inspired by Hegelian philosophy, is ruled by its primary maxim that the ends justify the means.<sup>232</sup>

Humanity's best despots, including Cromwell, Napoleon, and Hitler, arose from this type of dogmatic thinking.<sup>233</sup> It is the origin of the frontispiece of Thomas Hobbes's book *Leviathan*, king of all the children of pride.<sup>234</sup> Each human being ruled by pride thinks they could know what is best for everyone else by following their own internal compass without engaging with others in a common discourse.<sup>235</sup>

Cost/benefit balancing tests tend to isolate the individual mind to a point of ignorance of all else.<sup>236</sup> Pure hedonic rationalist dogma is the only thing that says weighing and balancing costs and benefits from a state of pure, individual ignorance could create rational results.<sup>237</sup> Therefore, as Kahneman and Tversky's

<sup>231</sup> *Id.*; Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) [hereinafter Holmes, Jr., *Natural*] (asserting Social Darwinism as a natural law stating: "A dog will fight for its bone."); see Martin B. Hickman, *Mr. Justice Holmes: A Reappraisal*, 5 WEST. POL. Q. 66, 69–73, 83 (1952) (considering *Buck v. Bell* at length and noting how Holmes "rejects the natural law of Cicero but embraces that of Hegel").

<sup>232</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927); G.W.F. HEGEL, PHILOSOPHY OF RIGHT 120–24 (S.W. Dyde trans., 2001) ("To this place belongs the famous sentence, 'The end justifies the means.'"), following and adopting THOMAS HOBBS, LEVIATHAN 123 (A. R. Waller ed., 1904) ("whosoever has right to the End, has right to the Means"); see Hickman, *supra* note 231, at 69–73 (explaining the Hegelian roots of Holmes's thinking in *Buck v. Bell*); cf. RUSSELL, UNPOPULAR, *supra* note 53, at 19–20 (analyzing Hegel); *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842) ("The fundamental principle applicable to all cases of this sort would seem to be that, where the end is required, the means are given, and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted."). *Prigg*, a predecessor of *Buck*, is a Hegelian slick of ends-justify-the-means rationalizations. *Id.*; Robert Meister, *Reviewed Work: The Partial Constitution by Cass R. Sunstein*, 23 POL. THEORY 182, 187 (1995) (observing that Sunstein adopted a Hegelian ends-justify-the-means principle for constitutional interpretation: "in Sunstein's view the appropriate test for judging a theory of constitutional interpretation is the kind of society that would be produced by practicing it").

<sup>233</sup> BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY xxii (1945) [hereinafter RUSSELL, A HISTORY].

<sup>234</sup> *Id.*; Norman Jacobson, *The Strange Case of the Hobbesian Man*, 63 REPRESENTATIONS 1, 1–2 (1998) (describing the frontispiece of *Leviathan*).

<sup>235</sup> See, e.g., Sunstein, *Cognition*, *supra* note 185, at 1065, 1087–88; Richard Epstein, *Leviathan's Apologists*, L. & LIBERTY: BOOK REV. (Sept. 16, 2020), <https://lawliberty.org/book-review/leviathan-administrative-state-sunstein-vermeule/>, reviewing CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN (2020); cf. HOBBS, *supra* note 232, at 231 (*Leviathan* is defined as the king over all the children of pride); LON L. FULLER, THE LAW IN QUEST OF ITSELF 1–3 (1999) (offering a theory of law inspired by Hobbes's attempts to dominate the imagination with reason).

<sup>236</sup> Sunstein, *Cognition*, *supra* note 185, at 1065, 1087–88; Sunstein, *Cost-Benefit*, *supra* note 162, at 1908.

<sup>237</sup> It all appears to go back to this: 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2; cf. KAHNEMAN, THINKING, *supra* note 163, at 377 (acknowledging the strong pull of Bentham's happiness principle, while explaining that it is not rational and lacks evidentiary support).



research destroyed the idea that a principle of utility can be rationally considered by humans, cost/benefit balancing tests literally cannot exist.<sup>238</sup>

Lulu Miller addressed the persistence of such delusions in her book *Why Fish Don't Exist*, after which this article is styled.<sup>239</sup> Similarly, Mary Trump labeled these type of delusions “toxic positivity” linking them to Norman V. Peale’s self-help styled Christianity presented in his book *The Power of Positive Thinking*.<sup>240</sup> Lulu and Mary both explained that no one can force another to engage in discourse to learn about reality or to let go of their harmful delusions.<sup>241</sup>

As surely as the self-help industry will continue to thrive, and fish will stay on the menu, so too, nobody can force any other person to discover that humans are incapable of inherent rational balancing of pain and pleasure.<sup>242</sup> Sunstein can maintain a very close relationship with Kahneman himself, and still defend cost/benefit balancing tests.<sup>243</sup> Scientific discovery will never automatically download itself into our brains, and it will always be hard for old dogs to learn new tricks;<sup>244</sup> but for any of us to discern justice for immigrants it will require engaging in a discourse with others, rather than engaging in inherently isolating cost/benefit balancing exercises.<sup>245</sup>

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<sup>238</sup> KAHNEMAN, THINKING, *supra* note 163, at 381; LEWIS, *supra* note 163, at 278 (noting that “the economists felt that we are right and at the same time they wished we weren’t because the replacement of utility theory by the model we outlined would cause them no end of problems” (internal quotation marks omitted)). Kahneman actually misdescribes Bentham’s theory, which is that experienced pain and pleasure automatically inform the rational mind so that it can make reasonable choices *without* help from empirically proven sources. *Id.* at 377 (citing 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2); Kahneman, Back, *supra* note 175, at 397 (misdescribing Bentham’s utilitarianism as an empirical).

<sup>239</sup> MILLER, *supra* note 6, at 97–106.

<sup>240</sup> TRUMP, *supra* note 19, at 211.

<sup>241</sup> MILLER, *supra* note 6, at 97–106; TRUMP, *supra* note 19, at 211. This is something Daniel Kahneman wisely realized during the course of his work with Amos Tversky. LEWIS, *supra* note 163, at 323 (“‘Amos wanted to crush the opposition,’ said Danny. ‘It just got under his skin more than it did mine. He wanted to find something to shut people up. Which of course you can never do.’”).

<sup>242</sup> I can’t force you to read this: KAHNEMAN, THINKING, *supra* note 163, at 381; or this: 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2.

<sup>243</sup> See generally KAHNEMAN, NOISE, *supra* note 74.

<sup>244</sup> *Id.*; compare Sunstein, *Cognition*, *supra* note 185, at 1065, 1087–88, with KAHNEMAN, THINKING, *supra* note 163, at 381.

<sup>245</sup> Amy H. Kastely, *Cicero’s De Legibus: Law and Talking Justly Toward a Just Community*, 3 YALE J.L. & HUMAN. 1, 3 (1991) (expounding the Ciceronian definition of “law as public discourse about justice”).

## PART IV: REMEMBERING WHAT WAS LOST IN THE AGE OF BALANCING

According to Professor T. Alexander Aleinikoff, around fifty or so years ago liberal jurists stopped objecting to cost/benefit balancing tests and America entered an “age of balancing.”<sup>246</sup> Aleinikoff’s view of balancing tests may be too optimistic, but he still managed to perceive some of the fundamental problems seething underneath.<sup>247</sup> It is worth remembering the almost nostalgic view of cost/benefit balancing received by the Boomers, presented by Aleinikoff here:

Balancing entered constitutional law like wild clover, not poison ivy. It appeared in disparate fields, adding color to dreary doctrinalism. Once rooted, however, it spread, ultimately changing the hue of the landscape. Harlan Fiske Stone applied the new methodology with creativity and vigor to commerce clause, intergovernmental immunity, and civil liberties cases. Chief Justice Hughes in 1934 balanced the interests of the Minnesota Mortgage Moratorium Law in *Home Building & Loan Association v. Blaisdell*. In 1939, Justice Roberts wrote the first explicit balancing opinion in a free speech case, *Schneider v. State*. In 1944, the Court, through Justice Black(!), ruled that government actions that discriminated on the basis of race or national origin could be constitutional if supported by “[p]ressing public necessity.”<sup>248</sup>

These were the representative cases perceived by the academy as the “formative years” of balancing, believed to exist prior to balancing tests entering into questions of constitutional law.<sup>249</sup> It is also a general belief that it was not until the 1980s that balancing tests became commonplace in constitutional law, following Justice Powell’s opinions in *Mathews v. Eldridge* and *Stone v. Powell*.<sup>250</sup> Cost/benefit balancing tests are now considered, as Professor Aleinikoff noted, “the central metaphor for procedural due process analysis.”<sup>251</sup>

However, cost/benefit balancing tests entered into constitutional law before the 1970s and 80s in *Buck v. Bell*, involving forced surgical castrations, and *Jacobson v. Massachusetts*, involving government vaccine mandates.<sup>252</sup> They were directly connected with Justice Oliver Wendell Holmes, Jr.’s

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<sup>246</sup> Aleinikoff, *Constitutional*, *supra* note 22, at 944, 1005.

<sup>247</sup> *Id.* at 975.

<sup>248</sup> *Id.* at 963–64.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 964–65 n.126.

<sup>251</sup> *Id.* at 965.

<sup>252</sup> *Buck v. Bell*, 274 U.S. 200, 206–08 (1927), *extending* *Jacobson v. Massachusetts*, 197 U.S. 11, 24 (1905) (applying a cost benefit balancing test).

definition of law as prophecy.<sup>253</sup> In fact, cost/benefit balancing tests were clearly appended to prior eugenics propaganda to justify state adoptions of the model eugenics law.<sup>254</sup>

Also, cost/benefit balancing tests, and Holmes's definition of law itself, derived from the prior practice of the witch-hanging Puritans.<sup>255</sup> In fact, the first witch hanged in Massachusetts violated a quarantine not unlike the old vaccine mandates.<sup>256</sup> It is an actual historical fact that the tradition of hanging witches in Massachusetts began as a health law policy to deal with those who failed to cooperate with safety precautions in the midst of a plague.<sup>257</sup>

Even though several cycles of cost/benefit balancing preceded the present age, Professor Aleinikoff's observation that we are living through an age of balancing was correct.<sup>258</sup> He was also correct that the prevalence of balancing tests to answer all sorts of questions, including constitutional questions, created several problems for the American legal establishment.<sup>259</sup> Indeed, cost/benefit balancing tests can seem to create more questions than they answer.<sup>260</sup>

The biggest of these questions is, perhaps, how to address violations of substantive rights mandated under the Ninth Amendment.<sup>261</sup> For example, the flagship balancing case *Mathews v. Eldridge* only stated that: "We conclude that an evidentiary hearing is not required prior to the termination of disability

<sup>253</sup> *Id.*; see sources cited *supra* notes 1–3; cf. Hickman, *supra* note 231, at 69–73 (perceiving and explaining Justice Holmes's prophetic contributions in a negative light).

<sup>254</sup> LAUGHLIN, *supra* note 13, at 454 ("Thus, the lawmaker must balance evidence in favor and against the policy of eugenical sterilization."); see, e.g., *Buck*, 274 U.S. at 206–08.

<sup>255</sup> See sources cited *supra* notes 1–6; Nourse, *Buck*, *supra* note 13, at 110–12 ("Justice Holmes was a balancer through and through."); MILTON, *supra* note 12, at ls. 865–68; Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 494–95 (2001) ("Consistent with the limited heed paid to private interest were the limitations placed on individual freedom. People could do as they pleased only so long as their actions were congruent with the greater good."); cf. 4 BENTHAM, THE WORKS, *supra* note 161, at 501 ("Behold what was said in his day by *Cromwell!* In my eyes, it ranks that wonderful man higher than anything else I ever read of him:—it will not lower him in yours."); AUSTIN WOOLRYCH, COMMONWEALTH TO PROTECTORATE 271–73, 300 (1982).

<sup>256</sup> 2 JOHN WINTHROP, WINTHROP'S JOURNAL 344–45 (James Kendall Hosmer ed., 1908) (discussing the witch trial of Margaret Jones, the first person convicted and hanged of witchcraft for having the "malignant touch" and allegedly causing an epidemic in 1648); 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 237 (Nathaniel B. Shurtleff ed., 1853) (recording the first apparent American quarantine law enacted in what appears to be March of 1648, just before Margaret Jones was convicted of witchcraft); cf. Schriener & Ochs, *supra* note 255, at 494 (explaining the origins of ableism in Puritan-American law).

<sup>257</sup> See sources cited *supra* note 256.

<sup>258</sup> Aleinikoff, *Constitutional*, *supra* note 22, at 944, 1005.

<sup>259</sup> *Id.* at 975.

<sup>260</sup> See, e.g., *id.*

<sup>261</sup> *Id.* at 969; see *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citing U.S. CONST. amend. IX); *id.* at 487 (Goldberg, J., concurring) (citing U.S. CONST. amend. IX).

benefits . . . .”<sup>262</sup> *Mathews* explained only what was *not* required; it did not explain how to address alleged violations of actual rights, but only stated that an evidentiary hearing was not required to do so.<sup>263</sup>

In the area of indefinite immigrant detention *Zadvydas* agreed with the method but disagreed with the result, and required an evidentiary hearing to show reasonable cause for indefinite detention.<sup>264</sup> *Jennings v. Rodriguez* undermined this finding, citing a strict reading of the statutory text that aligned more closely with *Mathews*’ finding.<sup>265</sup> Then in *DHS v. Thuraissigiam*, the Court appeared to require dismissal of all habeas corpus writs that did not actually request release—again slanting in favor of *Mathews*’ anti-evidentiary-hearing decision.<sup>266</sup>

But none of these cases, concerned with the existence of administrative evidentiary hearings, answer the question of how to address violations of substantive rights.<sup>267</sup> Especially in the habeas context, they do not answer the question of how to address Suspension Clause violations that are inevitably attached to violations of the basic right to liberty secured under the Fifth and Fourteenth Amendments.<sup>268</sup> To answer these questions, one must turn to *Boumediene v. Bush*.<sup>269</sup>

In the run up to the Court’s decision in *Boumediene*, the U.S. Supreme Court attempted to extend *Zadvydas* in *Hamdi v. Rumsfeld* by answering merely

<sup>262</sup> *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*, partially extended and partially distinguished by *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982)).

<sup>265</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 850 (2018) (refusing to extend *Zadvydas* to an asylum seeker petition); see *Mathews*, 424 U.S. at 349.

<sup>266</sup> *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969–76 (2020); see *Mathews*, 424 U.S. at 349.

<sup>267</sup> *Thuraissigiam*, 140 S. Ct. at 1969–76; *Jennings*, 138 S. Ct. at 850; *Zadvydas*, 533 U.S. at 694; *Mathews*, 424 U.S. at 349; cf. KAHNEMAN, NOISE, *supra* note 74, at 333–34, 341 (appearing to argue in favor of *Mathews*’ holding that “individualized hearing[s]” that fail a cost/benefit balancing test should be abolished in favor of “noiseless” artificial intelligence algorithms, and suggesting that computers rather than people should determine whether a person has access to an individual hearing), expressing disagreement with *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (overruling a law for “treat[ing] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death”).

<sup>268</sup> See cases and sources cited *supra* note 267; *Stone v. Powell*, 428 U.S. 465, 494–95 (1976).

<sup>269</sup> *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (overruling an express repeal of § 2241 as a suspension of the writ of habeas corpus), extending *INS v. St. Cyr*, 533 U.S. 289, 305 n.25 (2001) (“In fact, § 2241 descends directly from § 14 of the Judiciary Act of 1789 and the 1867 Act. . . . Its text remained undisturbed by either AEDPA or IIRIRA.”). But see *Nasrallah v. Barr*, 140 S. Ct. 1683, 1690 (2020) (addressing changes to the IIRIRA that were enacted in 2005 without addressing the U.S. Constitution’s strong prohibition against suspensions of habeas corpus that was explicitly extended to non-U.S. citizens in *Boumediene v. Bush* in 2008 under the original Judiciary Act of 1789 that is not superseded, repealed, overruled, or otherwise set aside by any law or U.S. Supreme Court decision).

whether further administrative proceedings could secure Hamdi's due process rights in lieu of a common law treason trial.<sup>270</sup> The plurality opinion concluded that though "the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause," that it was still possible "that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."<sup>271</sup> The Court used a balancing test to punt the question of what to do to secure Hamdi's rights to a military tribunal in a black site that is legally not supposed to exist.<sup>272</sup>

The military tribunal embarrassed the U.S. Supreme Court by ignoring *Hamdi*, deporting Hamdi, stripping him of his U.S. citizenship, and putting him on a no fly list.<sup>273</sup> There was no possible way, after punting the issue, for the Court to reclaim its time.<sup>274</sup> The decision to punt *was* the decision on Hamdi's rights, and thus, *Hamdi* stands as an affirmative decision to ignore a U.S. citizen's right to a treason trial prior to being punished for treason.<sup>275</sup>

However, *Hamdi* was not the final say on the issue.<sup>276</sup> *Hamdi*'s sister case, *Rasul v. Bush*, required review in federal court under the Suspension Clause to decide, at the very least, whether Congress unconstitutionally suspended habeas corpus.<sup>277</sup> *Rasul* led to *Hamdan*, which finally resulted in *Boumediene v.*

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<sup>270</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29, 538 (2004) (plurality opinion) (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

<sup>271</sup> *Id.* at 538.

<sup>272</sup> *Id.* Dahlia Lithwick initially felt this move was "more right than wrong." Dahlia Lithwick, *More Right Than Wrong*, SLATE (June 28, 2004, 2:04 PM), <https://slate.com/news-and-politics/2004/06/more-right-than-wrong.html> [hereinafter Lithwick, *More*].

<sup>273</sup> See *supra* note 77 and accompanying text.

<sup>274</sup> *Id.*

<sup>275</sup> See *Hamdi*, 542 U.S. at 575–76 (Scalia, J., dissenting).

<sup>276</sup> See *id.* at 510 (plurality opinion) (arising under the Authorization for Use of Military Force of 2001, Pub. L. 107-40, 115 Stat. 224), *superseded by statute* Detainee Treatment Act (DTA) of 2005, Pub. L. 109-163, 119 Stat. 3474; Military Commission Act (MCA) of 2006, Pub. L. 109-366, 120 Stat. 2600, *as recognized in* *Hamad v. Gates*, 732 F.3d 990, 996–98 (9th Cir. 2013); *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay." (citing *Hamdi*, 542 U.S. at 564 (Scalia, J., dissenting))); *cf.* *Aamer v. Obama*, 742 F.3d 1023, 1028–29 (D.C. Cir. 2014) (explaining the congressional and judicial events that led from *Hamdi*'s sister case *Rasul v. Bush* to *Boumediene v. Bush*'s vindication of the rights of alleged non-U.S. citizen enemy combatants).

<sup>277</sup> *Rasul v. Bush*, 542 U.S. 466, 472–73 (2004); see *Aamer*, 742 F.3d at 1028–29 ("The story starts with *Rasul v. Bush*," a decision which led to "Congress pass[ing] the Detainee Treatment Act of 2005 (DTA), which contained a provision designed to abrogate *Rasul* and strip federal courts of jurisdiction over Guantanamo detainees' claims," which resulted in *Hamdan v. Rumsfeld*, which narrowly construed the DTA, to which "Congress responded by passing the MCA, the statute at issue in this case, whose jurisdiction-stripping provisions unequivocally applied to *all* claims brought by Guantanamo detainees" and finally to the Court's final response and decision "in *Boumediene*, 553 U.S. at 792, that "MCA section 7 'operates as an unconstitutional suspension of the writ.'").

*Bush*, after further amendments to the statute by Congress in an attempt to preclude the Court from answering the constitutional question by suspending the writ.<sup>278</sup>

Even though *Boumediene* produced an exhaustive exposition of the constitutional minimum of the common law privilege of habeas corpus that Congress is mandated to extend to every person, the *Boumediene* precedent remains largely dormant.<sup>279</sup> In the age of balancing, the legal community seems to have forgotten how to apply *stare decisis* to similar facts before the court.<sup>280</sup> Thus, remedies for immigrants under *Boumediene* were not requested in *Thuraissigiam*.<sup>281</sup>

The natural argument that flows from *Boumediene* is this: if the writ runs to a black site in a foreign country to release foreign nationals, then it should also extend to immigrants detained within the United States.<sup>282</sup> But this argument was not generally pursued in *Thuraissigiam*.<sup>283</sup> Instead, in the age of balancing and with the best of intentions, *Boumediene* was misused in attempts to justify more process in administrative proceedings.<sup>284</sup>

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<sup>278</sup> *Boumediene*, 553 U.S. at 732–33, 792; see *Aamer*, 742 F.3d at 1028–29.

<sup>279</sup> See *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969–76 (2020) (distinguishing *Boumediene* based on the fact that Mr. Thuraissigiam did not “seek[] release from custody”) (emphasis in original); *Salahi v. Obama*, No. 05-0596, 2015 WL 9216557, at \*4–5 (D.D.C. Dec. 17, 2015); *Salahi v. Obama*, 710 F. Supp. 2d 1, 16 (D.D.C. 2010) (extending *Boumediene* to decide: “The petition for writ of habeas corpus is granted. Salahi must be released from custody.”), *vacated and remanded*, 625 F.3d 745 (D.C. Cir. 2010) (boldly flouting *Boumediene*); *Bostan v. Obama*, 662 F. Supp. 2d 1, 3–4 (D.D.C. 2009) (balancing away petitioner’s common law rights despite *Boumediene*); *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 207–08 (D.D.C. 2009) (misinterpreting *Boumediene*’s critical factor test as a multifactor balancing test), *rev’d*, 605 F.3d 84, 98–99 (D.C. Cir. 2010) (using the district court’s misinterpretation of *Boumediene* to apply only two factors as sufficient to deny habeas corpus); cf. *THE MAURITANIAN* (STX Films 2021) (dramatizing the judiciary’s disappointing reluctance to apply *Boumediene* in *Salahi v. Obama*).

<sup>280</sup> See, e.g., *Thuraissigiam*, 140 S. Ct. at 1982 (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)); *Salahi*, 625 F.3d at 750–51 (citing *Hamdi*, 542 U.S. at 534); *Bostan*, 662 F. Supp. 2d at 3–4; cf. *Lee Kovarsky, Habeas Privilege Origination and DHS v. Thuraissigiam*, 121 COLUM. L. REV. F. 23, 24 (2021) (misconstruing *Boumediene* as a balancing test case).

<sup>281</sup> *Thuraissigiam*, 140 S. Ct. at 1976 (distinguishing *Boumediene* based on the fact that Mr. Thuraissigiam did not “seek[] release from custody”) (emphasis in original).

<sup>282</sup> See Schroeder, *Conservative*, *supra* note 105, at 47, 61 (“[T]he Writ does not have a geographic limitation and may be asserted against any custodian the U.S. Courts have jurisdiction over including U.S. military officers that run black sites in foreign countries.”).

<sup>283</sup> *Thuraissigiam*, 140 S. Ct. at 1976.

<sup>284</sup> *Id.* (arising after *Boumediene* was decided, when immigration attorneys attempted to use *Boumediene* to get more process in EOIR without asking for common law release); cf. cases at *supra* note 27 (demonstrating well-meaning attempts by district court judges to vindicate the rights of immigrants to more process in EOIR through cost/benefit balancing tests).

We know these efforts in the immigration arena are collapsing and yet we fail to reevaluate.<sup>285</sup> Kahneman and Tversky proved humanity's inherent inability to understand their own pain and pleasure,<sup>286</sup> and yet Kahneman endorsed the famed cost/benefit balancer Cass R. Sunstein.<sup>287</sup> We have the cautionary tale of *Hamdi*,<sup>288</sup> and yet the *Hamdi* strategy was renewed when *Boumediene* was magically reinterpreted as a balancing test case in the lower courts.<sup>289</sup>

We can objectively *know* that we are being irrational, and yet this knowledge obviously does not force human beings to reevaluate their behavior.<sup>290</sup> Knowledge alone is not a salve for the delusions that plague us in the age of balancing.<sup>291</sup> It was, therefore, not a trick of knowledge that caused the delusions we face.<sup>292</sup> Rather, judges apply cost/benefit balancing tests because they promise control over the future—which *feels* right—it *soothes* their anxieties.<sup>293</sup>

Judges lose their freedom to act in the present when they soothe their anxieties about the uncertain future with cost/benefit balancing tests.<sup>294</sup> In

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<sup>285</sup> See *supra* notes 28–29 and accompanying text.

<sup>286</sup> See *supra* notes 191–196 and accompanying text.

<sup>287</sup> KAHNEMAN, THINKING, *supra* note 163, at 144, 351, 412 (noting Sunstein's influence); see generally KAHNEMAN, NOISE, *supra* note 74.

<sup>288</sup> See cases and sources cited *supra* note 276 (noting how *Hamdi* is superseded by law and replaced by *Boumediene*); see also Lithwick, *Nevermind*, *supra* note 77.

<sup>289</sup> See cases and sources cited *supra* note 279.

<sup>290</sup> LEWIS, *supra* note 163, at 223 (“[T]he most sophisticated minds [are] prone to error . . . ‘their intuitive judgments are liable to similar fallacies.’”); *id.* at 342 (“‘People tried to ignore it,’ said Thaler. ‘Old economists never change their minds.’”); see *supra* note 279 and accompanying text.

<sup>291</sup> Compare Sunstein, *Cognition*, *supra* note 185, at 1068 (expressing a desire, perhaps borne of his own anxieties, to collect the pros and cons of risk regulations “by placing the various effect on-screen”), with MILLER, *supra* note 6, at 14–15, 97–106 (the activity of collecting knowledge had more to do with the emotional state of the collector than the intrinsic value of the knowledge).

<sup>292</sup> MILLER, *supra* note 6, at 14–15, 97–106.

<sup>293</sup> *Id.* at 14–15 (noting that David Starr Jordan's obsessive collecting of fish likely had to do with soothing his stress and anxiety); *id.* at 98–99 (“[I]t became widely accepted that a dash of self-deception . . . was good for the bones.”); *id.* at 102–03 (“Maybe David Starr Jordan is proof that a steady dose of hubris is the best way of overcoming the odds.”); see also TRUMP, *supra* note 19, at 211.

<sup>294</sup> Sunstein, *Cognition*, *supra* note 185, at 1068 (advocating without evidence that putting costs and benefits “on-screen” has an inherent value). For example, the *Hamdi* Court's attempt to put Mr. Hamdi's interests “on-screen” precluded it from securing Hamdi's right to a common law treason trial. *Id.*; *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (plurality opinion); Lithwick, *Nevermind*, *supra* note 77. In another example, when the *Landon* Court put the government's interests “on-screen,” it enabled the *Thuraissigiam* Court to use that information as if it were a holding to dismiss future cases without considering costs or benefits. *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)); cf. JOHN ADAMS, DISCOURSES ON DAVILA 62 (1790) [hereinafter ADAMS, DISCOURSES] (explaining why human

*Hamdi*, the Court could have ordered the suspected terrorist's release pending a constitutional treason trial, and then presumably Hamdi would have been given his trial rather than being released.<sup>295</sup> But the Court was deluded; it thought ordering release of a potentially dangerous terrorist might reflect badly on it.<sup>296</sup>

Perhaps images of the World Trade Center burning tormented their minds, and thus they feared releasing any alleged enemy combatant.<sup>297</sup> If Hamdi was such a dangerous traitor, however, the U.S. Supreme Court should not have feared, because the U.S. government would have easily detained him until his actual trial.<sup>298</sup> But irrational fears won out on the U.S. Supreme Court, and so it punted to the military who punished Hamdi as a traitor without having to prove it first.<sup>299</sup>

The delusion that requiring a common law treason trial before punishing a U.S. citizen for treason might cause a catastrophe convinced the Court to delegitimize itself in *Hamdi*.<sup>300</sup> The Court accomplished exactly the kind of delegitimization that it was trying to avoid.<sup>301</sup> The same kind of delusion caused the Court to dismiss *Dep't of Homeland Sec. v. Thuraissigiam*, which appeared to implicitly accept former President Donald Trump's false claim that asylum seekers were an invading force.<sup>302</sup>

Some jurists likely fear that if the court released immigrants into the country pending legitimate process, it could create a catastrophe.<sup>303</sup> We have the Nobel Prize winning research of David Card proving that no such catastrophe awaits destination countries with open borders, and that excluding immigrants

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beings support systems they objectively know are unjust: "Neither is our deference to their inclinations founded chiefly, or altogether, upon a regard to the utility of such submission . . . ." Rather, utility "is the doctrine of reason and philosophy; but not the doctrine of nature." (quoting ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 74 (1892) [hereinafter SMITH, *THE THEORY*]).

<sup>295</sup> See, e.g., *Hamdi*, 542 U.S. at 564 (Scalia, J., dissenting).

<sup>296</sup> *Id.* at 529 (believing that using *Mathews* made its decision moderate).

<sup>297</sup> Cf. Andrew Cohen, *Crying Wolf in the War Against Terror*, L.A. TIMES (Aug. 16, 2004, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2004-aug-16-oe-cohen16-story.html> (expressing one view about how the U.S. Supreme Court's opinion in *Hamdi* played out badly after the federal government deported Hamdi without a trial).

<sup>298</sup> See *Hamdi*, 542 U.S. at 564 (Scalia, J., dissenting).

<sup>299</sup> *Id.* at 528–29 (plurality opinion); Lithwick, *Nevermind*, *supra* note 77.

<sup>300</sup> Lithwick, *Nevermind*, *supra* note 77.

<sup>301</sup> See cases and sources cited *supra* notes 296–299.

<sup>302</sup> Compare *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1969–76 (2020), with Jack Herrera, *One Way Trump May Have Changed Immigration Forever*, POLITICO (Mar. 2, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/03/02/biden-immigration-trump-legacy-asylum-refugees-472008> (noting that "Trump's obsessive tweeting led many of his supporters to understand the arrival of two caravans of asylum seekers from Central America as an 'invasion'").

<sup>303</sup> *Thuraissigiam*, 140 S. Ct. at 1970 (expressing extreme fear of releasing immigrants in a radical and draconian redefinition of what habeas release is).



costs the U.S. government billions of dollars every year.<sup>304</sup> We also know that when the U.S. government illegally repatriated around two-million people of Mexican descent in the 1930s, it extended the very economic depression that it was trying to end.<sup>305</sup>

We can *know* that austerity doesn't work, and that taking a more generous approach toward immigrants and asylum seekers might actually benefit our society by making us rich and happy, but this knowledge does not change behavior.<sup>306</sup> Our emotions leave us susceptible to even simple manipulations.<sup>307</sup> The illogical and absurd lengths that even the most elite Americans are willing to take to protect bigoted dogmas are written on the pages of recent U.S. Supreme Court precedent.<sup>308</sup>

For example, in *Thuraissigiam*, Justice Alito wrote: "While respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka."<sup>309</sup> Justice Alito knows that to legally conflate habeas release with deportation, he would not only need to get a majority of the Court to overrule *Boumediene* and *Bollman* in a future case, but he would also have to prevail upon the sitting

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<sup>304</sup> See sources cited *supra* notes 202–203.

<sup>305</sup> Apology Act for the 1930s Mexican Repatriation Program, CAL. GOV'T CODE § 8720–23 (West 2006); Jongkwan Lee et al., *The Employment Effects of Mexican Repatriations: Evidence from the 1930's* 24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23885, 2017) ("We find that cities with larger repatriation intensity, driven by a larger initial Mexican community, performed similarly or worse in terms of native employment and wages, relative to cities which were similar in most labor market characteristics but which experienced small repatriation intensity. This finding is robust across specifications, subsamples and estimation methods. Not only did politicians' claims not hold true, but the opposite seems closer to what happened in reality.").

<sup>306</sup> Cf. Herrera, *supra* note 302 (showing how Trump's behavior of degrading immigrants publicly has become widely accepted in America as a valid point of view).

<sup>307</sup> *Id.* ("Having successfully made opposition to Muslim refugees mainstream two years earlier, during the 2018 midterms, Trump's obsessive tweeting led many of his supporters to understand the arrival of two caravans of asylum seekers from Central America as an 'invasion.'" (quoting @realdonaldtrump, TWITTER (Oct. 29, 2018, 10:41 AM), <https://www.thetrumparchive.com/?searchbox=%22invasion%22> ("Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border . . . This is an invasion of our Country and our Military is waiting for you.")); cf. U.S. CONST. art. I, § 9, cl. 2 (allowing Congress to suspend habeas corpus in cases of "Invasion").

<sup>308</sup> See cases cited *supra* notes 94–96; cf. *Buck v. Bell*, 274 U.S. 200, 206–08 (1927) (demonstrating that one of the most beloved jurists of our time, Oliver Wendell Holmes, Jr., defended and established draconian policies premised on misogyny and bigotry).

<sup>309</sup> *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1970 (2020).

president to make it so.<sup>310</sup> Nevertheless, this knowledge failed to moderate Alito's wild rhetoric steeped in presumptuous, self-flagellating sarcasm.<sup>311</sup>

Yet again, *knowing* the limits of the U.S. Supreme Court will not change the behavior of those that sit on the bench.<sup>312</sup> Their anti-immigrant dogmas are threatened.<sup>313</sup> Justice Alito sensed that his impious religious dogmas might be overwrought by the immigration rights that Saint Paul asserted at the Court of Festus in Caesarea to appeal his case against the Sanhedrin of Jerusalem, which were unanimously reaffirmed by *Johnson v. Eisentrager*.<sup>314</sup>

Foreign Jews do not threaten the basis of the U.S. republic.<sup>315</sup> Anti-immigrant dicta issued by weak men in an attempt to defend impiety in the name of Jesus, who was himself a Jew, is not enough to overrun the baseline constitutional minimum affirmed in *Boumediene v. Bush*.<sup>316</sup> As messy as the illogical tantrums of Justice Alito are,<sup>317</sup> even when they manage to carry a

<sup>310</sup> *Id.* at 1969 n.12, 1975, 1981 (distinguishing *Boumediene v. Bush*, 553 U.S. 723 (2008); *Ex parte Bollman*, 8 U.S. 75 (1807)); *see, e.g.*, *Biden v. Texas*, 142 S. Ct. 2528, 2552–53 (2022) (Alito, J., dissenting) (noting his disagreement with President Biden's order undoing the MPP, but struggling with his own logic that was extended in *Aleman Gonzalez* that disclaimed the Court's jurisdiction to meddle with the president's administration of immigration law).

<sup>311</sup> *See* cases cited *supra* notes 309–310; *see, e.g.*, CNN, *See Moment Justice Alito Mocks Foreign Critics of Abortion Ruling*, YOUTUBE (July 29, 2022), <https://www.youtube.com/watch?v=2Bwt8E7kTFw> (stating that Justice Alito's speech at Notre Dame's 2022 religious liberty summit in Rome, Italy "was so classic Samuel Alito . . . he exudes a sense of aggrievement all the time even as he is winning," and noting that "he cannot help but engage in sarcasm, that's his way").

<sup>312</sup> *Thuraissigiam*, 140 S. Ct. at 1970.

<sup>313</sup> *Id.*

<sup>314</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) (citing *Acts* 25:10–11); *id.* at 798 (Black, J., dissenting) (citing *Acts* 25:16); *see also* *Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (modifying and limiting *Eisentrager*'s critical factor test); *Thuraissigiam*, 140 S. Ct. at 1975 (distinguishing *Boumediene*).

<sup>315</sup> *See Eisentrager*, 339 U.S. at 769 (inspired by Paul of Tarsus's appeal from Caesarea to Rome to place the ultimate functional limit on habeas corpus as far out as possible); *cf.* HANNAH ARENDT, *ON REVOLUTION* 215 (1965) (vindicating the revolutionary basis of the U.S. republic as a precious treasure, worth remembering).

<sup>316</sup> *Eisentrager*, 339 U.S. at 769, *extended and modified in Boumediene*, 553 U.S. at 766; *cf.* ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION* 10–11 (1644) (decrying "[t]he bloody irreligious and inhumane oppressions and destructions under the mask or veil of the Name of Christ").

<sup>317</sup> *See* sources cited *supra* notes 309–311; *see, e.g.*, *Thuraissigiam*, 140 S. Ct. at 1970; *see also* *Jennings v. Rodriguez*, 138 S. Ct. 830, 850 (2018) (attacking the dissent as unrestrained in comparison to the majority opinion, while explicitly refusing to consider whether the statute as interpreted by the Court would necessarily be overruled by the U.S. Constitution); *id.* at 875 (Breyer, J., dissenting) (arguing that "we should decide the constitutional question here and now," because "[w]e have already asked for and received briefs on that question"). The imprudence of Justice Alito's opinion in *Jennings* consists in the fact that if the Court, in a future case, decides that Justice Alito's statutory construction in *Jennings* violates the U.S. Constitution and must be

majority of the Court they only speak to the emotional manipulation at the heart of the age of balancing.<sup>318</sup>

PART V: PARTING THE VEIL – WHAT ARE COST/BENEFIT BALANCING TESTS REALLY?

A recent utilitarian study applying cost/benefit balancing tests concluded “we find that veil-of-ignorance reasoning favors the greater good.”<sup>319</sup> After Kahneman and Tversky’s research, this is little more than the Wizard of Oz shouting: “Pay no attention to that man behind the curtain!”<sup>320</sup> For Kahneman and Tversky proved that self-interest is irrational and that humans tend to pursue satisfaction over happiness, and yet the utilitarians are still rationally weighing and balancing outcomes.<sup>321</sup>

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overruled, then potentially several thousand cases of immigrant detention prosecuted under *Jennings* may be suable in such a way that the U.S. Supreme Court may be visibly implicated as a primary cause of the unconstitutional injustices experienced by immigrants. *Id.*; see *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1834 (2022) (admitting that *Jennings* was a rejection of, rather than an application of, constitutional avoidance doctrine); *id.* at 1835 (noting that *Arteaga-Martinez*’s constitutional claims regarding release are still at play and implying that these claims may, in time, reverse *Jennings*).

<sup>318</sup> See *supra* notes 299–300 and accompanying text; cf. LEWIS, *supra* note 163, at 261 (“*When they made decisions, people did not seek to maximize utility. They sought to minimize regret.*” (emphasis in original)). The basic structure of Suspension Clause jurisdiction still survives. U.S. CONST. art. 1, § 9, cl. 2; *Boumediene*, 553 U.S. at 766; cf. ERIC M. FREEDMAN, MAKING HABEAS WORK 7 (2018) (explaining habeas corpus fundamentals, including the common law origins of habeas corpus).

<sup>319</sup> Karen Huang, Joshua D. Greene & Max Bazerman, *Veil-of-Ignorance Reasoning Favors the Greater Good*, 116 PROCS. OF THE NAT’L ACAD. OF SCIS. OF THE U.S. 23989, 23990 (2019) (applying the veil-of-ignorance to utilitarian cost/benefit analyses).

<sup>320</sup> THE WIZARD OF OZ (MGM 1939).

<sup>321</sup> LEWIS, *supra* note 163, at 261, 266, 272–73, 277; see Daniel Kahneman & Angus Deaton, *High Income Improves Evaluation of Life but not Emotional Well-Being*, 107 PROCS. OF THE NAT’L ACAD. OF SCIS. OF THE U.S. 16489 (2010) (“We conclude that high income buys life satisfaction but not happiness.”); KAHNEMAN, THINKING, *supra* note 163, at 377–78, 381 (debunking utilitarianism by showing that human beings are incapable of rationally pursuing utility). Compare RUSSELL, UNPOPULAR, *supra* note 56, at 31 (“Dogma demands authority, rather than intelligent thought, as the source of opinion; it requires persecution of heretics and hostility to unbelievers; it asks of its disciples that they should inhibit natural kindness in favour of systematic hatred.”), with 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2 (“The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.”) (emphasis in original).

It is commonplace for human beings to pursue reason, even where it is objectively unreasonable to do so.<sup>322</sup> For example, Amos Tversky's "love affair" with Daniel Kahneman began in 1969 over Tversky's attempts to prove inherent human rationalism—a proposition Kahneman and Tversky proceeded to spend their careers dismantling.<sup>323</sup> Then, against the evidence he himself produced, Kahneman endorsed Richard H. Thaler and Cass R. Sunstein's book *Nudge*.<sup>324</sup>

*Nudge* unscientifically presupposed the inherent rationality of society's choice architects.<sup>325</sup> It promised that choice architects could overcome the inherent irrationality of humankind through subtle manipulations, and specifically concerned itself with fixing the Homer Simpsons of society.<sup>326</sup> However, Thaler and Sunstein expressly admitted that they too are subject to "biases in human decision making," and that even geniuses like Beethoven were imbeciles.<sup>327</sup>

This admission was mere good humor to charm an audience; it was *not* a pledge to adopt a "humbler approach" going forward.<sup>328</sup> In fact, Thaler and Sunstein subsumed everything into the preexisting cost/benefit balancing test heuristics of Justice Holmes, applied to disastrous effect in *Buck v. Bell* and beyond.<sup>329</sup> They did not encourage choice architects, including the members of

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<sup>322</sup> See generally, e.g., THOMAS PAINE, *THE AGE OF REASON* (1794) [hereinafter PAINE, *THE AGE*]. Paine's *Age of Reason* discussed the inherent rationality of human beings amid the French Revolution, even as strong evidence of the inherent irrationality of humans unfolded all around him. *Id.* In fact, this treatise was split into two parts, because Paine almost lost his head at the Guillotine in an absurd procession of political trials that punished criminals and innocents alike, and even in this context Paine was not convinced to walk away from his project. *Id.*

<sup>323</sup> Daniel Engber, *The Irony Effect: How the Scientist Who Founded the Science of Mistakes Ended Up Mistaken*, SLATE (Dec. 21, 2016, 12:17 PM), <https://slate.com/technology/2016/12/kahneman-and-tversky-researched-the-science-of-error-and-still-made-errors.html>.

<sup>324</sup> THALER & SUNSTEIN, *supra* note 173, at cover (including an endorsement from Kahneman); see LEWIS, *supra* note 163, at 286 ("To Danny the whole idea of proving that people weren't rational felt a bit like proving that people didn't have fur.").

<sup>325</sup> Robert Sugden, *Do People Really Want to be Nudged Towards Healthy Lifestyles?*, 64 INT'L REV. OF ECON. 113, 122 (2017); Slavisa Tasic, *Are Regulators Rational?*, 17 J. DES ECONOMISTES ET DES ETUDES HUMAINES 1, 15 (2011).

<sup>326</sup> THALER & SUNSTEIN, *supra* note 173, at 45, 52–53 ("[L]et's design policies for *Homer economicus*.").

<sup>327</sup> *Id.* at xii, 26, 40–43 ("We are supposedly experts on biases in human decision making, but that definitely does *not* mean we are immune to them! Just the opposite.").

<sup>328</sup> Sugden, *supra* note 325, at 122; Tasic, *supra* note 325, at 15.

<sup>329</sup> THALER & SUNSTEIN, *supra* note 173, at 166–68, 312, 331; Nourse, Buck, *supra* note 13, at 111–14.

the U.S. Supreme Court, to humbly consider their own irrational nature as a proven fact.<sup>330</sup>

Instead, they advocated judicial hypocrisy.<sup>331</sup> Thaler and Sunstein acknowledged that Kahneman and Tversky were correct, that all humans are at some level a Homer Simpson, and their solution was that the Homers at the top should manipulate the behavior of those at the bottom presupposing that the result will be rational.<sup>332</sup> In fact, they implicitly hope that society might stop thinking about the choice architects at the top as Homers or even as humans at all.<sup>333</sup> They seriously suggested that computer algorithms may be used to govern humanity better than humans.<sup>334</sup>

The idea that machines would be better at governing us than *we* would be seems to ignore the basic lesson of *The Matrix*.<sup>335</sup> In fact, Thaler and Sunstein appear to ignore the idea that the arts have any role in human decision making at all—positing that all decision making should be reduced to clean math.<sup>336</sup> Barring the possibility that Thaler and Sunstein are secret transhumanists,<sup>337</sup> it seems that they fell for the very biased heuristics that they sought to avoid.<sup>338</sup>

In the pages of *Nudge* where Kahneman and Tversky's work is paid tribute, Thaler and Sunstein unloaded an embarrassing story about one of Kahneman's parenting strategies.<sup>339</sup> They wrote that in order to manipulate his son to stop asking for toys, Kahneman told his son that he has two systems of

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<sup>330</sup> THALER & SUNSTEIN, *supra* note 173, at 45; Sugden, *supra* note 325, at 122.

<sup>331</sup> THALER & SUNSTEIN, *supra* note 173, at 45; Sugden, *supra* note 325, at 122; Tasic, *supra* note 316, at 15.

<sup>332</sup> THALER & SUNSTEIN, *supra* note 173, at 40–45.

<sup>333</sup> *Id.* at 45; Sugden, *supra* note 325, at 122.

<sup>334</sup> THALER & SUNSTEIN, *supra* note 173, at 45, 124, 132, 147; Sunstein, *Governing*, *supra* note 189, at 5; *see supra* note 174 and accompanying text.

<sup>335</sup> *See generally* THE MATRIX (Warner Bros. 1999).

<sup>336</sup> THALER & SUNSTEIN, *supra* note 173, at 45, 124, 132, 147, 166–68, 312, 331; Richard H. Thaler, *Nobel Prize Banquet Speech* (2017), <https://www.nobelprize.org/prizes/economic-sciences/2017/thaler/speech/> (hoping to hone economic theories “just as those fancy microscopes improve the resolution of images in biochemistry”); Sunstein, *Governing*, *supra* note 189, at 5; *see supra* note 174 and accompanying text.

<sup>337</sup> *Cf.* BBC, *I'm Transhuman. I'm Going to Become Digital* – BBC, YOUTUBE (May 14, 2019), <https://www.youtube.com/watch?v=qOcktbXSfxU> (explaining transhumanism, a fringe point of view that could explain why Thaler and Sunstein feel so strongly that humanity's irrational nature is a problem that needs to be fixed).

<sup>338</sup> *See* THALER & SUNSTEIN, *supra* note 173, at 26–29, 102, 189; *cf.* Tasic, *supra* note 325, at 15 (arguing that “our ignorance is fundamental” and therefore “resistant to rectification by an even higher expert”); Sugden, *supra* note 325, at 122 (noting strong reasons why Thaler and Sunstein's claims about nudging are “misleading” and arguing that “[a]dvocates of nudging should come clean about the paternalism of their position and defend it directly”).

<sup>339</sup> THALER & SUNSTEIN, *supra* note 173, at 42–43.

thinking—fast and slow.<sup>340</sup> Kahneman used his slow thinking to manipulate his son's fast thinking by inspiring emotions of pride and dejection.<sup>341</sup>

The benefit was solely Kahneman's, and the cost solely borne by his son—the choice architect made it seem that it would be stupid to go get more toys.<sup>342</sup> So, the chooser decided to stop asking for toys because he perceived his father would find him a dunce if he kept asking, that is, Kahneman convinced his son that if he kept asking for toys he would wear the scarlet letter of being a bad cost/benefit balancer—he would be seen as a Homer Simpson.<sup>343</sup> Thaler and Sunstein hailed this as proof of concept—that Kahneman's theory of thinking fast and slow can and should be used to manipulate others to make choices that the choice architect finds rational.<sup>344</sup>

Thaler and Sunstein's choice architects are allowed to subtract themselves from the cost/benefit equation.<sup>345</sup> The irrationality of their inquiries, including the question of whether applying a cost/benefit analysis is rational at all, is not considered; only the irrationality of the subjects they apply their tests to is analyzed.<sup>346</sup> Choice architects may also assume that all people *want* to be manipulated into making better choices as defined by choice architects.<sup>347</sup>

So, without proving cost/benefit balancing tests are rational and without so much as a referendum to confirm that people actually *want* to be subject to government administered manipulations based upon cost/benefit balancing tests, Thaler and Sunstein's choice architects may presuppose it would still be a good idea, on the whole, to weigh and balance costs and benefits.<sup>348</sup> In other words, the findings of Kahneman and Tversky do not apply to Thaler and Sunstein's

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<sup>340</sup> *Id.*

<sup>341</sup> *Id.* (One day Declan “asked ‘Daddy, do I even have a System Two?’”). After Kahneman's parenting technique, his son thought perhaps he was more of a lizard brain than a human. *Id.*

<sup>342</sup> *Id.* (“[T]he explanation seemed to work, and Declan could pass by toy stores without uttering a word.”).

<sup>343</sup> *Id.*; cf. LEWIS, *supra* note 163, at 261 (“People did not seek to avoid other emotions with the same energy they sought to avoid regret.”).

<sup>344</sup> THALER & SUNSTEIN, *supra* note 173, at 42–43.

<sup>345</sup> *Id.* at 312; cf. LEWIS, *supra* note 163, at 261 (explaining how cost/benefit balancers failed to calculate the psychology of emotions into decision making heuristics, and how Daniel Kahneman began to address this problem by explaining the central role of human emotions such as the feeling of regret in human decision-making).

<sup>346</sup> THALER & SUNSTEIN, *supra* note 173, at 42–43, 312; Sugden, *supra* note 325, at 122; Tasic, *supra* note 325, at 15.

<sup>347</sup> Sugden, *supra* note 325, at 122; cf. Sunstein, *Cognition*, *supra* note 185, at 1059–60 (arguing that all people would want cost/benefit balancing tests to determine their choice architecture “if in fact they were aware of the cost-benefit analysis”), quoting and disagreeing with Joseph Biden, *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 310 (1994) (statement of Sen. Joseph Biden, Chairman).

<sup>348</sup> See sources cited *supra* notes 345–347.

choice architects.<sup>349</sup> Therefore, choice architects are *homo economicus*, i.e., not humans, and do not need to “accept that wherever there is judgement, there is noise.”<sup>350</sup>

The cost/benefit balancing test itself is a Benthamite *Panopticon* by another name.<sup>351</sup> Instead of making its subjects feel seen, the cost/benefit balancing test makes its subjects feel heard—and out of this hearing, the decision-maker is dogmatically presumed just, the same way as God is presumed just—*without evidence*.<sup>352</sup> This is strikingly similar to Bentham’s claim that if all humans felt seen by the government, then they would presume the government omniscient and therefore omnipotent (a claim James Otis wisely preempted prior to the American Revolution).<sup>353</sup>

When Thaler and Sunstein disclose to the masses that we are all in some sense a Homer Simpson, they are asking us to be ashamed of our irrational way of thinking—telegraphing through our emotions that our irrationality is a problem that needs to be solved.<sup>354</sup> When they teach us of how we think fast and slow, and that with this knowledge we can overcome our shameful lizard brains, they are asking us to take pride in this knowledge—to feel smug about their promise that through knowledge we can fix our brains.<sup>355</sup> What we need, Thaler

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<sup>349</sup> THALER & SUNSTEIN, *supra* note 173, at 42–43; Sugden, *supra* note 325, at 122; Tasic, *supra* note 325, at 15.

<sup>350</sup> Evan Nesterak, *A Conversation with Daniel Kahneman About “Noise”*, BEHAV. SCIENTIST (May 24, 2021), <https://behavioralscientist.org/a-conversation-with-daniel-kahneman-about-noise/>; Sugden, *supra* note 325, at 122.

<sup>351</sup> 1 JEREMY BENTHAM, PANOPTICON 3 (1791) [hereinafter BENTHAM, PANOPTICON]; see Jacques-Alain Miller, *Jeremy Bentham’s Panoptic Device*, 41 MIT PRESS 3, 3–6 (Richard Miller trans.) (1987); compare *Stone v. Powell*, 428 U.S. 465, 494–95 (1976), with 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; cf. Confidential Memorandum from Lewis F. Powell, Jr. to Mr. Eugene B. Sydnor, Jr., Chairman of the U.S. Chamber of Com. Educ. Comm. (August 23, 1971), <https://www.greenpeace.org/usa/wp-content/uploads/2021/08/PowellMemorandumTypescript.pdf> [hereinafter Powell Memo] (advocating that pro-corporation ideologues engineer the success of corporations by using rational systems that take advantage of humankind’s general lack of reason), generally inspired by BERNAYS, *supra* note 12, at epigraph (quoting MILTON, *supra* note 12, at ls. 865–68).

<sup>352</sup> See sources cited *supra* notes 345–350; *Stone*, 428 U.S. at 515 (Brennan, J., dissenting).

<sup>353</sup> See sources cited *supra* notes 345–350; Schroeder, *Leviathan*, *supra* note 46, at 9–10 (“Bentham’s *Panopticon* was directly preempted by James Otis.”).

<sup>354</sup> THALER & SUNSTEIN, *supra* note 173, at 45.

<sup>355</sup> *Id.* at 42, 45. “Humans sometimes go with the answer the lizard inside is giving without pausing to think”—the manipulation of calling part of our brain “lizard” is similar to Mill’s evidence-less *ad hominem* assertion that Bentham was a swine. *Id.*; see source cited *infra* note 380. Within the insult is the presupposition that lizards are unwise or stupid, which is reminiscent of the eugenicists’ quasi-religious ladder to heaven. See MILLER, *supra* note 6, at 143–45.

and Sunstein say, to overcome our shameful irrationality, is a paternalistic government to trick us into making better choices.<sup>356</sup>

This emotional manipulation that lies behind *Nudge* also lies behind cost/benefit balancing tests.<sup>357</sup> It is not an application of Kahneman and Tversky's empirical research; rather, it is repackaged Hobbesian pride and dejection to manipulate the masses to adopt strong centralized governments and to consequently abandon the common law.<sup>358</sup> It is an old populist manipulation, a play on human emotion that long predates Kahneman and Tversky's work, but which also seems to be malleable enough to corrupt almost any good idea.<sup>359</sup>

In the language developed by Kahneman and Tversky, when a judge uses a cost/benefit balancing test, that judge is using his or her slow brain to manipulate the fast part of other people's brains to get what the judge wants.<sup>360</sup> It is like telling a boy that he is using his fast brain whenever he complains about not getting to go to the toy store, which is the same as dressing him down for being a human.<sup>361</sup> Cost/benefit balancing tests make some claims about science and positive outcomes, but ultimately it is a dogmatic justifier for dismissal of a complaint.<sup>362</sup>

In the end, the boy may be entranced by a feeling of pride that derives from knowing the theory of how his inner brain is working or how some greater societal good is being served by his suffering.<sup>363</sup> In the moment, this feeling, along with the feeling of making one's father proud, may be perceived as more

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<sup>356</sup> THALER & SUNSTEIN, *supra* note 173, at 45.

<sup>357</sup> Compare *id.*, with Sunstein, *Cognition*, *supra* note 185, at 1059–60; MILLER, *supra* note 6, at 14–15, 97–106; see *supra* note 293 and accompanying text.

<sup>358</sup> Schroeder, *Leviathan*, *supra* note 47, at 143; MILLER, *supra* note 6, at 143–45.

<sup>359</sup> See HOBBS, *supra* note 232, at 46–48.

<sup>360</sup> THALER & SUNSTEIN, *supra* note 173, at 42–45.

<sup>361</sup> *Id.*

<sup>362</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333–34 (1976); *Buck v. Bell*, 274 U.S. 200, 207 (1927); cf. Sunstein, *Cognition*, *supra* note 185, at 1068 (naming the supposed benefits of putting costs and benefits “on-screen” without considering the costs of delays caused by gathering and analyzing this knowledge).

<sup>363</sup> THALER & SUNSTEIN, *supra* note 173, at 42–43 (suggesting that Declan should be and presumably is comforted by the knowledge of his lizard brain); see ADAMS, DISCOURSES, *supra* note 294, at 62 (“Our obsequiousness to our superiors more frequently arises from our admiration for the advantages of their situation, than from any private expectations of benefit from their good will. Their benefits can extend but to a few; but their fortunes interest almost everybody. We are eager to assist them in completing a system of happiness that approaches so near to perfection; and we desire to serve them for their own sake, without any other recompense but the vanity or the honor of obliging them. Neither is our deference to their inclinations founded chiefly, or altogether, upon a regard to the utility of such submission, and to the order of society, which is best supported by it. Even when the order of society seems to require that we should oppose them, we can hardly bring ourselves to do it.” (quoting SMITH, THE THEORY, *supra* note 294, at 73–74) (internal quotations omitted)).



rewarding than the prospect of more toys.<sup>364</sup> However, in the long run, children grow up and may question their upbringing because new adults sometimes realize when their parents told them something just to get them to shut up.<sup>365</sup>

New feelings are piled on top of the old ones—perhaps a child has an epiphany later in life that a parent, or an aunt or uncle, had a tendency to misuse their knowledge of psychology to abuse them.<sup>366</sup> Once such a child learns that the source of the abuse he or she experienced was a psychological trick, it is not the underlying knowledge or research about psychology that they consider the trick—the knowledge is only a chaser to help the medicine go down.<sup>367</sup> At some point, when knowledge doesn't inspire compliance, violence is employed.<sup>368</sup>

Nevertheless, Cass R. Sunstein somehow convinced others to fudge the line between the choice architect and the chooser.<sup>369</sup> It is as if Sunstein defined human choice as informing everyone they are irrational, and then manipulating them to get the results the choice architect desires.<sup>370</sup> Call it “libertarian paternalism,” call it whatever you like, it is no different from a bid to transform the U.S. Government into a Bernaysian public relations operation that engineers consent.<sup>371</sup>

In fact, Thaler and Sunstein's central, defining term for their movement “libertarian paternalism” seems to be a mere talking point for them to distract from the propaganda justification they put forth.<sup>372</sup> Nobody takes the idea of

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<sup>364</sup> THALER & SUNSTEIN, *supra* note 173, at 42–43; *cf.* HOBBS, *supra* note 232, at 46–48 (explaining his theory of inherent human madness premised upon the co-occurring emotions of pride and dejection).

<sup>365</sup> THALER & SUNSTEIN, *supra* note 173, at 42–43; *see generally* HARPER LEE, *GO SET A WATCHMAN* (2015) (demonstrating the lengths American parents went through in order to pass down their racism and elitism to future generations).

<sup>366</sup> LEE, *supra* note 365, at 260, 271 (“She slammed down the drunk lid, snatched out the key, and straightened up to catch Dr. Finch’s savage backhand swipe full on the mouth. Her head jerked to the left and met his hand coming viciously back . . . ‘Don’t you tell me you can’t, girl! Say that again and I’ll take this stick to you, I mean that!’”); *cf.* MILLER, *supra* note 6, at 111, 123 (explaining how David Starr Jordan may have murdered Jane Stanford for getting in his way).

<sup>367</sup> LEE, *supra* note 365, at 261 (“Jean Louise drank and choked. ‘Hold your breath, stupid. Now chase it.’”).

<sup>368</sup> *See* sources cited *supra* notes 366–367.

<sup>369</sup> Sunstein, *Cognition*, *supra* note 185, at 1059–60.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*; THALER & SUNSTEIN, *supra* note 173, at 6; Edward Bernays, *The Engineering of Consent*, 250 THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 113, 113–14 (1947); BERNAYS, *supra* note 12, at epigraph (quoting MILTON, *supra* note 12, at ls. 865–68 (giving the Puritan version of cost/benefit balancing tests)).

<sup>372</sup> THALER & SUNSTEIN, *supra* note 173, at 6 (“We are keenly aware that this term is not one that many readers will find immediately endearing.”).

libertarian paternalism seriously, including Thaler and Sunstein.<sup>373</sup> It actually appears that they raised this oxymoron, as all good Hegelians do, just to exhaust everyone before they are able to fully comprehend what they are actually saying.<sup>374</sup>

Cass R. Sunstein, the bureaucrat among them, is famously unconcerned with government form.<sup>375</sup> Given the rare opportunity to pass down a serious canon of constitutional theory to future generations, Sunstein decided to ruin *Star Wars* instead.<sup>376</sup> To take a line from Professor Victoria Nourse, Sunstein “believe[s] that the Constitution could be reduced to *ad hoc* balancing,” i.e., Sunstein doesn’t care about the Constitution as long as it supports *The Cost-Benefit State*.<sup>377</sup>

Much more could be said about the specific delusions that must be held by these men.<sup>378</sup> It is strange to see them spend the last portion of their careers lamenting the death of rationalism rather than pressing forward into new questions of behavioral psychology.<sup>379</sup> There is still much work to be done to see

<sup>373</sup> *Id.* (putting down their own movement as “somewhat off-putting, weighed down by stereotypes from popular culture and politics that make them unappealing to many”).

<sup>374</sup> *But see id.* at 6–8 (maintaining that libertarian paternalism makes sense, because the ends justify the means). As beheld by Bertrand Russell, Hegel’s philosophy was dressed up in so many contradictions and paradoxes that few who engaged with it ever succeeded in reaching the bottom of the theory, which is that the ends justify the means. RUSSELL, UNPOPULAR, *supra* note 56, at 20; RUSSELL, A HISTORY, *supra* note 233, at 774 (noting that Hegelian philosophy is “defective” because it “does not take account of the distinction between ends and means”).

<sup>375</sup> Sunstein, *Cognition*, *supra* note 185, at 1059–60; Epstein, *supra* note 235.

<sup>376</sup> Cass R. Sunstein, *How Star Wars Illuminates Constitutional Law* 2, 6, 12–13 (May 11, 2015) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2604998](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2604998); *see* William Baude, *Star Wars Destroyed*, THE NEW RAMBLER (May 31, 2016), <https://newramblerreview.com/book-reviews/film-media-studies/star-wars-destroyed> (reviewing CASS R. SUNSTEIN, THE WORLD ACCORDING TO STAR WARS (2016)); *cf.* Meister, *supra* note 232, at 186, 193 (“As a historical account of American democracy, Sunstein’s view is idiosyncratic, and somewhat weakly supported.”). Professor Meister commented on the “incompleteness” of Sunstein’s constitutional analysis, and noted that “the most original aspect of Sunstein’s argument” is a sort of Hobbesian social compact theory that defines what constitutions are without finding adequate support from the founding generation of Americans. *Id.*

<sup>377</sup> Nourse, Buck, *supra* note 13, at 114 (speaking of Justice Holmes); Cass R. Sunstein, *The Cost-Benefit State* 1, 6 (Univ. of Chi. L. Sch.: Chi. Unbound, Working Paper No. 39, 1996) [hereinafter Sunstein, *The Cost-Benefit*] (interpreting U.S. government form according to the principles of the New Deal rather than the “checks and balances” of the U.S. Constitution); *id.* at 42 (“[A] general background requirement of cost-benefit balancing—a substantive supermandate—should be enacted.”).

<sup>378</sup> *Cf.* MILLER, *supra* note 6, at 97–106 (explaining differing views of psychologists regarding whether delusions are good or bad, and why they are important to think about).

<sup>379</sup> *See, e.g.*, Richard H. Thaler, *From Homo Economicus to Homo Sapiens*, 14 J. ECON. PERSPECTIVES 133, 140 (2000) (guessing that idealized economic structures premised on *homo economicus* can rationally be remodeled around the actual characteristics of *homo sapiens*); THALER & SUNSTEIN, *supra* note 173, at 45 (proposing that choice architects can re-create

whether Bertrand Russell's theories about natural human love, kindness, and humanity's aversion to cruelty make a better center for economies than rational self-interest.<sup>380</sup>

It will be disappointing, if unsurprising, for powerful Boomers like Cass R. Sunstein to leave all the real work to Millennial scientists after they hobble the scientific discourse with paternalistic government censors.<sup>381</sup> Lulu Miller's observations of David Starr Jordan's hubris seem to be reflected throughout American society in 2022.<sup>382</sup> Cost/benefit balancing tests are disproved, and yet they will continue on as long as enough people believe they are not disproven—as long as their propagandistic allure still holds influence over the popular mind.<sup>383</sup>

#### PART VI: ON THE PURSUITS OF LOVE, NATURAL KINDLINESS, AND MUTUAL FORBEARANCE

Willful ignorance of Kahneman and Tversky's discoveries seems to illustrate “the tyranny of the remembering self.”<sup>384</sup> Kahneman and Tversky upended Bentham's central presuppositions, but this does nothing to dispel delusive beliefs about cost/benefit balancing in the judiciary.<sup>385</sup> At the very least, Kahneman and Tversky revealed that cost/benefit balancing tests are a pre-established psychological anchor in feeling-based intuition that may continue on regardless of reason.<sup>386</sup>

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economic programs around the least common denominator of humanity and unscientifically presupposing without evidence that this lowest common denominator would consistently match the “fast” thinking that humans engage in); KAHNEMAN, NOISE, *supra* note 74, at 48–49.

<sup>380</sup> Thaler, *supra* note 379, at 139; RUSSELL, UNPOPULAR, *supra* note 56, at 175 (“Universal love is an emotion which many have felt and which many more could feel if the world made it less difficult.”); Peacefulness, *Bertrand Russell – “Love is Wise, Hatred is Foolish” (Message To Future Generations)*, YOUTUBE (Feb. 11, 2020), <https://www.youtube.com/watch?v=WI0Awxxb-mI>.

<sup>381</sup> THALER & SUNSTEIN, *supra* note 173, at 45; *cf.* BRUCE CANNON GIBNEY, A GENERATION OF SOCIOPATHS: HOW THE BABY BOOMERS BETRAYED AMERICA 103 (2017) (calling Boomers “*homo sociopathicus*”).

<sup>382</sup> Compare MILLER, *supra* note 6, at 102–03, with TRUMP, *supra* note 19, at 211.

<sup>383</sup> KAHNEMAN, NOISE, *supra* note 74, at 48–49; THALER & SUNSTEIN, *supra* note 173, at 312, 331; *see* sources cited *supra* notes 191–196 (noting the tectonic shift caused by Kahneman and Tversky's Nobel Prize winning research that showed why self-interested rationalism does not exist).

<sup>384</sup> KAHNEMAN, THINKING, *supra* note 163, at 381.

<sup>385</sup> *Id.* at 377 (citing 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2).

<sup>386</sup> *Id.* at 473; Kahneman, *Maps*, *supra* note 164, at 473; *cf.* KAHNEMAN, NOISE, *supra* note 74, at 48–49 (Kahneman and Sunstein's attempts to vindicate cost/benefit heuristics that reduce or eliminate “noise” are due to “an internal signal of judgment completion, unrelated to any outside information”); THALER & SUNSTEIN, *supra* note 173, at 26 (discussing the anchoring bias originally developed by Amos Tversky and Daniel Kahneman).

Kahneman and Tversky theoretically ruined several rational theories that came after Bentham as well, especially those of John Stuart Mill, John Rawls, and Oliver Wendell Holmes, Jr.<sup>387</sup> Mill, for one, thought even pigs were rational enough to know what pleased them.<sup>388</sup> After Kahneman and Tversky, it is possible that pigs may be *more* rational than humans if further experimentation reveals that Mill's central presupposition about pigs still follows.<sup>389</sup>

As Mill demonstrated, Bentham's idea of rational ordering of experience under our two masters of pain and pleasure was considered so low as to be animal.<sup>390</sup> Thus, every rationalist after Mill seemed to use Bentham as a baseline from which to build from, as synonymous with animal reason, that is, rationalism's lowest form.<sup>391</sup> For example, Rawls presupposed that ableist white men can know, without engaging in a discourse with others, what it would be like to be a woman or black or disabled.<sup>392</sup> And Holmes—perhaps the most extravagant of all—believed he could rational-balancing-test a land of supermen into being.<sup>393</sup>

Cicero preempted Mill when he wrote that animals generally do not try to “comprehend[] the chain of consequences” to change the course of future events like humans.<sup>394</sup> Several notable empiricists and common law jurists were inspired by Cicero's concept of practical justice arising from public discourse about the law rather than sheer human reason.<sup>395</sup> These thinkers, several of whom

<sup>387</sup> See KAHNEMAN, THINKING, *supra* note 163, at 411 (citing generally MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE (1980)) (“[F]aith in human rationality is closely linked to an ideology in which it is unnecessary and even immoral to protect people against their choices.”).

<sup>388</sup> JOHN STUART MILL, UTILITARIANISM 10–11 (1861) [hereinafter MILL, UTILITARIANISM].

<sup>389</sup> *Id.* at 6–7 (“The subject is within the cognizance of the rational faculty.”); *id.* at 14 (calling Benthamism “a doctrine worthy only of swine”); *id.* at 95 (“[W]e ought to shape our conduct by a rule which all rational beings might adopt *with benefit to their collective interest.*”) (emphasis in original).

<sup>390</sup> *Id.* at 10; 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2. The accusation of animalistic thinking to influence an audience to adopt a solution for it, as Mill did, was repurposed by Richard H. Thaler and Cass R. Sunstein in the comments about “lizard” brains. THALER & SUNSTEIN, *supra* note 173, at 42.

<sup>391</sup> MILL, UTILITARIANISM, *supra* note 388, at 10–11; *cf.* Sunstein, *Problems*, *supra* note 199, at 956, 958 (similarly using Bentham as a foil to create a baseline for Sunstein's legal ideas).

<sup>392</sup> JOHN RAWLS, A THEORY OF JUSTICE: REVISED EDITION 85, 92, 124–25, 136, 154, 443 (1999).

<sup>393</sup> See *Buck v. Bell*, 274 U.S. 200, 207 (1927); Nourse, *Buck*, *supra* note 13, at 114 (“Holmes . . . believed that the Constitution could be reduced to ad hoc balancing.”); *cf.* *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 574 (2015) (Scalia, J., dissenting) (decrying “the bestiary of ad hoc tests and ad hoc exceptions that we apply nowadays”).

<sup>394</sup> CICERO, DE OFFICIIS WITH AN ENGLISH TRANSLATION 1.11.4 (Walter Miller, ed., trans., Harvard Univ. Press 1913), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2007.01.0048%3Abook%3D1%3Asection%3D11>.

<sup>395</sup> See, e.g., 2 WILSON, *supra* note 198, at 778–80 (quoting CICERO, PRO CAECINA 26.74–75); *Chisholm v. Georgia*, 2 U.S. 419, 453–55 (1793) (quoting CICERO, DE REPUBLICA 6.13), *precedential value examined by Schroeder, We Will*, *supra* note 56, at 28 (“In *Franchise Tax Bd.*

were American Revolutionaries, were vindicated by Kahneman and Tversky's research.<sup>396</sup>

Kahneman and Tversky proved that Bentham's center does not hold, and so too that any rational philosophy premised on the same cannot stand.<sup>397</sup> From Ayn Rand to Max Weber, there are several rational theories that cannot exist without the pre-existing, inherent capacity to know one's own self-interest.<sup>398</sup> In short, Kahneman and Tversky's research ruins any theory premised on rational self-interest, because Kahneman and Tversky proved that the pursuit of self-interest is inherently irrational.<sup>399</sup>

Rational self-interest theories were upended by Kahneman and Tversky's studies, and yet Kahneman himself appeared not to recognize it.<sup>400</sup> Kahneman is not an epistemologist, and it is not Kahneman's job to explain the intricate ways his research has an effect in related fields.<sup>401</sup> However, in several places Kahneman, along with several of his colleagues, appeared to mistake the epistemology of Bentham, who was a devout rationalist, for empiricism.<sup>402</sup>

This is a common mistake, and for Kahneman it appears to have caused him to misconstrue utilitarians like Cass R. Sunstein as friends of empirical analysis.<sup>403</sup> This is like mistaking a bulldog for a butterfly, because Benthamites are self-avowed radicals characterized by the "rejection of any philosophical

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*of California v. Hyatt*, the Court disparaged *Chisholm v. Georgia* as incorrectly decided . . . ."); Kastely, *supra* note 236, at 31; THOMAS PAINE, COMMON SENSE 15 (1776) [hereinafter PAINE, COMMON] (exhorting readers to "examine the passions and feelings of mankind" to discern "the touchstone of nature").

<sup>396</sup> See sources cited *supra* note 395; sources cited *infra* notes 422–429; KAHNEMAN, THINKING, *supra* note 163, at 411; cf. [Jeremy Bentham,] *Short Review of the Declaration*, in [JEREMY BENTHAM & JOHN LIND,] AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 131–32 (1776) (demonstrating that Bentham was a staunch counterrevolutionary).

<sup>397</sup> KAHNEMAN, THINKING, *supra* note 163, at 411. There were also several world-shaping pre-Bentham theories that should be reconsidered in the light of Kahneman & Tversky's research, including the dispute between Hugo Grotius's *The Free Sea* and John Selden's *The Sea is Closed* that created New York. Compare generally *id.*, with HUGO GROTIUS, THE FREE SEA (Richard Hakluyt trans., 2004), and JOHN SELDEN, THE SEA IS CLOSED (Marchamot Nedham trans., 1652).

<sup>398</sup> KAHNEMAN, THINKING, *supra* note 163, at 411; see generally AYN RAND, THE VIRTUE OF SELFISHNESS (1964); MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1905).

<sup>399</sup> KAHNEMAN, THINKING, *supra* note 163, at 411.

<sup>400</sup> *Id.* (connecting his studies to the unsettling of *laissez-faire* economics that call for a weak central government but seeming not to perceive the same unsettling effect on rationalist theories that call for a strong central government).

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 377; Kahneman, Back, *supra* note 175, at 397 (misdescribing Bentham's utilitarianism as empirical).

<sup>403</sup> Perreau-Saussine, *supra* note 175, at 349–50. See, e.g., KAHNEMAN, THINKING, *supra* note 163, at 141–45.

notion of moral authority.”<sup>404</sup> Bentham appealed to reason to justify radical moral ambiguity by attacking the imagination as the cause of whimsy and caprice.<sup>405</sup>

Thus, Amanda Perreau-Saussine correctly characterized “Bentham’s jurisprudence as exemplifying ‘enlightenment rationalism in its utilitarian dress.’”<sup>406</sup> Strictly speaking, empiricism rejects the epistemological idea of knowledge from innate reason, which is called “dogma”—even innate experiential knowledge must be rejected until proven through a scientific discourse.<sup>407</sup> Bertrand Russell, and *not* Bentham, best represented these “Liberal beliefs” of the empiricist.<sup>408</sup>

An empiricist must accept that Bentham is debunked by Kahneman and Tversky even if the empiricist does not perceive a viable alternative heuristic for decision making.<sup>409</sup> Real empiricism requires doubt, even doubt that, in the absence of evidence, human beings can be rational.<sup>410</sup> In the light of empirical evidence that human beings can exercise reason, the empiricist does not conclude the capacity to reason is inherent, but must leave open the possibility that reason is learned or developed.<sup>411</sup>

<sup>404</sup> Perreau-Saussine, *supra* note 175, at 383.

<sup>405</sup> H.L.A. HART, *ESSAYS ON BENTHAM* 15, 65 (1982) (“Bentham insisted that . . . the doctrine of inalienable specific rights . . . belong to Utopia: that is, nowhere or an imaginary world.”). Bentham’s claims regarding the imagination were extremely ironic because Bentham’s utilitarianism was a cause of the French Reign of Terror and several whimsical despotisms in Spanish America. See M. DUMONT, *PRINCIPLES OF LEGISLATION: FROM THE MS. OF JEREMY BENTHAM* 120 (John Neal trans., 1830) (1789) (“If it be better for the greatest happiness of the greatest number that a man should die, whoever he may be, and whatever he may be, *cut him [down] without mercy.* And so with his liberty, and so with his property.”); see also *id.* at 148–57 (noting the role Bentham had in the French Revolution); MIRIAM WILLIFORD, *JEREMY BENTHAM ON SPANISH AMERICA* 87 (1980) (noting how “Bentham planned, schemed, [and] worked for the establishment of a New World utilitarian utopia”); cf. Gertrude Himmelfarb, *Bentham’s Utopia: The National Charity Company*, 10 *J. BRIT. STUD.* 80, 113 (1970) (noting how Bentham “had described his work as ‘the Romance, the Utopia’—which, he hastened to add, meant not that it was unrealizable but only that it had not yet been realized”).

<sup>406</sup> Perreau-Saussine, *supra* note 175, at 348 (quoting POSTEMA, *supra* note 190, at 319); see WILLIFORD, *supra* note 405, at xiv (“Believing that men everywhere were alike, i.e., rational, [Bentham] did not bother to acquaint himself with the traditions, customs, or life-styles of the people for whom he made these plans. In actuality, he virtually ignored the existence of the indigenous peoples of Spanish America.”).

<sup>407</sup> RUSSELL, *UNPOPULAR*, *supra* note 56, at 33–34.

<sup>408</sup> *Id.*

<sup>409</sup> KAHNEMAN, *THINKING*, *supra* note 163, at 411; RUSSELL, *UNPOPULAR*, *supra* note 56, at 27 (“The genuine Liberal does not say ‘this is true,’ he says ‘I am inclined to think that under present circumstances this opinion is probably best.’ And it is only in this limited and undogmatic sense that he will advocate democracy.”).

<sup>410</sup> RUSSELL, *UNPOPULAR*, *supra* note 56, at 27.

<sup>411</sup> *Id.*; KAHNEMAN, *THINKING*, *supra* note 163, at 411.

The final result of Kahneman and Tversky's studies is that selfishness is *not* rational.<sup>412</sup> Choosing self-interest as a pole star of a philosophy, an economic or legal system, or even as a lifestyle is not rational.<sup>413</sup> It is whimsical.<sup>414</sup> Whimsy can be an extremely attractive character trait in a friend or lover, but not in a judge.<sup>415</sup> Thus, judges should not adopt cost/benefit balancing heuristics based on "rational" self-interest, because self-interest is proven *irrational*—its center will not hold.<sup>416</sup>

An empirical proof of the irrationality of self-interest philosophers, economists, and jurists is their frequent disagreements.<sup>417</sup> To give one extreme example, Rawls thought that judges should make decisions behind a veil,<sup>418</sup>

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<sup>412</sup> KAHNEMAN, THINKING, *supra* note 163, at 411. Selfishness is irrational in the epistemological sense of the term "rational," which indicates *a priori* knowledge, i.e., Kahneman proved that one's own self-interest is not *a priori* knowledge and is therefore irrational. *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> See, e.g., JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 287 (2000) [hereinafter ADAMS, THE REVOLUTIONARY] ("Pope flattered tyrants too much when he said, 'For forms of government let fools contest / That which is best administered is best.' Nothing can be more fallacious than this. But poets read history to collect flowers, not fruits; they attend to fanciful images, not the effects of social institutions." (quoting ALEXANDER POPE, AN ESSAY ON MAN 80 (1763))).

<sup>416</sup> *Id.* at 291–92; LEWIS, *supra* note 163, at 321 (demonstrating how Kahneman and Tversky leveled Oxford Professor L. Jonathan Cohen's dogmatic argument that "as man had created the concept of rationality he must, by definition, be rational"); cf. JOAN DIDION: THE CENTER WILL NOT HOLD (Netflix 2017) (paying homage to Didion's written work that examined how America's attempts to rationalize the delusions of its citizenry is a center that will not hold).

<sup>417</sup> For example, John Maynard Keynes hailed Newtonian Rationalism as a great inspiration to his work, but Keynes disagreed with Isaac Newton about what actually *is* rational. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 74 (1923); John Maynard Keynes, *Newton, the Man*, in JMK/PP/60, The Papers of John Maynard Keynes, King's College, Cambridge (1946); JOHN MAYNARD KEYNES, *The End of the Gold Standard*, Sept. 27, 1931, in ESSAYS IN PERSUASION 288 (1932); Isaac Newton, *Sir Isaac Newton's Report on the Gold and Silver Coin in 1717*, Dec. 30, 1717, in 11 THE NUMISMATIC CHRONICLE AND JOURNAL OF THE NUMISMATIC SOCIETY 181–85 (Apr. 1848 – Jan. 1849). Another example is how Jeremy Bentham both hailed Adam Smith as "the father of political economy" and betrayed Smith's economic theories. See JEREMY BENTHAM, RATIONALE OF REWARD 71 n.\* (1825); Jeremy Bentham, *Circulating Annuities* [1800], reprinted in 2 W. STARK, JEREMY BENTHAM'S ECONOMIC WRITINGS 337–38 n.\* (1954); Jeremy Bentham, *The True Alarm* (1801), reprinted in 3 W. STARK, JEREMY BENTHAM'S ECONOMIC WRITINGS 112 n.\* (1954). In yet another example, J.S. Mill put lipstick on the Benthamite pig in his book *Utilitarianism*, which defended Jeremy Bentham saying that it was actually his detractors that held a dim view of human nature, while Mill vastly disagreed with Bentham about the value of his systems of Puritanical control and appeared to be oblivious of his paradoxical departure from Benthamite Rationalism, of which he claimed to be a disciple. MILL, UTILITARIANISM, *supra* note 388, at 10–11; J.S. MILL, ON LIBERTY 168 (1863).

<sup>418</sup> RAWLS, *supra* note 392, at 136.

while Bentham preferred judgments made in absolute transparency.<sup>419</sup> If these men were expounding rational thought, as they both claimed, rational humans must agree with both—but to adopt both Bentham and Rawls is to embrace paradox.<sup>420</sup>

From the almost perfectly diametric contradictions of Rationalists alone we can suppose,<sup>421</sup> as the American Revolutionaries supposed,<sup>422</sup> that rationalism is not rational.<sup>423</sup> Kahneman and Tversky's studies added scientific proof to this pre-existing empirical rebuttal in America against rational dogma.<sup>424</sup> In the law, this rebuttal took place in several centuries' long disputes that the common law maintained against legal realism and positivism.<sup>425</sup>

Rational self-interest is disproven, including cost/benefit balancing tests, but empiricism is not.<sup>426</sup> The Scottish empiricists James Beattie and Thomas Reid drew upon the *sensus communis* of Cicero and inspired the American Revolution as commemorated by Justice Wilson's exceptional opinion in *Chisholm v. Georgia*.<sup>427</sup> The desire to love and to be loved in return as the actual basis of

<sup>419</sup> 1 BENTHAM, PANOPTICON, *supra* note 351, at 3; *see* Miller, *supra* note 351, at 3–6 (“The Panopticon is not a prison. It is a general principle of construction, the polyvalent apparatus of surveillance, the universal optical machine of human groupings . . . . The Panopticon is an area of totalitarian control . . . . [T]he Panopticon is the model of the utilitarian world . . . .”).

<sup>420</sup> *Compare* source cited *supra* note 418, with sources cited *supra* note 419. To adopt Thaler & Sunstein is also to embrace paradox. THALER & SUNSTEIN, *supra* note 173, at 6 (calling their position “libertarian paternalism,” which is an oxymoron).

<sup>421</sup> *See, e.g.*, sources cited *supra* notes 417, 420.

<sup>422</sup> PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50 (vindicating love's place over reason); PAINE, COMMON, *supra* note 395, at 23 (basing his arguments of 1776 upon “those feelings and affections which nature justifies, and without which we should be incapable of discharging the social duties of life, or enjoying the felicities of it”); *id.* at 44 (noting that those who can ignore their emotions in the face of injustice “hath forfeited his claim to rationality—an apostate from the order of manhood”); G.W. SNYDER, THE AGE OF REASON UNREASONABLE 8 (1798); THE FOLLY OF REASON 8, 20, 23 (1794); ELIAS BOUDINOT, THE AGE OF REVELATION 30 (1801).

<sup>423</sup> G.K. CHESTERTON, THE PARADOXES OF MR. POND 41 (2008) (noting that paradox is the “truth standing on her head to attract attention”).

<sup>424</sup> *Compare* KAHNEMAN, THINKING, *supra* note 163, at 141–45, with PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50, SNYDER, *supra* note 422, at 8, and THE FOLLY OF REASON 8, 20, 23 (1794).

<sup>425</sup> 2 WILSON, *supra* note 198, at 808 (“The proceedings of the common law are founded on long and sound experience; but long and sound experience will not be found to stand in opposition to the original and genuine sentiments of the human mind.”); WOOLRYCH, *supra* note 255, at 271–73, 300; CHRISTOPHER HILL, GOD'S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION 171, 273 (1970).

<sup>426</sup> Kahneman, Back, *supra* note 175, at 397 (suggesting the adoption of an empirical model to confirm reason).

<sup>427</sup> JAMES BEATTIE, AN ESSAY ON THE NATURE AND IMMUTABILITY OF TRUTH; IN OPPOSITION TO SOPHISTRY AND SKEPTICISM 80 (1825) (“When reason invades the rights of common sense, and presumes to arraign that authority by which she herself acts, nonsense and confusion must of



human happiness was also affirmed by Adam Smith and Thomas Paine, each of whom inspired the Americans with Ciceronian discourse.<sup>428</sup>

However, the boldest enlightenment representatives of the emotional backbone of the American Revolution were James Otis and Phillis Wheatley.<sup>429</sup> In agreement with Otis, Wheatley set forth an empirical theory for how the human mind works.<sup>430</sup> She summarized that the leader of the mental train is the

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necessity ensue; science will soon come to have neither head nor tail, beginning nor end; philosophy will grow contemptible; and its adherents, far from being treated, as in former times, upon the footing of conjurers, will be thought by the vulgar, and by every man of sense, to be little better than downright fools.”); THOMAS REID, AN INQUIRY INTO THE HUMAN MIND 19 (1810) (“[I]n reality, Common Sense holds nothing of Philosophy, nor needs her aid. But, on the other hand, Philosophy (if I may be permitted to change the metaphor) has no other root but the principles of Common Sense; it grows out of them, and draws its nourishment from them: severed from this root, its honours wither, its sap is dried up, it dies and rots.”); *id.* at viii (quoting WILLIAM SHAKESPEARE, THE TEMPEST act 4, sc. 1, ls. 151, 156) (wielding Shakespeare to encapsulate Hume’s fatalism, that Reid says is “a hypothesis, which, in my opinion, overturns all philosophy, all religion and virtue, and all common sense: and finding that all the systems concerning the human understanding which I was acquainted with, were built upon this hypotheses, I resolved to inquire into this subject anew, without regard to any hypothesis”); *id.* at 8, *quoted by* Chisholm v. Georgia, 2 U.S. 419, 453–54 (1793); *id.* at 463 (quoting Reid’s paraphrase of Shakespeare from page viii of the dedication of *An Inquiry into the Human Mind*, where Reid uses Shakespeare to resist the fatalistic idea that seems to flow from Hume’s philosophy, i.e., that human beings do not really exist); *cf.* CICERO, DE ORATORE 1.12 (J.S. Watson, ed., trans., 1860), [https://pages.pomona.edu/~cmc24747/sources/cic\\_web/de\\_or\\_1.htm](https://pages.pomona.edu/~cmc24747/sources/cic_web/de_or_1.htm) (presenting thoughts regarding the common sense or *sensus communis* as it was originally conceived in ancient Rome).

<sup>428</sup> PAINE, COMMON, *supra* note 395, at 15; SMITH, THE THEORY, *supra* note 294, at 53, 236 (“Humanity does not desire to be great, but to be beloved.”); *id.* at 56 (“[T]he chief part of human happiness arises from the consciousness of being beloved.”); *id.* at 165 (“What so great happiness as to be beloved, and to know that we deserve to be beloved?”); *cf. id.* at 73–74 (providing strong evidence regarding why rational cost/benefit balancing tests cannot work), *quoted by* ADAMS, DISCOURSES, *supra* note 294, at 62.

<sup>429</sup> OTIS, *supra* note 218, at 63–64; *id.* at 119 (quoting Virgil, *Aeneid* 11.320–24) (noting that love is the impetus for the creation of a society); *id.* at 123–24 (noting that love, especially sexual and maternal love, is the basis of human societies); PHILLIS WHEATLEY, *On Friendship* [July 15, 1769], *reprinted in* THE COLLECTED, *supra* note 217, at 136 (In Ciceronian Latin, Wheatley wrote: “Let Amicitia in her ample reign / Extend her notes to a Celestial strain.”); PHILLIS WHEATLEY, *To the Right Honorable William, Earl of Dartmouth, His Majesty’s Principal Secretary of State for North America, &c.* (1773), *reprinted in* THE COLLECTED, *supra* note 217, at 73–75 (noting that her resistance to tyranny is “By feeling hearts alone best understood”); *cf.* CICERO, DE AMICITIA 14.51, 21.80–81 (W.A. Falconer, trans., Harvard Univ. Press 1923), [https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cicero/Laelius\\_de\\_Amicitia/text\\*.html](https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cicero/Laelius_de_Amicitia/text*.html) (providing thoughts about natural human love inspired by the ancient Roman playwright Terence).

<sup>430</sup> PHILLIS WHEATLEY, *On Imagination* (1773), *reprinted in* THE COLLECTED, *supra* note 217, at 65–68; PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), *reprinted in* THE COLLECTED, *supra* note 217, at 43–50; PHILLIS WHEATLEY, *On Recollection* (1773), *reprinted in* THE COLLECTED, *supra* note 217, at 62–64.

imagination, which contains both wonders and horrors, both the real and the fantastic.<sup>431</sup>

Wheatley presaged Kahneman and Tversky's theory of thinking fast and slow when she presented a vision of humanity swaying back and forth between day and night, imagination and reality.<sup>432</sup> Human beings retreat into the realm of their imaginations to rest, to heal, to be entertained, to tell stories, to have sex, and to pray—in the dreaminess of night, human beings prepare to make their choice.<sup>433</sup> Then after resting and dreaming, they turn and swing into the reality of day as if on a trapeze, rushing into the city square to submit their ideas to a public discourse with others, to make their decisions known in the burning heat of the sun.<sup>434</sup>

Wheatley noted that reason, the “king of day,”<sup>435</sup> is not implanted in humans as God's “viceroy,”<sup>436</sup> but rather that God implanted love as his

<sup>431</sup> PHILLIS WHEATLEY, *On Imagination* (1773), reprinted in THE COLLECTED, *supra* note 217, at 65–68.

<sup>432</sup> PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50; see LEWIS, *supra* note 163, at 307, 312. Kahneman and Tversky began working on studies reminiscent of the themes in Phillis Wheatley's poetry regarding the human imagination and recollection entitled *The Psychology of Possible Worlds* by Daniel Kahneman and *The Theory of Alternative States* by Amos Tversky. *Id.*

<sup>433</sup> PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50; PHILLIS WHEATLEY, *An Hymn to the Morning* (1773), reprinted in THE COLLECTED, *supra* note 217, at 56–57; PHILLIS WHEATLEY, *An Hymn to the Evening* (1773), reprinted in THE COLLECTED, *supra* note 217, at 58–59.

<sup>434</sup> PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50; PHILLIS WHEATLEY, *On Recollection* (1773), reprinted in THE COLLECTED, *supra* note 217, at 62–64.

<sup>435</sup> PHILLIS WHEATLEY, *An Hymn to the Morning* (1773), reprinted in THE COLLECTED, *supra* note 217, at 56–57; PHILLIS WHEATLEY, *An Hymn to the Evening* (1773), reprinted in THE COLLECTED, *supra* note 217, at 58–59 (observing the diurnal nature of humanity and concluding that the God “who gives the light” also “draws the sable curtains of the night”). Wheatley's personifications of the moon as “the silver queen of light” who assists our memory and imagination and the sun as the “king of day” who assists our reasoning and capacity for action exists throughout her poetry, but is most clearly elucidated in her poems *Thoughts on the Works of Providence*, *On Recollection*, and especially in her poem for Reverend Amory. *Id.*; PHILLIS WHEATLEY, *To a Gentleman and Lady on the Death of the Lady's Brother and Sister, and a Child of the Name Avis, Aged One Year* (1773), reprinted in THE COLLECTED, *supra* note 217, at 84–85; PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50; PHILLIS WHEATLEY, *To the Rev. Dr. Thomas Amory on Reading His Sermons on Daily Devotion, in which that Duty is Recommended and Assisted* (1773), reprinted in THE COLLECTED, *supra* note 217, at 90–91; PHILLIS WHEATLEY, *On Recollection* (1773), reprinted in THE COLLECTED, *supra* note 217, at 62–64; cf. John C. Shields, *Phillis Wheatley's Struggle for Freedom in Her Poetry and Prose*, in THE COLLECTED, *supra* note 217, at 241–43 (guessing at the African origins of Wheatley's writings about the sun and moon, and explaining the old, classical terms Wheatley used for sun and moon like “Apollo and Phoebus”).

<sup>436</sup> JOHN DONNE, *Holy Sonnet XIV*, reprinted in THE DIVINE, *supra* note 211, at 10. Phillis Wheatley's disagreement with the Puritans, especially John Milton who was cited most forcefully

representative in us.<sup>437</sup> Humans obviously do not need to listen to God’s love or natural human love generally—so it is also not a viceroy or any sort of dictator.<sup>438</sup> Rather, God “pervades the sable veil” and sent recollection “the regent of the night” to assist human beings in their pursuit of love.<sup>439</sup>

All humans feel the siren call of love.<sup>440</sup> Those who follow love into societies receive rewards of sex, children, sustenance, and community—which can be summed up in one word: *pleasure*.<sup>441</sup> The maximization of pleasure and minimization of pain is not the center of human thought, but a secondary result of love.<sup>442</sup> And natural love, a profound emotion, is discovered and retained through the imagination and recollection, each of which guide human beings to the choice of whether to create societies.<sup>443</sup>

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by the founders to exclude women from their rights on the basis of their sex, is explained further in my article *Leviathan Goes to Washington*. Schroeder, *Leviathan*, *supra* note 47, at 158–59; see *id.* at 141 (quoting Wheatley’s assessment of John Milton in order to observe how “the Puritan Revolution sank England into ‘the great depth . . . hell’s profound domain’” (quoting PHILLIS WHEATLEY, *Phillis’s Reply to the Answer* (Dec. 5, 1774), reprinted in THE COLLECTED, *supra* note 217, at 143–45)).

<sup>437</sup> JOHN DONNE, *Holy Sonnet XIV*, reprinted in THE DIVINE, *supra* note 211, at 10 (dubbing reason God’s viceroy, but lamenting that he, Donne, is unreasonable and thus believing that he is sinfully out of God’s plan), refuted by PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50 (denying that reason is a representation of God, and demonstrating that reason is properly the servant of love); see also PHILLIS WHEATLEY, *On Friendship* [July 15, 1769], reprinted in THE COLLECTED, *supra* note 217, at 136.

<sup>438</sup> PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50 (settling the dispute over whether love or reason best represents the God in favor of love), refuting JOHN DONNE, *Holy Sonnet XIV*, reprinted in THE DIVINE, *supra* note 211, at 10.

<sup>439</sup> PHILLIS WHEATLEY, *To the Rev. Dr. Thomas Amory on Reading His Sermons on Daily Devotion, in which that Duty is Recommended and Assisted* (1773), reprinted in THE COLLECTED, *supra* note 217, at 90–91; PHILLIS WHEATLEY, *On Recollection* (1773), reprinted in THE COLLECTED, *supra* note 217, at 62–64.

<sup>440</sup> OTIS, *supra* note 218, at 123–24; cf. SMITH, THE THEORY, *supra* note 294, at 56, 165 (describing the centrality of natural human love to the acquisition of human happiness).

<sup>441</sup> SMITH, THE THEORY, *supra* note 294, at 165; cf. OTIS, *supra* note 218, at 123–24 (describing the origin of society as a result of the basic, primal attraction of the sexes).

<sup>442</sup> See sources cited *supra* notes 435–440.

<sup>443</sup> RUSSELL, UNPOPULAR, *supra* note 56, at 175 (“Universal love is an emotion which many have felt and which many more could feel if the world made it less difficult.”); Peacefulness, *Bertrand Russell – “Love is Wise, Hatred is Foolish” (Message To Future Generations)*, YOUTUBE (Feb. 11, 2020), <https://www.youtube.com/watch?v=WIoAwxxb-ml>; see PHILLIS WHEATLEY, *On Imagination* (1773), reprinted in THE COLLECTED, *supra* note 217, at 65–68; PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50; PHILLIS WHEATLEY, *On Recollection* (1773), reprinted in THE COLLECTED, *supra* note 217, at 62–64; cf. OTIS, *supra* note 218, at 126 (“The few Hermits and Misanthropes that have ever existed, show that those states are unnatural.”).

This, Otis and Wheatley asserted, was God's plan for humans—we were to love each other and through love create societies to secure the happiness of others.<sup>444</sup> Choosing to love others is, in the soft empirical sense, rational or wise—it is the most likely way that a human can secure the love of others toward him or herself, which is the source of human happiness.<sup>445</sup> Adam Smith testified to this in his work *A Theory of Moral Sentiments*, inspiring John Adams and others.<sup>446</sup>

In government, the common law is the culmination of ages of empiricism, of law standing the test of time and being modified or removed whenever it does not.<sup>447</sup> Inspired by Lord Coke, founder James Wilson captured the common law's liberal empiricism that confirms reason through experience rather than through dogma.<sup>448</sup> In his famous lectures, Wilson wrote,

The common law of England, says my Lord Coke, is a social system of jurisprudence: she receives other laws and systems into a friendly correspondence: she associates to herself those, who can communicate to her information, or give her advice and assistance. Does a question arise before her, which properly ought to be resolved by the law of nations? By the information received from that law, the question will be decided: for the law of nations, is, in its full extent, adopted by the common law, and deemed and treated as a part of the law of the land. Does a mercantile question occur? It is determined by the law of merchants. By that law, controversies concerning bills of exchange, freight, bottomry, and insurances receive their decision. That law is indeed a part of the law of nations; but it is peculiarly appropriated to the subjects before mentioned. Disputes concerning prizes, shipwrecks, hostages, and ransombills, are, under the auspices of the common law, settled

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<sup>444</sup> PHILLIS WHEATLEY, *Thoughts on the Works of Providence* (1773), reprinted in THE COLLECTED, *supra* note 217, at 43–50; PHILLIS WHEATLEY, *On Friendship* [July 15, 1769], reprinted in THE COLLECTED, *supra* note 217, at 136; OTIS, *supra* note 218, at 63–64, 123–24.

<sup>445</sup> SMITH, THE THEORY, *supra* note 294, at 53, 165, 322; *cf.* CICERO, DE AMICITIA 14.51, 21.80–81 (W.A. Falconer, trans., Harvard Univ. Press 1923), [https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cicero/Laelius\\_de\\_Amicitia/text\\*.html](https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cicero/Laelius_de_Amicitia/text*.html) (explaining the role of natural human love in societies of human beings).

<sup>446</sup> ADAMS, DISCOURSES, *supra* note 294, at 26, 61–69; SMITH, THE THEORY, *supra* note 294, at 53, 165, 322.

<sup>447</sup> ELIHU S. RILEY, CORRESPONDENCE OF “FIRST CITIZEN”—CHARLES CARROLL OF CARROLLTON, AND “ANTILON”—DANIEL DULANY, JR., 1773, at 192 (1902) (“Groundless opinions are destroyed, but rational judgments, or the judgments of nature, are confirmed by time.” (quoting and translating CICERO, DE NATURA DEORUM 2.2.5) (internal quotation marks omitted)); *see, e.g.*, 2 WILSON, *supra* note 198, at 784 (“[A]s the rules of the common law are introduced by experience and custom; so they may be withdrawn by discontinuance and disuse.”).

<sup>448</sup> 2 WILSON, *supra* note 198, at 778.

and adjudged by the same universal rule of decision. Does a contract, in litigation, bear a peculiar reference to the local laws of any particular foreign country? By the local laws of that foreign country, the common law will direct the contract to be interpreted and adjusted. Does a cause arise within the jurisdiction of the admiralty? Within that jurisdiction the civil law is allowed its proper energy and extent.

But, while she knows and performs what is due to others, the common law knows also and demands what is due to herself. She receives her guests with hospitality; but she receives them with dignity. She liberally dispenses her kindness and indulgence;—but, at the same time, she sustains, with becoming and unabating firmness, the preeminent character of *gravior lex*.<sup>449</sup>

Wilson further gravitated toward Coke's "encomium of the common law,"<sup>450</sup> which sang of the superior collective reason that the common law represents, not only by allowing a discourse where reasonable minds can disagree, but also by consulting the "many successions of ages," by which the common law "has been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this realm . . . no man ought to be wiser than the law, which is the perfection of reason."<sup>451</sup>

In short, common law confirms reason through experience and is an ancient form of empirical application.<sup>452</sup> It comports with the Ciceronian empiricism championed by Otis and Wheatley in America, and by Beattie and Reid in Scotland.<sup>453</sup> Common law also remains the primary alternative to the cost/benefit heuristics based on the rationalist dogmas of legal realism and legal positivism first developed by the Puritans in an attempt to supplant the common law with a legal code.<sup>454</sup>

Cost/benefit balancing tests are, therefore, an irrational replacement for the common law.<sup>455</sup> Cost/benefit balancing heuristics are the part of legal realism and legal positivism that attempted to dress itself in a false empiricism.<sup>456</sup> For

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<sup>449</sup> *Id.* at 778–79.

<sup>450</sup> *Id.* at 779 (noting the "encomium of the common law, which I take from my Lord Coke"). An encomium is like a vindication and is a term of art that was used occasionally during the founding era. *See, e.g.*, 2 THE COMPLETE WORKS OF WILLIAM BILLINGS 31–32 (Hans Nathan ed., 1977) (including Billings' *An Encomium on Music* that vindicates music).

<sup>451</sup> 2 WILSON, *supra* note 198, at 779.

<sup>452</sup> *Id.* at 778–80 (quoting CICERO, PRO CAECINA 26.74–75).

<sup>453</sup> *Id.*; *see supra* notes 427–447 and accompanying text.

<sup>454</sup> *See* WOOLRYCH, *supra* note 255, at 271–73, 300.

<sup>455</sup> *Id.*; KAHNEMAN, THINKING, *supra* note 163, at 411; Aleinikoff, *Constitutional*, *supra* note 22, at 963.

<sup>456</sup> Aleinikoff, *Constitutional*, *supra* note 22, at 963; HILL, *supra* note 425, at 171, 273.

example, Bentham's assertion that we can rationalize experienced utility is not actually experienced utility, it is rational dogma.<sup>457</sup> Oliver Wendell Holmes, Jr.'s idea of "experience" is similarly deceptive.<sup>458</sup>

Balancers, under Bentham's tutelage, confused scientific discovery through empiricism with the rational dictates of dogma.<sup>459</sup> Experimentation and results were never followed by these men, rather they were instituted by them to serve their preexisting agendas.<sup>460</sup> They used the language of experience, empiricism, and science, but what they described under flowing liberal and progressive themes was nothing short of religion, dogma, and Puritanical rationalism.<sup>461</sup>

Rational cost/benefit balancers maintained a complex set of contradicting value biases, including "anchors,"<sup>462</sup> that they developed through feeling-based intuition.<sup>463</sup> To examine Bentham a little closer, he was partial to

<sup>457</sup> Perreau-Saussine, *supra* note 388, at 383; 1 BENTHAM, AN INTRODUCTION, *supra* note 165, at 1–2; *cf.* LEWIS, *supra* note 163, at 261, 266, 272–73 (in the language developed by Kahneman and Tversky, Benthamism is a theory premised on the inherent capacity for humans to attain "expected utility" through inherent rationalism).

<sup>458</sup> HOLMES, JR., THE COMMON, *supra* note 200, at 1 ("The life of the law has not been logic: it has been experience."). Holmes's references to experience are not a reference to empirical experience, but rather judicial dogmas developed over time. *Id.*; *see, e.g.*, Kaley v. United States, 571 U.S. 320, 340 (2014) ("So experience . . . confirms that even under *Mathews*, [the parties] have no right to revisit the grand jury's finding.").

<sup>459</sup> *See, e.g., id.*; Holmes, Jr., *Law*, *supra* note 9, at 444 (speaking of science as a way to discern "the true historic dogma"); Holmes, Jr., *The Path*, *supra* note 1, at 458 (defining the law in terms of "a finite body of dogma which may be mastered within a reasonable time," without feeling that the word "dogma" was in any way a bad or contradictory to Holmes's views).

<sup>460</sup> *See, e.g.*, Holmes, Jr., *Law*, *supra* note 9, at 444; Perreau-Saussine, *supra* note 175, at 383.

<sup>461</sup> *See* sources cited *supra* notes 456–459; *see generally* THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA (2016).

<sup>462</sup> THALER & SUNSTEIN, *supra* note 173, at 26–27 (explaining Kahneman and Tversky's research that decision-makers "start with some anchor, a number you know, and adjust in the direction you think appropriate . . . . The bias occurs because the adjustments are typically insufficient . . . . Even obviously irrelevant anchors creep into the decision-making process.").

<sup>463</sup> *Id.*; *see* SCHOFIELD, *supra* note 13, at 241; 1 BENTHAM, PANOPTICON, *supra* note 351, at 2–3; MILL, UTILITARIANISM, *supra* note 388, at 16, 31, 53 (preferring the "cultivated mind" to Bentham's swine philosophy); RAWLS, *supra* note 392, at 124–25, 136, 154 ("when everything is tallied up, it may be perfectly clear where the balance of reason lies"); *cf.* Maryland v. King, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting) ("Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."); *but see* SUNSTEIN, THE COST, *supra* note 173, at x (ignoring the basic value disagreements in his own camp by saying "the issues that most divide us are fundamentally about facts rather than values").

authoritarian control,<sup>464</sup> the surveillance state,<sup>465</sup> and the unity of powers.<sup>466</sup> Bentham hated the common law and common law judges so much<sup>467</sup> that he

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<sup>464</sup> 1 BENTHAM, PANOPTICON, *supra* note 351, at 3.

<sup>465</sup> *Id.*

<sup>466</sup> Letter from Jeremy Bentham to Andrew Jackson (Apr. 26, 1830), in 11 SMITH COLLEGE STUDIES IN HISTORY 215 (Sidney Bradshaw Fay & Harold Underwood Faulkner eds., 1926) [hereinafter Bentham, *Anti-Senatica*] (reviewing a short letter asking President Jackson to overthrow the Senate; this writing was occasionally called “*Anti-Senatica*”); *cf.* Jeremy Bentham, *Short Review of the Declaration*, in JEREMY BENTHAM & JOHN LIND, AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS 131–32 (1776) (Bentham’s desire that the United States adopt a unity of powers accompanied his strong counter-revolutionary views); ARENDT, *supra* note 315, at 78. Bentham’s opposition to the U.S. separation of powers was candidly Cromwellian, in part, because bicameralism (which Bentham distinctly hated) was adopted in America to avoid Marchamont Needham’s anti-common law, puritanical government of a unity of powers that ended in the despotism of Oliver Cromwell. Throughout his writings, Bentham almost appeared to worship Cromwell as the basis of his anti-common law school of thought, now known as legal positivism, which he succeeded in establishing in France, resulting in the despotism of Napoleon Bonaparte and the suffering of the French people. *Compare* Letter from John Adams to Thomas Boylston Adams (Apr. 7, 1796), <https://founders.archives.gov/documents/Adams/04-11-02-0128> (“The Dutch are trying over again after the French the Experiment of a Government of a single assembly. Nedham, as great a Changeling as he was, and as great a Villain, has had more honour done to his weak system than Sir Thomas More, Mr. Harrington or even Plato.”), Letter from John Adams to Samuel Adams, Sr. (Oct. 18, 1790), in JOHN ADAMS & SAMUEL ADAMS, FOUR LETTERS 12 (1802), (noting that after humanity suffers under “the Plan of Milton, Nedham or Turgot,” which was a government of one assembly, it is evident that they prefer “the simple monarchical form” to a republican form of government as the Puritans demonstrated when they chose Cromwell who was a kind of absolute monarch), *and* Letter from James Madison to Jeremy Bentham (May 8, 1816), <https://founders.archives.gov/documents/Madison/03-11-02-0019> (disappointing Bentham by denying his vision of a U.S. government without a common law, writing “with the best plan for converting the common law into a written law, the evil can not be more than partially cured”), *with* Letter from Jeremy Bentham to President James Madison (Oct. 30, 1811), <https://founders.archives.gov/documents/Madison/03-03-02-0595> (expressing disdain for the English common law upon the brink of the War of 1812, and appearing to misconstrue the president’s power as absolute or plenary by offering his help to Madison to undo it), *and* 4 BENTHAM, THE WORKS, *supra* note 170, at 478 (quoting truncated parts of Madison’s response several years later in order to flatter Bentham’s codification project, when Madison generally debunked it in his letter); 4 BENTHAM, THE WORKS, *supra* note 170, at 501 (appearing to address his writing “to the Citizens of the several American United States,” Bentham proceeded to celebrate Napoleon Bonaparte as “the Cromwell of France” and wrote to us with sanguine jubilation: “Behold what was said in his day by Cromwell! In my eyes, it ranks that wonderful man higher than anything else I ever read of him:—it will not lower him in yours.”). Unlike Bentham, most Americans viewed the French Reign of Terror, which ended in the despotism of Napoleon Bonaparte, as an indication that the French Revolution disappointingly failed where the American Revolution previously succeeded. *See, e.g.*, 3 MERCY OTIS WARREN, THE HISTORY OF THE RISE, PROGRESS, AND TERMINATION OF THE AMERICAN REVOLUTION 407–09 (1805).

<sup>467</sup> Bentham, *Anti-Senatica*, *supra* note 466, at 215 (labeling common law judges the “harpies of the law” for upholding the separation of powers as a guiding principle in government).

likely would have found *Stone v. Powell* too weak, albeit correct for ignoring human rights.<sup>468</sup>

The habeas decision *Stone v. Powell* was the first case in which the court extended a *Mathews v. Eldridge* cost/benefit balancing test.<sup>469</sup> In *Stone*, the court sidelined a structural error based on the idea that dismissing habeas corpus had more benefits than costs to the court.<sup>470</sup> Justice Powell, writing for the court, minimized and relativized the actual rights of prisoners so that the court was only required to respect them if failing to do so created an *appearance* of injustice.<sup>471</sup>

Thus, in lieu of actually reviewing the facts and circumstances of a habeas claim *de novo*, which is in the court's power to do,<sup>472</sup> the court asserted a balancing test instead.<sup>473</sup> Balancing tests give the habeas petitioner the *feeling* that his or her case was reviewed,<sup>474</sup> even if the balancing test supplants the full *de novo* review required under *Crowell v. Benson*.<sup>475</sup> It also lets the court off the hook for not implementing a more rigorous process under habeas common law to confirm that justice was *actually* done.<sup>476</sup>

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<sup>468</sup> 3 BENTHAM, THE WORKS, *supra* note 170, at 435 (“As for the *Habeas Corpus Act*, better the statute-book were rid of it. Standing or lying as it does, up one day, down another—it serves but to swell the list of sham-securities, with which, to keep up the delusion, the pages of our law books are defiled.”); *cf.* *Stone v. Powell*, 428 U.S. 465, 494–95 (1976) (using a cost/benefit balancing test to deny a habeas writ in a way that Bentham would likely approve, though Bentham may have cheered more loudly if the Court overruled the entire habeas corpus statute rather than merely limiting it through cost/benefit balancing).

<sup>469</sup> *Stone*, 428 U.S. at 489. *Mathews* was decided on the same day *Stone* was argued, and *Stone* applied the same kind of cost/benefit balancing test: “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.” *Id.*; *Mathews v. Eldridge*, 424 U.S. 319, 347–48 (1976); *see* Schroeder, *The Dark*, *supra* note 208, at 335–36 (“The *Mathews* test, first eclipsed by its sister case *Stone v. Powell*, eventually outgrew *Stone* to touch potentially every corner of American law to answer the question of ‘what process is due.’” (quoting *Mathews*, 424 U.S. at 349)).

<sup>470</sup> *Stone*, 428 U.S. at 494–95.

<sup>471</sup> *Id.* at 493–96 n.35, quoting and following Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963) (emphasizing the primary goal of the courts was to create the appearance of justice rather than establishing actual justice, and going so far as to suggest that attempting to actually establish justice in U.S. Courts would sink the entire system and cause chaos).

<sup>472</sup> *See, e.g., Cone v. Bell*, 556 U.S. 449, 472 (2009) (“[T]he claim is reviewed *de novo*.”).

<sup>473</sup> *Stone*, 428 U.S. at 489.

<sup>474</sup> *Id.*; *cf. Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (“We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.”).

<sup>475</sup> *See, e.g., Crowell v. Benson*, 285 U.S. 22, 58 (1932) (“When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined *de novo* upon habeas corpus.”).

<sup>476</sup> *See, e.g., Stone*, 428 U.S. at 489; *Mathews*, 424 U.S. at 349.



To summarize, cost/benefit balancing tests are a formality that may violate the abolition of forms in the Federal Rules of Civil Procedure.<sup>477</sup> It indulges the laziness of judges to crowd U.S. prisons with petitioners who, in the end, will overwhelm the habeas docket of the federal courts.<sup>478</sup> Therefore, cost/benefit balancing heuristics exemplify *Dioguardi v. Durning*'s<sup>479</sup> memorable statement that “here is another instance of judicial haste which in the long run makes waste.”<sup>480</sup>

The cost/benefit formality is almost exactly the opposite of a common law inquiry.<sup>481</sup> Common law requires *stare decisis* to promote fairness and predictability by ensuring that like cases are decided similarly.<sup>482</sup> It also consults other legal frameworks, it considers the positive law, it opens review on former precedents to decide whether they control or whether they may be distinguished, and it considers fundamental changes to the society in which it operates.<sup>483</sup>

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<sup>477</sup> FED. R. CIV. P. 2; cf. J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 61–64, 67, 83 (4th ed. 2002) (noting the likely precursor of Federal Rule of Civil Procedure 2, which was the informal common law writ of *trespass on the case*).

<sup>478</sup> See 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, 102–03 (2016) [hereinafter Schroeder, *The Body*] (noting that views that tend to discuss nothing “except efficiencies and cost/benefit balancing analyses” tend to be “the most inefficient and costly of all”).

<sup>479</sup> *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

<sup>480</sup> *Id.* at 775.

<sup>481</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 564 (2004) (Scalia, J., dissenting); *Stone*, 428 U.S. at 515 (Brennan, J., dissenting); cf. Powell Report, *supra* note 351, at 7–27 (lobbying Congress to make habeas dismissals speedier and easier *without* weighing or balancing costs or benefits), *adopted by* Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. 104-132, 110 Stat. 1214.

<sup>482</sup> *Kimble v. Marvel Ent., L.L.C.*, 576 U.S. 446, 455 (2015) (“*Stare decisis*—in English, the idea that today’s Court should stand by yesterday’s decisions—is ‘a foundation stone of the rule of law.’” (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014))).

<sup>483</sup> See *supra* notes 446–452 and accompanying text.

## CONCLUSION: THE EYE SEES NOT ITSELF, NOR ITS SELF-INTEREST

Today, the role of human happiness, if any, in the project of defining right government action remains as contested as it was in 1776.<sup>484</sup> The United States began when Thomas Jefferson wrote that human beings are endowed with certain inalienable rights including “the pursuit of Happiness,” to check government power and to limit centralized authority.<sup>485</sup> By great contrast, Thomas Hobbes proposed that absolute kings could depend upon a maxim that “felicity . . . consisteth not in having prospered, but in prospering,” to maximize despotic power with well-placed gifts of property, titles, and wealth.<sup>486</sup>

Hobbes theorized that human beings were perpetually in pursuit of happiness or felicity, and that they never rested, because happiness required the continual acquisition of things.<sup>487</sup> To lay hold of absolute power, a ruler must arrest this perpetual motion in humanity by honoring and dishonoring individuals according to their value.<sup>488</sup> Thus, Hobbes believed that human lives should be evaluated in terms of money, so he proposed the first modern utilitarian system of rulers weighing costs versus benefits for the purpose of maximizing government power.<sup>489</sup>

In order to reduce human lives to dollar amounts, Hobbes objectified love itself.<sup>490</sup> In bold disagreement with William Shakespeare, who famously

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<sup>484</sup> See, e.g., Kahneman & Deaton, *supra* note 321, at 16489 (examining whether humans even pursue happiness per se); cf. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [hereinafter Vermeule, *Beyond*] (proposing that conservatives abandon originalism and adopt a Hobbesian system of “common-good constitutionalism,” that exercises power to define the nation’s perception of its own happiness, because perceptions “may change over time anyway, as the law teaches, habituates, and re-forms them”).

<sup>485</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>486</sup> THOMAS HOBBS, THE ELEMENTS OF LAW, NATURAL AND POLITIC: HUMAN NATURE & DE CORPORE POLITICO 30 (1640), *paraphrased by* RUSSELL, A HISTORY, *supra* note 233, at 550; HOBBS, *supra* note 232, at 37–38, 62 (defining felicity as “continually prospering”); cf. Donald Rutherford, *In Pursuit of Happiness: Hobbes’s New Science of Ethics*, 31 PHIL. TOPICS 369, 378–89 (2003) (describing Hobbes’s conception of felicity or happiness); Vermeule, *Beyond*, *supra* note 484 (proposing the United States adopt a Hobbesian system).

<sup>487</sup> HOBBS, *supra* note 232, at 62–63 (“Felicity is a continually progressive of the desire, from one object to another; the attaining of the former, being still but the way to the later.”).

<sup>488</sup> *Id.*

<sup>489</sup> *Id.* at 55–56; MILTON, *supra* note 12, at ls. 865–68; see Christopher N. Warren, *When Self-Preservation Bids: Approaching Milton, Hobbes, and Dissent*, 37 ENG. LIT. RENAISSANCE 118, 119–20 (2007) (“Milton and Hobbes have unexpectedly similar positions.”).

<sup>490</sup> HOBBS, *supra* note 232, at 31–33, 52, 64 (“[T]o love, and to feare, is to value.”).

defined love as “an ever-fixed mark,”<sup>491</sup> Hobbes posited that love was fungible in terms of happiness.<sup>492</sup> With the implicit endorsement of that “grounded maxim” of cost/benefit balancing tests in John Milton’s anti-sex, misogynistic, Puritan propaganda *Samson Agonistes*, Hobbes’ objectification of love was intended to collapse the prospect of attaining absolute government powers into a mere matter of wealth management.<sup>493</sup>

Hobbes’s breakdown of the why and how of cost/benefit balancing is the way most of the modern cost/benefit balancers discussed in this article see the world.<sup>494</sup> Out of this Hobbesian cynicism sprang unscrupulous men like former professor John C. Eastman.<sup>495</sup> Even as Congress investigated Eastman for his role as an architect of the attempted coup d’état of January 6, 2021, Eastman was able to file several amicus briefs that the U.S. Supreme Court appeared to follow.<sup>496</sup>

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<sup>491</sup> WILLIAM SHAKESPEARE, *Sonnet 116*, in SHAKESPEARE’S SONNETS 63 (1609). Preemptively defining love in such a way that if Hobbes is right about love being fungible, then love does not exist at all, because love’s steadfastness is definitional for Shakespeare, i.e., “Love’s not Time’s fool.” *Id.*

<sup>492</sup> HOBBS, *supra* note 232, at 55–56, 62–63; *cf.* sources cited *supra* note 428 (noting Paine, Smith, and Adams’ disagreements with the Hobbesian formulation of love).

<sup>493</sup> HOBBS, *supra* note 232, at 118–19 (discussing the generation of *Leviathan*, “that *Mortall God*, to which we owe under the *Immortall God*, our peace and defence”); MILTON, *supra* note 12, at ls. 865–68 (noting “that grounded maxim / So rife and celebrated in the mouths / Of wisest men; that to the public good / Private respects must yield”); *cf.* Warren, *supra* note 489, at 119–20 (noting the similarities and possible alliance between Hobbes and Milton).

<sup>494</sup> HOBBS, *supra* note 232, at 55–56; *see, e.g.*, Epstein, *supra* note 235 (reviewing Cass R. Sunstein & Adrian Vermeule’s book *Law and Leviathan*); Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, THE ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/>. Barnett criticized Vermeule’s anti-originalist conservatism because it practically reiterated Milton’s pro-government balancing test ideology that “to the public good / Private respects must yield,” which was the basis of Cromwellian despotism in England. *Id.*; Vermeule, *Beyond*, *supra* note 474; MILTON, *supra* note 12, at ls. 865–68.

<sup>495</sup> *See* William Saletan, *John Eastman’s Phony “Plenary Authority” Theory*, THE BULWARK (June 22, 2022, 12:49 PM), <https://www.thebulwark.com/john-eastmans-phony-plenary-authority-theory/>; Schroeder, *We Will*, *supra* note 56, at 38, 42–43 (noting that plenary power ideology was based upon Hobbes’ *Leviathan*).

<sup>496</sup> *Eastman v. Thompson*, No. 8:22-cv-00099, 2022 WL 894256, at \*20–21, \*24–25, \*26–27 (C.D. Cal. Mar. 28, 2022) (“Dr. Eastman and President Trump launched a campaign to overturn a democratic election, an action unprecedented in American history. Their campaign was not confined to the ivory tower—it was a coup in search of a legal theory. The plan spurred violent attacks on the seat of our nation’s government, led to the deaths of several law enforcement officers, and deepened public distrust in our political process.”); *see also* Brief for the Claremont Inst. Ctr. for Const. Juris. as Amicus Curiae Supporting Petitioners, at 5, *NYSRPA v. Bruen*, 142 S. Ct. 333 (2022) (No. 20–843) (quoting HOBBS, *supra* note 232, at 94), *apparently followed by* *NYSRPA v. Bruen*, 142 S. Ct. 2111, 2131 (2022); Brief for the Claremont Inst. Ctr. for Const. Juris. as Amicus Curiae Supporting Petitioners at 10, 12, *Dobbs v. Jackson Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19–1392) (“*Janus* provides some guidance for when stare decisis

Social media giants also played a central role in the storming of the Capitol Building on January 6, 2021.<sup>497</sup> In the time immediately preceding the attempted coup d'état, noiseless algorithms maximized Twitter and Facebook's profits as well as the political polarization of the United States to the point of tearing it at the seams.<sup>498</sup> Dave Eggers' *The Circle* came to pass in America,<sup>499</sup> and in response Frances Haugen warned Congress that "Facebook wants you to get caught up in a long, drawn out debate over the minutiae of different legislative approaches."<sup>500</sup>

Yet, shortly after the Capitol was besieged,<sup>501</sup> and after Facebook helped dictator Rodrigo Duterte install himself as the ruler of the Philippines,<sup>502</sup>

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should not bind future courts."), *apparently followed by* *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2111, 2257–58, 2264–65, 2268, 2271 (2022) (overruling *Roe* and *Casey*'s interest-balancing test with *Janus*' anti-*stare decisis* balancing test). Eastman's influence over *Dobbs* can also be observed by the repudiation of his "one-way ratchet problem" in the dissent: *Dobbs*, 142 S. Ct. at 2332 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("[L]ogic and principle are not one-way ratchets."); John C. Eastman, *Stare Decisis: Conservatism's One-Way Ratchet Problem*, in *COURTS AND THE CULTURE WARS* 133 (Bradley C. S. Watson ed., 2002) (cited in Eastman's *Dobbs* amicus). One of the precedents in Eastman's direct line of fire is the principle he tried to end on January 6, 2021, of "one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Dobbs*, 142 S. Ct. at 2347 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight."); *id.* at 2301 (Thomas, J., concurring) (explaining, as one of the five votes necessary to overrule *Roe*, his understanding of the majority's reasoning: "Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion . . . . For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."), referring to *id.* at 2280–81 (majority opinion) (noting that the five *Janus* factors applied in *Dobbs* should be applied to "[e]ach precedent" separately, one-by-one to re-determine whether *stare decisis* should apply to previous cases).

<sup>497</sup> Musadiq Bidar, *House January 6 Panel Subpoenas Social Media Companies After 'Inadequate Responses'*, CBS NEWS (Jan. 13, 2022, 7:20 PM), <https://www.cbsnews.com/news/house-january-6-committee-social-media-subpoenas/>.

<sup>498</sup> Billy Perrigo, *How Facebook Forced a Reckoning by Shutting Down the Team That Put People Ahead of Profits*, TIME (Oct. 7, 2021, 11:35 AM), <https://time.com/6104899/facebook-reckoning-frances-haugen/>; cf. THE SOCIAL DILEMMA (Netflix 2020) (generally explaining the noiseless algorithms used by Facebook).

<sup>499</sup> See generally DAVE EGGERS, *THE CIRCLE* (2013).

<sup>500</sup> Vera Bergengruen, *Congress Can't Agree on How to Reform Big Tech. Frances Haugen Says That's What Facebook Wants*, TIME (Dec. 1, 2021, 5:30 PM), <https://time.com/6125089/frances-haugen-congress-tech-reform/>.

<sup>501</sup> Kat Lansdorf et al., *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR (Jan. 5, 2022, 5:00 AM), <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when>.

<sup>502</sup> See Lauren Etter, *What Happens When the Government Uses Facebook as a Weapon?*, BLOOMBERG BUSINESSWEEK (Dec. 7, 2017, 1:00 AM),

Kahneman and Sunstein went ahead and published a book to encourage the adoption of *more* noiseless algorithms.<sup>503</sup> Kahneman and Sunstein *want* us to get caught up in the minutiae.<sup>504</sup> Against this travesty, Frances Haugen has spoken: “Please don’t fall into that trap. Time is of the essence.”<sup>505</sup>

“Noise is a problem,” Kahneman and Sunstein agreed,<sup>506</sup> but so are delays.<sup>507</sup> Who needs their government to approach the visage of absolute reason before justice can be dispensed?<sup>508</sup> Who defines justice as fairness to the exclusion of mercy?<sup>509</sup> It is the Hobbesian Man,<sup>510</sup> he is desirous of a noiseless system to arrogate power to himself—and, knowing this, the American Revolutionaries thoughtfully established a noisy system of separated powers to stop him.<sup>511</sup>

Kahneman and Tversky’s research supports the Shakespearean wisdom that “the eye sees not itself,”<sup>512</sup> which inspired the American Revolution.<sup>513</sup> We

<https://www.bloomberg.com/news/features/2017-12-07/how-rodrico-duterte-turned-facebook-into-a-weapon-with-a-little-help-from-facebook>.

<sup>503</sup> KAHNEMAN, NOISE, *supra* note 74, at 377; Sunstein, *Governing*, *supra* note 189, at 5.

<sup>504</sup> See *supra* notes 501–503 and accompanying text.

<sup>505</sup> Bergengruen, *supra* note 500.

<sup>506</sup> KAHNEMAN, NOISE, *supra* note 74, at 364.

<sup>507</sup> Bergengruen, *supra* note 500; *Justice Delayed: The Human Cost of Regulatory Paralysis*, Hearing before the Subcommittee on Oversight, Federal Rights and Agency Action of the Committee on the Judiciary, 113th Cong. 26 (2013) (statement of Peg Seminario, Director of Safety and Health for the AFL–CIO).

<sup>508</sup> RUSSELL, UNPOPULAR, *supra* note 56, at 23; RUSSELL, A HISTORY, *supra* note 233, at xxii; cf. Sarah E. Spengeman, Saint Augustine and Hannah Arendt on Love of the World 302, 394 (June 2014) (Ph.D. dissertation, University of Notre Dame) (ND Curate), <https://curate.nd.edu/downloads/und:q811kh06s9f> (observing the self-serving rationalizations copped by those who advocated for totalitarianism).

<sup>509</sup> Compare KAHNEMAN, NOISE, *supra* note 74, at 340, SUNSTEIN & VERMEULE, *supra* note 235, at 143, and RAWLS, *supra* note 392, at 17, with HOBBS, *supra* note 232, at frontispiece.

<sup>510</sup> HOBBS, *supra* note 232, at 81–83, 231 (showing that tyranny and fairness can go hand in hand).

<sup>511</sup> Spengeman, *supra* note 508, at 302, 306; see HOBBS, *supra* note 232, at frontispiece (advocating a unity of powers in one man); U.S. CONST. arts. I–III (separating powers into three departments); cf. Jacobson, *supra* note 234, at 1–2 (describing the meaning behind the frontispiece of Hobbes’s *Leviathan*).

<sup>512</sup> WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, l. 58.

<sup>513</sup> *Chisholm v. Georgia*, 2 U.S. 419, 463 (1793) (quoting Thomas Reid’s paraphrase of Shakespeare from page viii of the dedication of *An Inquiry into the Human Mind*); PHILLIS WHEATLEY, *To the University of Cambridge in New-England* (1773), reprinted in THE COLLECTED, *supra* note 208, at 15–16 (advising her fellow American patriots to “[s]uppress the deadly serpent in its egg”) (quoting WILLIAM SHAKESPEARE, JULIUS CAESAR act 2, sc. 1, l. 32); MERCY OTIS WARREN, *To Mrs. Montague, Author of “Observations on the Genius and Writings of Shakespeare,”* in POEMS, DRAMATIC AND MISCELLANEOUS. BY MRS. M. WARREN (1790) (noting that through Shakespeare “Britain taught us to be free”); Letter from Abigail Adams to Mercy Otis

who live in the shockwaves of the January 6, 2021 attempted coup d'état know it is hubristic to keep trusting in the cost/benefit analyses that enabled social media giants to create perfect pandemonium.<sup>514</sup> Humans cannot accurately balance costs and benefits, and it is embarrassing to see the courts keep trying on the emperor's new clothes.<sup>515</sup>

Balancing costs and benefits is not an empirical process; it originated from utilitarian rationalism.<sup>516</sup> In the same way Bentham's *Panopticon* was engineered to make people feel watched, cost/benefit balancing was engineered to make people feel heard.<sup>517</sup> It is a public relations ploy aimed at engineering consent for a paternalistic government rather than actually weighing and balancing evidence like a scientist with the aim of arriving at the truth.<sup>518</sup>

Even before Kahneman and Tversky's research, those who used cost/benefit heuristics were more interested in social control while seeming empirical, rather than actually *being* empirical.<sup>519</sup> As cost/benefit balancers do

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Warren (May 14, 1787), <https://founders.archives.gov/documents/Adams/04-08-02-0019> (commending Elizabeth Montagu's book *An Essay on the Writings and Genius of Shakespeare* to Mercy's attention); Letter from Abigail Adams to John Adams (Mar. 2-10, 1776), <https://www.masshist.org/digitaladams/archive/doc?id=L17760302aa> (quoting WILLIAM SHAKESPEARE, JULIUS CAESAR act 4, sc. 3, ls. 216–22) (using the pen-name Portia the wife of Brutus, Abigail wrote to her husband, from time to time, quoting Shakespeare's *Julius Caesar*); cf. Michael Dobson, *Fairly Brave New World: Shakespeare, The American Colonies, and the American Revolution*, in 23 RENAISSANCE DRAMA 189, 196 (Jeffrey Masten & William N. West eds., 1992) (“[P]aeans to Brutus scatter the parricidal rhetoric of John Adams, Josiah Quincy, and others.”); but see KAHNEMAN, NOISE, *supra* note 74, at 340, *expressing disagreement with* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, ls. 184–97 (arguing that justice should be tempered with mercy).

<sup>514</sup> KAHNEMAN, THINKING, *supra* note 163, at 411; WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, ls. 51–52; *Chisholm*, 2 U.S. at 453–54, 463.

<sup>515</sup> See, e.g., *Kaley v. United States*, 571 U.S. 320, 341 (2014) (after donning the emperor's clothes, the Court expected the American people to accept this banal holding: “the answer is: whatever the grand jury decides”).

<sup>516</sup> Perreau-Saussine, *supra* note 175, at 356 (“With rigorously ordered reasoning, Bentham sought to undermine not simply corrupt traditions, but customary thinking itself as inherently corrupting in any large, complex society . . . .”); SCHOFIELD, *supra* note 13, at 74–76, 126–27, 241.

<sup>517</sup> See *supra* note 351 and accompanying text.

<sup>518</sup> THALER & SUNSTEIN, *supra* note 173, at 166–68, 312, 331 (defending cost/benefit balancing tests as the ideal way for paternalistic governments to govern); see Sunstein, *Governing*, *supra* note 189, at 5; cf. Bernays, *supra* note 371, at 113–14 (claiming the constitutional right of public relations counsels to manipulate the American public, as if our constitutional system was indestructible); 1 BENTHAM, PANOPTICON, *supra* note 351, at 3 (rationalizing putting potentially all of society in prisons as a method of manipulating the masses to believe in the omnipotence and omniscience of the ruler); MILTON, *supra* note 12, at ls. 865–68 (demonstrating how Dalila rationalized betraying her husband Samson to painful humiliation and death through a cost/benefit balancing test).

<sup>519</sup> See, e.g., Sunstein, *The Cost-Benefit*, *supra* note 377, at 23 (attempting to take account of empiricists by inviting them to add their knowledge to the overall cost/benefit analysis, but *not* engaging in empiricism of any sort).

not seem dissuaded by Kahneman and Tversky's research, it may be inferred that these balancers *know* they support an irrational theory.<sup>520</sup> They *know* their systems are falsely empirical, falsely rational, and falsely deferent to common law.<sup>521</sup>

The post-Kahneman and Tversky balancers even appear to associate with Kahneman to get his permission for them to continue their cost/benefit empire unchecked by Kahneman and Tversky's research.<sup>522</sup> This is a classic cost/benefit balancer strategy: to invite the empiricist to the table, get their apparent go ahead, and then ignore the actual empirical evidence.<sup>523</sup> This ploy appears to exist ultimately to justify the supplanting of the empirically driven common law.<sup>524</sup>

They know that if they can convince a large enough portion of the legal community that weighing costs and benefits is best, they can defer to the court's application of common law rights indefinitely.<sup>525</sup> They already convinced immigration experts to spend years waiting for the courts to decide whether to extend *Zadydas v. Davis* relief to asylum seekers.<sup>526</sup> While delayed to decide cost/benefit minutiae, immigrants languished in detention facilities.<sup>527</sup>

For several years, immigrant common law rights have been sidelined in violation of the U.S. Constitution.<sup>528</sup> Relief under *Boumediene's* Suspension Clause analysis remained dormant, while judges balanced away the rights of

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<sup>520</sup> Sunstein, *Governing*, *supra* note 189, at 5 (admitting Kahneman teaches that wherever humans make judgements there is noise, but failing to apply this logic to his own theories, which Sunstein appears to believe are utopian in a style strikingly similar to that of Jeremy Bentham); *see generally* CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006); Himmelfarb, *supra* note 405.

<sup>521</sup> *See supra* notes 514–515 and accompanying text; *cf.* KAHNEMAN, *NOISE*, *supra* note 74, at 48–49, 367 (continuing their cost/benefit enterprise as if it did comport with Kahneman's research triggers their “*internal signal of judgment completion*” a positive feeling that is “unrelated to any outside information”).

<sup>522</sup> THALER & SUNSTEIN, *supra* note 173, at 166–68, 312, 331; KAHNEMAN, *NOISE*, *supra* note 74, at 333–34, 340–41 (“Consider the case of *Woodson v. North Carolina*, in which the US Supreme Court held that a mandatory death sentence was unconstitutional not because it was too brutal but because it was a rule. The whole point of the mandatory death sentence was to ensure against noise—to say that under specified circumstances, murderers would have to be put to death.” (disagreeing with *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976))).

<sup>523</sup> *Cf.* Sunstein, *The Cost-Benefit*, *supra* note 377, at 23 (demonstrating how scientific knowledge is meant to be subsumed by cost/benefit balancing tests).

<sup>524</sup> *Compare id.*, with Perreau-Saussine, *supra* note 175, at 356 (describing Bentham's central disagreement with common law authority, along with any established authority).

<sup>525</sup> *See supra* notes 279, 289 and accompanying text (explaining how balancing tests inspired by *Hamdi* caused *Boumediene* to go dormant for years).

<sup>526</sup> *See supra* note 267 and accompanying text.

<sup>527</sup> *See supra* note 267 and accompanying text.

<sup>528</sup> *See supra* note 267 and accompanying text.

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foreign nationals on an *ad hoc* basis.<sup>529</sup> Now that *Zadvydas* was nullified so that due process balancing may be denied to immigrants as well,<sup>530</sup> there is only one response to jurists who did not make use of *Boumediene* when they could:

“Justice delayed is justice denied!”<sup>531</sup>

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<sup>529</sup> See *supra* notes 279, 289 and accompanying text.

<sup>530</sup> See *supra* notes 28–29 and accompanying text.

<sup>531</sup> *Salahi v. Obama*, 710 F. Supp. 2d 1, 16 (D.D.C. 2010), *vacated and remanded*, 625 F.3d 745 (D.C. Cir. 2010). “Justice delayed is justice denied” is an ancient maxim adopted by several distinguished Americans: David Josiah Brewer, *Justice Brewer Again on Appeals*, 27 LIT. DIGEST 608, 609 (1903); Martin Luther King, Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) (“We must come to see with the distinguished jurist of yesterday that ‘justice too long delayed is justice denied.’”); WILLIAM PENN, *SOME FRUITS OF SOLITUDE* 86 (1905).